Construction Law Newsletter

Published by the Section on Construction Law of the Oregon State Bar

ISSUE No. 22 November, 2002

HOW TO KEEP CORPORATE COUNSEL HAPPY

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Performance Contracting, Inc.

More and more construction companies are hiring in-house counsel to help manage the ever-increasing number of legal issues that face and threaten their businesses. Outside counsel often view this event with trepidation and a belief that they have lost the client. However, like most fears, that belief arises from a lack of understanding of what in-house counsel expects from outside attorneys. By following a few simple rules, in-house counsel can be the best source of new business any lawyer will ever encounter.

One of the primary goals of in-house counsel is to manage legal expense – not eliminate it. No matter how experienced, clever or good in-house counsel may be, they cannot do without independent representation, and they need the objective advice of knowledgeable, experienced attorneys. To manage outside counsel costs, corporate counsel looks at several aspects of the relationship.

1. *Hourly Rates and Efficiency.*

Does the attorney's or firm's skills match the hourly rates? We are concerned with the bottom line. How much will it cost to accomplish the given task? The total cost of resolution is the product of hourly rates and efficiency, which, in turn, is driven, to a greater or lesser extent, by the skill of the attorneys.

Most in-house counsel are not willing to pay high hourly rates for simple lien foreclosures and contract disputes. On the other hand, if the problem is a highly specialized area – such as mold litigation – I am going to find the most skilled attorney and use her nationwide as lead counsel. You can meet corporate counsel's expectations in this respect by promoting areas where you are specially skilled and charging commensurate rates and charging lower rates for simple matters. Corporate counsel will never be offended by varying hourly rates.

2. *Responsiveness.*

Often, outside counsel confuses eagerness for new work for responsiveness. Corporate counsel are just as busy as lawyers in private practice, and when they hire an outside attorney, they do not have the time or inclination to dog the lawyer to get the job done, keep them advised or propose a plan of action. Keeping in-house counsel happy (and keeping the business) requires taking initiative in getting the case started, keeping the client informed and resolving the matter promptly – all without prodding from the in-house.

3. *Cost Effectiveness.*

In-house counsel is ¾ attorney and ¼ business person (or vice versa), and we are constantly asking (or being asked): Does this make economic sense? Everyone knows it costs a lot to resolve litigated disputes or solve difficult business issues, but that does not mean it does not matter how much it costs to get there. To a certain extent, this is a delegation issue, but not just delegation within the firm. Of course, among the lawyers in the firm, work should always be delegated to the time keeper with the lowest hourly rate and appropriate skills for the task. But more important, work should always be delegated back to the company personnel whenever possible.

The company is already paying its employees to be available, and, more often than not, they know more about the matter than outside counsel. Developing a strong working relationship with the employees of the company is the key to becoming an indispensable part of the company's legal team. Outside counsel should always ask in-house counsel: "Is there someone in-house who can do this more cost effectively?"

The other side of the issue of cost effectiveness is often waived off by attorneys as "a business decision." While it is true that attorneys should not give strictly business advice, that does not mean that the issue should not be raised or discussed by outside counsel. Often, in-house counsel does not have the time or the objectivity to evaluate whether or not it makes economic sense to pursue a matter, and they need direction from the outside. Be candid! Tell in-house counsel if the net economic benefit is likely to be minimal. Ask pointed questions: Will this damage future business relationships? Can the company spare the personnel to work on this matter? Is there an important principle at stake? Then give your opinion. We hire outside counsel because we want advice and we want someone to challenge assumptions.

In conclusion, by following these simple rules, any lawyer in private practice can earn the respect and loyalty of in-house counsel. The construction industry is knowledgeable about subcontractor relationships, and, in many respects, outside counsel is just another subcontractor. Similarly, you will only keep the business if you perform on the job.

CCB "RMI" Rules

Alan Mitchell
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The concept of a Responsible Managing Individual (RMI) is one that has evolved at the CCB over the years. For many years, the CCB enforced various RMI requirements. Then, the Department of Justice advised the CCB that it lacked statutory authority for doing so, at which point the CCB ceased enforcing the prior requirements. In 2001, the CCB obtained legislative authorization to "re-approve" its RMI rules. See 812-006-0011 (implementing 701.075 and 701.280).

Now, the CCB stringently enforces its RMI rules. Any contractor that first obtains its license after July 1, 2000 must designate one person as its RMI. That person must complete the 16-hour education requirement and pass the CCB licensing test. Contractors who were licensed prior to July 1, 2000 and whose license has not lapsed for more than a two-year period do not need to meet the education requirement. Thus, the RMI rules do not apply to those contractors.

The CCB generally expects the RMI to be either the sole proprietor, an officer of a corporation or a member of an LLC. There is a provision for an employee to be a company's RMI (known as a "designated RMI"). This requires that the employee be the only person within the company who directs the company's entire Oregon operations. Thus, this rule is directed toward the out-of-state contractor who wants to maintain an Oregon office that is not operated by a corporate officer.

If the RMI leaves the company, then the company must immediately appoint a new RMI and notify the CCB of the new RMI. Companies that fail to timely obtain a new RMI are likely to receive a license suspension notice from the CCB's enforcement division.

As noted above, companies that have been continuously licensed since prior to July 1, 2000 do not need to designate an RMI. What happens if all of the company's owners who were listed with the CCB as of July 1, 2000 leave the company? In that situation, the CCB will notify the company that it must immediately appoint a qualified RMI, or risk suspension of its CCB license. For these companies, prior planning is important.

One potential solution for a contractor who quickly needs a new RMI is to immediately appoint a new officer who is a licensed contractor and has been one since before July 1, 2000. That person will fit within the "grandfather" rules and, because he is a corporate officer, he will fulfill the CCB licensing requirements. This will then "cure" the RMI problem. Of course, adding a new officer may raise other issues that the company should address.

CASE LAW UPDATE

Alan Mitchell
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It has been awhile since our newsletter has included any updates on case law relevant to construction law practitioners. If I have missed any good cases, please let me know.

Construction Liens

HGC Limited v. Cascade Pension Trust, 174 Or App 464 (2001). A party acquiring interest in