Scribbles Squibs #16 - July 18, 2013 – Twenty Tips for More Effective Risk Management of Your Business Problems

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I. The Problem: Black's Law Dictionary , a significant legal authority for lawyers, defines 'justice' as: "The fair and proper administration of laws." But, in any given situation, what is 'fair'? And, in any given situation, what is 'proper'? And the 'administration' of laws is only done by people, who are more often guided by their emotions than by their intellect. Wasn't it Charles Dickens who in *Oliver Twist* said that 'the law is an ass'?

See if any of this looks familiar. You have a small collection case – say, fifteen thousand dollars or less. You feel you are absolutely right. Do you file a mechanic's lien? Is it economical to do so? How about a payment bond claim? Same question: is it worth pursuing? Or, do you just sue? And, once a claim or case is started, how long do you go with it if it doesn't look as if it will pan out?

Putting the shoe on the other foot, what if some company has a claim against *your* company for fifteen thousand dollars or less? It's a bogus claim in your view. You want vindication and justification. In other words, you want a judge or an arbitrator to say that you are 'right' and that the other guy is 'wrong'. Or, what if someone tells you to put your insurer on notice as to some kind of personal injury or property damage claim when, in your view, it is a meritless claim? You are concerned that if you contact your insurer, this might affect your future insurability and/or cause your rates to go up or that the insurer might just simply pay the claim.

'Risk management' is defined in Wikipedia thusly: "Risk management is the identification, assessment, and prioritization of risks followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities." In other words, one tries to *manage* one's problems rather than simply allow circumstances or other people and processes to manage them for you. After all, in your business you manage people, deadlines, budgets, jobs and any number of other things. Why shouldn't you manage risks?

You ask: isn't anyone concerned with right or wrong anymore? Isn't the legal system interested in justice? Providing you with at least twenty ideas reflecting thirty-seven years of experience for more effective risk management is the subject of this ***Squib.*** Before some readers will accept the desirability of risk management, **p**erhaps first we have to deal with this 'right or wrong' thing. And, for that matter, the 'justice' thing as well. After all, if one thinks he or she is right and that he or she will ultimately be vindicated, why would the idea of resolving a dispute by settlement have any appeal?

So, Yo! Let's start with the 'right or wrong', 'justice' thing. Until we get past what the court system/arbitration *is* and what it *isn't* risk management may not make as much sense.

II. Some Issues and Ideas:

1. <u>Is the legal system interested in justice</u>? That's a hard question to answer. I have been studying this question for more than 37 years and here is how I would answer it. And, like almost everything else in life, the answer is not one hundred percent one way or another. This has to be broken down into various sub-parts:

A. <u>Is the civil clerk's office interested in justice?</u> The answer to that would be that this is the wrong question to ask! The clerk's office accepts filings, schedules various forms of hearings, arranges for trials, handles the evidence and sends to the parties or their attorneys the orders issued by the various judges. (For most counties, there is a 'circuit' system in the superior court whereby judges are rotated in and out of different counties every two or three months. This much less so in the district court system where judges seem to stay put.) So, a simple answer is that the civil clerk's office is about *process.* Any court case is subject to several complicated sets of rules and procedures and the clerk's office's interest primarily is to keep the flow of the cases flowing and in making sure that the actions taken by the parties and by their attorneys comply with the various rules and procedures.

B. <u>Are judges interested in justice?</u> The short answer is 'basically', more so with a trial judge. Because of the circuit system of moving judges around in the superior court, any particular case over a matter of years will necessarily have several judges involved with the various steps of the case. This has advantages and disadvantages. To the extent that a party is unhappy with a particular judge or his/her rulings on a certain motion or other matter, chances are that this judge will be rotated out in a matter of months and other judges will come in.

There are two disadvantages with this, however. Until one gets to the trial judge, no particular judge feels any particular affinity with or ownership of the case. This is understandable, as that judge knows that he/she is unlikely to have to try the case and whatever participation that judge has will be as to one or more of the several steps there are between the filing of a case and the trial of a case (which process is referred to as 'litigation'.) As a practical matter, I have had any number of cases where I was in court arguing a motion or other matter and the judge had either not read the file at all or had not read it completely. To be fair, a lot is asked of judges and most would say they are over-worked. So, to the extent the attorney for the other side or the other side may have been playing games on different issues in the case – typically, on discovery issues (producing information, documents and witnesses before trial) – a judge not familiar with the case's prior procedural history is not likely to pick up on this. So, often, the 'circuit system' assists in discovery abuse because a judge just involved with one particular aspect of the case will not necessarily understand the history of the case up until that point. A second issue with the circuit system is that much like musical chairs, no particular judge wishes to consider a summary judgment motion (one party's attempt to end the case based on various motions, briefs and affidavits) with four to six inches of paper when that judge knows that he/she will be out of that county the next month or so. Both of these problems are improved on in the federal system where there is the same judge from the beginning of the case to the end. However, there is only federal court jurisdiction over a case where the matter in dispute exceeds

seventy-five grand and there is either diversity of citizenship – the plaintiff and defendant live or work in different states – or there is a federal question, meaning a suit filed specifically with regard to a federal statute, which would not ordinarily be the case in a run of the mill construction dispute. Apart from this, the expression 'don't make a federal case of this' wasn't taken out of the thin air! Federal court practice operates under different rules from state court practice and there may be more things necessary for the lawyers to do in handling a federal case, particularly early in the case.

By the time a judge knows that he/she is going to actually have to try the case, at this point the judge will get into the details of the case and be reasonably familiar with the papers filed and (somewhat) with the history of the case. At this point, what the lawyers and the parties are facing is that judges simply don't like construction cases. They are quite complex, put juries to sleep, have a lot of exhibits and take too long to try. Since one of the criteria of evaluating the performance of judges by their supervisors is how many cases they 'clear' in a month, having to try a five to ten day construction case might make that judge look bad for the month even though he or she was working very hard on a construction case. A large mechanical subcontractor I represent says (with some vehemence): "Don't go to court! Who knows what they are going to do to you?" A general contractor I have represented in several matters says: "Don't go to court more than half-prepared! It won't make a difference!" (This after having paid about one million dollars in legal fees and costs to another lawyer on a complex case, only to win the case but never collect a dime.) My experience is that not many judges have much experience with construction matters, probably fewer with experience with public construction law issues. It's never a very comfortable feeling when one or both of the lawyers knows more construction law than does the judge. At this stage of my career, this is what I typically find day in and day out. After all, this is what I *do*. Judges have to be familiar with any number of different areas of the law.

C. <u>Is a jury interested in justice?</u> Having served myself on several juries and after trying a variety of cases before juries, the answer to this question is 'yes'. Provided that the case doesn't last too long and isn't too complicated. The issue here is that juries are not generally going to *understand* the technical and legal issues associated with construction contracts, customs and usages of various trades, 'means and methods' and the requirements of complex codes regulating many trades. More likely than not, they will be confused and simply not fully understand the issues. Most construction lawyers, therefore, try to avoid juries at all times with any kind of complicated construction matter. On top of this, however warranted, there is a feeling among many of the trial bar that the longer one keeps a jury away from their daily lives, the more they are likely to punish one of the parties or that party's counsel. Some people feel that a jury may tend to find in favor of a party or a lawyer they like and to find against a party or a lawyer they don't like. People are people. As Popeye says: "I am what I am." And, after all, he eats spinach and has these big arms. Just like Robert Irvine.

And, whether you try a case to a judge or to a jury, a lot of your own time will be involved. You will have to help in the answering of interrogatories, which can take quite a period of time. You probably will be deposed. You have to help arrange for and meet with witnesses. You will have to be prepped as a witness. And, then there is the trial, at which you

will be expected to attend day to day. All of these time investments taking away from what you should be doing: estimating and running jobs.

D. <u>Are arbitrators concerned with justice?</u> Those familiar with my writings know that I am not a fan of arbitration. Much larger filing fees, arbitrator fees, 'final fees', room charges for each day of arbitration makes these cases fairly expensive when compared with court. Typically, the only discovery allowed is an exchange of documents (no interrogatories, no depositions.) A party and its lawyer know a lot less about the other side's contentions and witnesses than would be the case in court. And, since there are virtually no appeals from arbitration, the typical arbitrator actually has more power than does a judge hearing a case, whose rulings are subject to appeal. For all intents and purposes, there are no appeals from arbitration rulings absent very serious misconduct on the part of the arbitrator. And the rules for construction arbitrations say that the arbitrator doesn't have to follow the rules of evidence, which means that virtually *anything* might be admitted into evidence. And, various Massachusetts court cases say that even where the arbitrator decides the case based on the wrong evidence, or applies the wrong law or applies the wrong law to the wrong facts, a court will not interfere/intervene.

Here are some problems with arbitrators. The process almost encourages arrogance due to the fact that there will not likely be an appeal. You don't want an arbitrator who is doing this as a way of generating income. (Some actually perform this work as their idea of serving the industry. Or so they say.) Those who are looking at this as a way of making money are presumably less interested in shorter hearings and quicker resolutions. Then, there is the issue as to who will be the arbitrator. If you are a general contractor, you don't want a subcontractor deciding your case. The opposite is true. Even when you get a lawyer as an arbitrator, it is important to know whether they mostly represent subcontractors, mostly represent general contractors or mostly represent owners. This gives some indication of where their predilections might lie. But, this information is often not available. An architect or engineer by training and experience is more likely to find for an owner and/or against claims increasing the contract sum. I have had some good arbitrators and some bad arbitrators. In many instances, you will not be likely to tell before selecting an arbitrator the answers to some of these questions. Judges in many ways are preferable, including the fact that not many of them will have had prior experience as either contractors, subcontractors or as one of the lawyers who represent them. They are paid salaries and don't get paid more or less depending on how hard they work. And, since they have a lot of cases to handle, they have a greater incentive to keep the cases moving and to resolve them more quickly.

How many times in the last several pages have I mentioned 'right' or 'wrong'? Or, for that matter, 'justice'? My bad! My bad?

The point of the above is to point out the various issues involved with having your dispute settled by *other* people. It may not be all that it is cracked up to be. Don't get us wrong. We use the courts every day to try to work for successful conclusions to our clients' business problems. Sometimes, at some point, other possibilities might be available and successful.

2. Mediation may be a good alternative to litigation either standing on its own or as part of the litigation process because in this process, the parties control the result and no decision is issued. Mediation is a more-or-less non-adversarial process whereby the parties go in front of a non-judicial neutral (meaning, not a judge or arbitrator) for anywhere from between four hours and six hours - on the low end - to one day or more on the high end. (Typically, a two day hearing would be only with cases making progress by the end of the first day.) Each side pays for one-half of the mediator's compensation, which varies from about two hundred fifty dollars per hour to more than four hundred dollars per hour. Various organizations, such as the American Arbitration Association, offer mediation services. There are organizations such as JAMS-Endispute, which primarily uses retired judges to conduct mediations or to arbitrate cases. Many Massachusetts construction lawyers use a group of about five to ten very experienced construction attorneys who are good at mediation as mediators, which is generally cheaper. And, since many of the lawyers in the case know these mediators from cases they have had and through professional reputation, what they say during a mediation tends to be well-respected.

Through a controlled series of meetings, which are generally in conference rooms located outside of court facilities, the parties try to work out a solution to their problem. The mediator does not *per se* 'decide' the case. There is no written decision rendered. No one either 'wins' or 'loses'. And, by statute, whatever happens in mediation is specifically exempted and kept out of any subsequent trial. This is to keep the mediation process confidential and to encourage the parties to deal with each other earnestly, not concerned about how whatever is said can be used against them later in subsequent litigation.

What normally happens is that the mediator will require each party to prepare before the meeting a mediation memorandum explaining the case and its position to submit before the hearing, exchanging copies with the other side. Then, the parties get together in a room, typically one of the mediator's conference rooms. Each side may make an 'opening' statement, explaining its claim or defense, which is usually done by your attorney and might take ten to fifteen minutes. Then, the parties are separated for the rest of the day and put in separate rooms. The mediator goes from one room to the other, relaying what the current 'demand' or 'offer' is. What each party tells the mediator is privileged in that the mediator cannot reveal this information to the other side without that party's permission. The mediator points out to each side the strengths of the other side's position and the weaknesses in your position. A 'devil's advocate', if you will, for both sides, all at the same time! While all cases do not settle 'in the middle', a number of them will. At such time as there is a settlement, both sides will get together and the attorneys will prepare right there a detailed hand-written memorandum of what the deal is and they will sign it. That way, no one leaves the room only to think of any number of changes to the agreement one wants after having gotten back to the office. The vast majority of the cases I have been involved with in mediation have settled. Part of what makes this work is that spending four to six hours in a conference room, just you and your lawyer, is very tiring. People get more reasonable as they get bored and tired. If the mediation does not work, this ordinarily has no effect whatsoever on your existing court case. Mediations tend to take place fairly late in the court process: around the time that the pretrial conference occurs. But, that is

not to say that you can't have a mediation earlier. In fact, some contracts require mediation prior to arbitration or litigation.

3. Does getting a lawyer involved with a dispute early necessarily mean that you, the client, have lost all control over the file? The answer to this is that this depends on the lawyer and depends on the client. Thirty-seven years of experience has taught me that having someone who knows what they are doing getting involved earlier in the process may help to control and limit the problem and its costs. The fact that you are in a legal situation that you don't fully understand doesn't mean that necessarily you will lose control of the matter and necessarily be subject to monthly bills for years. A lot of it has to do with how you interact with the correct lawyer. Getting a quick answer to a problem you are facing doesn't mean that the problem becomes that lawyer's annuity. If the problem persists, control and minimization of costs might occur when you ask the lawyer for a projected plan for handling the matter and some projection of costs (which lawyers hate giving, because it is so hard to predict given the adversarial nature of the process – who knows what the other side will do - and because cases settle at different times.) Even when turning a file over to an attorney, staying involved with it regularly and regularly reviewing what is happening – and why – can minimize your costs and help assure that the proper things are done at the proper time.

There are some lawyers who tend to try a high percentage of their cases. They have reputations of 'winning big'. Unfortunately, they will also almost necessarily have reputations for 'losing big'. Keeping in mind that only one percent or so of Massachusetts superior court civil cases goes through a complete trial, having a lawyer more interested in solving the problem than in trying (and appealing) a case will often be to your advantage.

Here are a few practice tips. One might be to ask your prospective lawyer how many construction cases that lawyer tried in the last year. Since preparation for and the trial of a construction matter burns up a lot of hours, knowing how many times your lawyer tries his cases might be an indication of where yours is going and the chances of its ultimately settling. I don't generally try more than one or two cases per year. I'd be concerned with a lawyer saying that he/she tries a dozen cases or more per year. Secondly, you can ask your lawyer for references. This is a bit of a touchy matter as even divulging whose clients one represents may be a violation of the attorney-client privilege. Still, if you insist on it, most attorneys can probably give you one or two clients to give you an idea as to how that attorney handles himself/herself. Thirdly, attorneys who present themselves as "pit bulls" are probably attorneys who try more cases than others. An agreeable, reasonable personality and disposition is some evidence of having the ability to effectively settle cases. Attorneys who act in an adversarial way most or all of the time will ordinarily be less effective in the settlement of cases. Fourthly, be sure your attorney has substantial experience with the construction law problem you are facing. Lawyers who tend to practice several different areas of the law may not have the level of knowledge and skill to be economically efficient and proficient in the handling of your matter. There is usually some legal research a lawyer will have to do with the handling of *any* construction matter. But, if this is something he or she does every day, there should be less of it than there would be with a generalist. Fifthly, stay in the loop in a determination of what potential witnesses will get deposed. Until the pretrial memorandum phase of the case, the taking of depositions (asking

questions of potential witnesses who testify under oath) is one of the more expensive elements of litigation.

4. Do I report what I consider to be baseless claims against my company to my insurer or to my surety? The first answer will deal with insurance. The answer to this is 'usually'. 'Late notice' or 'no notice' are two of the more common grounds for insurers to deny an insured coverage. All insurance contracts have an implied or express provision requiring the insured to cooperate with the insurer. And, most insurance contracts have very specific requirements for the prompt notice as to potential claims. Since you want the insurer to pick up both defense costs (monies paid to a lawyer) and indemnity costs (payment of any judgment against you), not reporting potential claims is often a poor idea. My experience is that insurers involved with CGL claims are not quick to simply throw money at a problem. Your advising the insurer of your defenses comprehensively with documentation at the earliest possible moment helps you to try to curb an insurer's interests in writing a check too quickly or for too much and helps mold the insurer's impressions as to the validity of the claim and the validity of your defenses. Obviously, in many situations, some insureds are self-insured for a fairly hefty initial part of the loss. Or, an insured may have large deductibles as to particular losses. In those circumstances, handling smaller claims outside of your insurer may make more sense, provided that you, your attorney and your insurance agent understand what they are doing and have a claim which is very circumscribed as to its potential value. Meaning, you understand the maximum dollar value that this claim might have.

As to surety claims on payment and performance bonds upon which you are a principal, Massachusetts law is clear that a surety has its principal's factual and legal defenses as well as certain 'personal' to the surety defenses (such as statutes of limitation.) Again, usually, no one at a surety will be interested in writing a check too quickly and without some investigation. Your staying involved with the claims handling process and clearly giving the surety company your position in a well-documented fashion as early in the claim as possible generally works to your advantage. Letting the surety know your position before it hears from the claimant – particularly with regard to performance bond claims – is usually a very good strategy. A surety is interested in your ideas and documents because they form the largest part of their own defense. Your providing the surety information and documents earlier in the claim process is likely to help you with the claim and assist in trying to mold the surety's position. Keep in mind that the vast majority of general indemnity agreements say that the surety does *not* have to have the principal's permission to settle a claim. Some general indemnity agreements even provide that a surety can sign its principal's name to settlement agreements even when the principal vehemently opposes the settlement. With the surety having this amount of power, making sure they understand your position as early as possible is a very good idea.

5. How do I handle smaller claims and litigations? This is a very difficult problem, for both parties and their counsel because it is very hard to make smaller cases economically feasible. As one-third of a recovery for a legal fee is a typical contingent fee lawyer's compensation, one hopes that on hourly work, you can keep the legal fee more or less to this level or below. One of the problems with construction litigations is that there is roughly the same amount of legal work necessary to process a small case as there is with regard to the

handling of a larger case. For smaller cases, one can take less discovery, depending on the nature of that particular case. One can try to minimize trips to the court on motions. But no party or lawyer can control what the other side may choose to do.

Here's the skinny. If you use a contingent fee lawyer to handle your case, this controls your up-front expenses more than with an hourly rate guy. Either way, you are on the hook for the 'costs', which would include filing fees, service fees (sheriffs and constables), witness fees, deposition transcript fees and other expenses. A problem is that many times those lawyers interested in handling construction cases in this manner are less experienced with construction law problems. Many of them will be essentially 'collection' lawyers having no particular expertise or experience with construction matters, at least when compared against a construction law practitioner. Also, collection lawyers may tend to do less work on their cases as typically they handle a larger volume of cases. And, where collection lawyers often represent banks on credit card claims and banks against borrowers, there is a greater tendency for them to simply assume that the claim is owed, which may not make them as sensitive to the liability issues involved with your claim. So, if getting paid more quickly is really important and/or if the amount of money at issue is significant, an hourly guy might get the case resolved more quickly by working the case harder.

Typically, with our files at Sauer & Sauer, we, as hourly billers, beat a one-third contingency fee generally and often by a lot. We recently concluded three payment bond suits by the same subcontractor against the same general contractor's surety, each of which cases was both factually complex and legally complex. We got the subcontractor 1.5 million dollars. A typical contingency fee would have been five hundred thousand dollars *plus* expenses. Our fee was about sixty-five thousand dollars *including* expenses and not one deposition had to be taken. Our client didn't even have to answer interrogatories.

Like all lawyers, we have had our 'dogs'. Cases that didn't turn out as well as one might have hoped. Possibly, not all of the negatives of the case were reported by the client when the matter began. Since litigation is really war, the tides of war may have favored the other party for any number of reasons, including the good luck or bad luck of having a particular judge or arbitrator. Any lawyer telling you different probably spends a lot of time visiting the Blarney Stone. It is taken as a given in combat that no battle plan survives contact with the enemy. In one of the Rockford Files, Jim Rockford (speaking as Jimmy Joe Meeker, one of his 'con' aliases) said that: "The problem with sidewinders is that you can point them in one direction and they end up going in another."

But, if you have a plaintiff's claim for ten or fifteen thousand dollars and there is no mechanic's lien or payment bond possibility, using a contingent fee lawyer might be appropriate in many instances. Some hourly-billing lawyers – not to mention names – might take such a case on a contingency fee now and again for a really good client.

Here is a practice tip. Legal fees are not generally recoverable in Massachusetts cases irrespective of who wins. (The Courts actually give a winning plaintiff an attorney's fee as a 'statutory cost' in the amount of two dollars and fifty cents, the last time I looked. Don't spend it all in one place!) An exception, however, is if the contract in question awards legal fees to the

winner. In that circumstance, the economics of a case improve, provided that you and your attorney have correctly assessed your case for its strengths and weaknesses. Some statutes, such as claims against a general contractor's payment bond on a public project or claims for unfair and deceptive trade practices award attorneys' fees to plaintiffs who win their claims because those statutes specifically provide for them.

Wherever possible, then, try to include in your contracts a provision that you will be entitled to your attorney's fees and court costs if the other side's conduct requires you to use court processes.

Are we saying to avoid all court cases and all arbitrations? Absolutely not! We use court processes every day to try to bring about successful resolutions of our clients' business problems. What we *are* saying is to consider other alternatives when evaluating a business problem and to not assume that just because a law case has been filed – sometimes necessary, as when required to do so to meet an applicable statute of limitation - this inevitably means that your case will have to go to trial. I know of one situation where there were disputes between two joint-venturers who had decided to go their separate ways. There were issues between them, including, potentially, a fair amount of money. They solved this dispute by having each contractor pick a person that they trusted. (At least one of them was an insurance agent.) And, then those two people picked a third person and everyone went to a bar for the purposes of settling the dispute. It worked!

III. Twenty Tips for Effective Risk Management.

So, what do we *really* mean by 'risk management'. We mean, generally, looking at the disputes you have realistically and attempting to manage them rather than have others (arbitrators or judges) manage them for you. Here are at least twenty tips from my thirty-seven years of experience as to effective means of risk management which over the long run should save you money and help you manage your risks:

(1) **Don't insist on trying every case to a conclusion**. Half of the plaintiffs win and the other half lose. Half of the defendants win and the other half lose. Which half you will fall into can't be predicted with certainty.

(2) **Stop wasting your time and legal fees on cases that don't appear to be going anywhere**. If the defendant corporation or limited liability company has closed its doors, your chances of recovery are significantly reduced unless you have payment bond, mechanics' lien or reach and apply possibilities. Filing cases without giving much thought to where the money will come to pay a judgment is not the best of ideas, although sometimes it has to be done.

(3) Above all, **don't look for 'vindication'**. It simply may not be available for any number of reasons, some of which are set forth above.

(4) **Look at your disputes as business problems and not as situations where you are looking for a third person's validation of your actions or judgment or to reinforce your own ego**.

(5) **Don't spend fifteen thousand dollars to collect fifteen thousand dollars** even when you are right. Business owners should be focusing their attention on good estimating and good project management. Taking time to answer interrogatories, to be deposed, to be prepared for the other party's deposition of you and the tremendous amount of your time necessary to prepare

your case for hearing can be significant bites of your time and can cause these other more important matters to languish.

(6) Please keep in mind **that once a case is in litigation, your lawyer will have to take certain steps within certain time periods because this is what applicable rules and court orders require**. In other words, clients less familiar with litigation may want to provide information and documents or take certain actions at times they wish to. This may not be possible. (For those not familiar with the litigation process, there is an article on our website – www.sauerconstructionlaw.com – explaining the different steps in a typical case.

(7) **If you try cases, you will find that you may win some you didn't think you would win and you will lose some that you didn't think you would lose**. If there is one plaintiff and one defendant, only one party will win and one party will lose. So, looking at the issue quickly suggests that if you have ten cases and have not followed many of the suggestions in this article, you are likely to win five and to lose five.

(8) **If you gave the same case to five different judges, you might get five different responses**. Although our judicial system is based on the idea that this is a process of law, not of men/women, you can't deduct from the process the vagaries of the individual people serving as judges and arbitrators. And, often, one may not know whether a particular judge or arbitrator is good or bad until the case results in a finding or judgment. Particularly if the matter was an arbitration, there may be no grounds for any appeal.

(9) One of what we consider to be one of our better suggestions**. When you have a legal matter or problem and you are presenting it to a lawyer, be sure to tell that lawyer up front every single difficulty and problem there might be with the case. In other words, tell the lawyer every fact and show him/her every document that the other side will rely on to win.** In litigation, the good aspects of cases tend to take care of themselves but it is the bad aspects of cases that may cause you to lose. In other words, if your claim or defense has warts, be sure to bring these to your lawyer's attention up front. There is a tendency on the part of some clients to try to 'hide' the bad aspects of their cases from their lawyers for whatever reasons. Maybe they think that if the lawyer knew all of the adverse facts, the lawyer might not take the case or would be less aggressive with it. Maybe they don't want to look stupid. Whether litigation results in every case with what you consider justice, pretty much all of the facts and circumstances come out in the wash. Telling your lawyer these problems up front might cause a difference in how your lawyer handles your matter and as to what advice you are given.

(10) **Get a good lawyer**. Ask your friendly competitors and friends who they use. See what writing and service they have contributed to the construction industry. The internet may be one source for this information. Many construction lawyers belong to various contractor organizations. But, in the past several years with the their economic difficulties, many of these organizations have been over-run by lawyers. So, membership alone in such an organization is not necessarily evidence that this is a good construction lawyer. Have any lawyer you are looking to hire tell you his/her knowledge and experience with the problem you are facing. Also, inquire as to this lawyer's past success with mediations and strategies and ideas as to how to minimize litigation.

(11) **Be a good client**. Tell your lawyer the truth as you understand it. Honor whatever fee agreement you have entered into with your lawyer. You work to support your family. So does your lawyer. The majority of lawyers are not wealthy. One internet resource says in 2013 that the average lawyer in Boston makes $74,000. You pay your better project managers more than that. This is said not to cause you to feel sorry for lawyers. But, most are not made of money

and cannot afford to give you things for free. Speaking as one with a very significant internet presence, a lot of people try to get valuable advice for nothing. Trying to get something for nothing or for less than fair value may mean that what you have obtained might not be worth having.

(l2) **Get your lawyer involved in the issue earlier**. If you don't take the proper early lien and payment bond claim steps, you may not qualify for those remedies. If you don't understand the lien waivers and contracts you are being asked to sign, you may give up very substantial rights. Particularly with time, as you and your lawyer get more comfortable with one another and your level of trust increases (which may lead to more candidness), you may see that your lawyer's experience and judgment might provide a 'different look' to a problem you may be too close to for objectivity.

(13) **Holding out for every last dollar with a claim you have may not be a good strategy**. The same applies to when claims are made against you. When you are in the ballpark in terms of numbers, leaving that ballpark may not be a good strategy. The definition of a good settlement is one where the plaintiff feels it didn't recover enough money and one where the defendant feels it paid too much money. Remember that Solomon was wise when he offered two women each half of the baby. A blast from the past. I had a case where a certain subcontractor made a claim for an extra against a general contractor for about twelve grand. This would have been a clear pass-through claim to a public owner. The claim had a lot of problems with it. Fairly close to trial, on a Friday, I had the ability to settle the case for $7500. I was able to assemble an offer from the public owner (for most of the money) and I needed an additional five hundred dollars from the general contractor to make a settlement then and there that would have worked. The general wouldn't go along with this. However, on the following Monday, I convinced him to go along with this and I got the five hundred dollars. The problem was that the plaintiff's lawyer had worked all weekend and rather than be willing to settle for $7500, he now wanted $13,000 (some interest and/or attorneys' fees.) We tried the case and the plaintiff won in a jury trial. The general prevailed as to its claim for the value of the extra from the public owner for one hundred cents on the dollars so that the city actually paid the amount of the judgment. However, being a public project, the court gave the plaintiff's attorney twelve thousand dollars for attorney's fees (he wanted eighteen thousand dollars) and it cost my guy thirteen thousand dollars in attorneys' fees to prepare and try the case. This, all over five hundred dollars that would have saved a great deal of expense and the general's time in attending the trial.

(14) **An evaluation of your judgment (and strategy) and of your lawyer's judgment (and strategy) as risk managers should probably be with regard to a number of cases over a period of time as any particular case's result might not be stellar.** Good lawyers can lose cases. Poorer lawyers can win cases. But a person's ability and judgment should be capable of being evaluated over a number of cases and/or over a period of time. A more cautious approach to business problems over a period of time might make more sense than the result achieved in any particular matter.

(15) In our legal process, who gets to the 'plaintiff' (the party bringing the claim) and who gets to be the 'defendant' (the party defending against the claim) may be determined by who gets to the courthouse first. Since a defendant is generally required to file a counterclaim against the plaintiff's complaint if it arises out of the same factual circumstances when it files an answer, in any given claim, both parties may have claims for damages against the other. Some think that being a plaintiff has an advantage over being a defendant. According to our Rules of Civil Procedure, there probably isn't any significant advantage. So, when you, as a plaintiff, bring a

claim, be very careful to understand any 'counterclaim' that might be brought against you. You could win your claim and defeat the counterclaim. Or, you can lose your claim and have the defendant win on its counterclaim. **So, both 'claims' and 'counterclaims' should be subjected to more or less the same standards of risk management and sober and effective analysis.**

(16) **Use good contract and other forms and understand other peoples' forms (e.g. lien waivers and releases) that other parties want you to sign**. In certain issues, these may include credit applications. For a subcontractor, the best subcontract one can have – in my view – is to use your proposal with terms and conditions on the back side of the page as your contract. In that case, your proposal should state that whatever the proposed amount of money is, this is specifically quoted with the understanding that the proposal will serve as your contract. And, if the party to whom the quote is given wishes to use a different form of contract, you reserve your right to adjust the amount of your quote.

(17) **Make sure your downstream contractors and subcontractors are performing to the same requirements as you are performing upstream as to your contracting party**. General contractors should make sure subcontractors are subject to the same essential terms and conditions, such as general conditions and the terms of the general contract, as is the general contractor. Subcontractors should make sure that lower tier subcontractors are performing with the exact obligations that they have assumed towards the general contractor. All material suppliers must have at least some of the 'upstream' obligations, such as that all materials will meet the plans and specifications for this particular job. In addition, where possible, try to make sure the material supplier agrees to be subject to the same schedule that you are subject to.

(18) **Have some figure for legal fees in your annual budget**. I have inferred from any number of discussions with material suppliers and subcontractors when the discussion of a legal matter occurs, that they have given no thought at all as to how they might pay for that. You ***will*** have disputes. You ***will*** need legal forms read, prepared and revised. You ***will*** have business problems and disputes. You will need (benefit from) business advice. If you have made no provision for how this is to be paid for, you are behind the eight ball as to your adversary if your adversary *has* made such provisions. One of the reasons that general contractors have some success against some subcontractors in the first several years of litigation is that general contractors better understand this and have made provision for this. If the other party can afford to litigate and you can't, where will this leave you? You'll be abandoning claims that might otherwise have brought you money. Or, you might be forced to pay judgments by parties against you because you were not able to defend or properly defend.

(19). **While you may want your lawyer to tell you in advance what something will cost, quite often he or she will not be able to give you anything more than a range, sometimes only a guess.** When your car won't start and it is towed to the garage, can the mechanic tell you up front without examining the car what it will cost to fix the car when the engine won't start? This could be a simple matter, such as a fuse. Maybe you ran out of gas. Maybe the fuel injectors are dirty. Or, it might be a more expensive matter, such as you need a new battery. Or, it might be that you might need a new engine. The cost differences among each of these possibilities reflect huge variations. A lawyer can't tell you up front what a payment bond claim or a mechanics' lien will cost. Will the case settle with just one letter or the filing of one lien document? For one client, I got a client three hundred thousand dollars in five days with a notice of contract. For another client on a demand for direct payment, I got them one hundred twenty-five thousand dollars with just one letter. Yet, I have had cases last eight years without

resolution and without obtaining a penny. When does the other party want to do what is 'right'? Does the other party want to exercise good principles of risk management or is that party simply difficult? For reviews of contracts, lien waivers and the filing of a notice of contract, a lawyer can often give you a fairly accurate estimate or range. (For mechanics' liens, for example, the research of the title could vary in terms of time depending on how complicated the title might be, which has to be examined before the lien can be filed.) I have had any number of clients I have represented for decades who have never inquired as to the cost of anything even *once*. Many of them have been quite successful, even through this last (and present) difficult economic period. Pick the right lawyer and pay attention, particularly as to the first several matters. If you pick well and keep in contact with your lawyer, the cost will be appropriate, particularly when measured against a number of matters over a period of time.

(20). **Make sure you have a designated person in your business whose job is principally to keep track of your accounts receivable.** I have seen any number of businesses which are able to prepare reasonable, competitive estimates and then to run the jobs they bid well. Often, however, once they render a bill, they really don't have one person whose job is to keep track of who is current, who is 30 days out, who is 90 days out and who is 120 days out. Under such circumstances, before the problem is so serious that it can no longer be avoided, some substantive rights and remedies may have been sacrificed.

IV. CONCLUSION: In a more perfect world, it would be nice to have issues in peoples' lives decided by objective standards of what is 'right' and what is 'wrong'. Our world is simply not well set up for this. People have different ideas about any number of subjects. Is there a God or isn't there one? Is abortion right or is abortion wrong? Is capital punishment right or is it wrong? Is gay marriage right or is it wrong? The United States Supreme Court often 'interprets' the Constitution, written in the late eighteenth century, attempting (sometimes rather ridiculously) to apply it to issues that simply didn't exist more than two hundred years ago and could not have *possibly* been in the drafters' minds. Perhaps in the next world, we will find out what things we did right in *this* world. And, for that matter, what were the errors of our ways. May the former exceed the latter! 'Right' and 'wrong' are each four letter words with, uh, an extra letter.

Business problems and disputes will inevitably arise. How one attempts to manage them may be the difference between your company's success or its failure. Being personally familiar with some of the circumstances of the failures of some of the larger Massachusetts general contractors over the last ten years or so, some of those companies appeared to have far too much litigation. When one of these companies failed, it is reported that there were over two hundred and seventy cases pending against that company. Litigation is expensive and will result in findings and judgments over which you may have little control. Attempting to resolve as many of these issues as possible economically, quickly and prudently, may reflect sound risk management principles in practice.

At Sauer & Sauer, we are committed to having a high degree of knowledge as to the legal principles applicable to our clients' problems. At the same time, it is our practice to employ as many of these suggestions – and others – in the resolutions of our clients' problems, using good

business judgment, common sense and the experience we have as to how doing otherwise often does not work well. We would welcome the opportunity to serve *you!*

*(These materials are intended as general information only, not specific legal advice. When confronted with a legal problem you don't understand, seek the assistance of legal counsel. Construction law is something that most 'general' lawyers don't do a lot of. At Sauer & Sauer, we **only** practice construction law and attempt to assist our clients in practicing as many principles of risk management as possible wherever possible.)*

SEVEN QUICK THINGS ABOUT OUR FIRM:

1. No charge to non-clients for quick answers to *general* Massachusetts construction law questions.

2. We guarantee our billing rate for five years in writing for all new clients through the end of this year who mention this offer at engagement.

3. As trials can be expensive, take a great deal of management time and the result of which is uncertain, we make our best efforts towards seeing whether something short of a trial – such as mediation – might be possible for resolving the matter. If a trial is necessary, we have a lot of experience trying cases.

4. We endeavor to maintain, wherever possible, future business relationships with your contracting party by emphasizing a fair and reasonable approach to disputes, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'. And, while you might say now 'I'd never work for that guy again', a lot of experience over the years suggests otherwise. Given the right job, he'd be given another chance, particularly if it was a good job!

5. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first. We recently obtained a 1.5 million dollar settlement for a subcontractor against a bankrupt general contractor's payment bond surety on three projects without a single deposition ever being taken and without our client's even having to answer interrogatories.

6. Being a smaller firm, our attention is focused *solely* on our clients and their problems, not on feeding the overhead of a fancy office and many partners, associates and support staff. We only have to feed our five dogs, most of which, however, are *quite large!* (If you ever meet The Worm, be respectful and, perhaps, a bit wary. After all, Rotties *can* be difficult! Especially around meal times. For big dogs like this, it is almost *always* around meal times! Or, close enough.)

7. Satellite offices in Boston and Worcester for more convenient meetings.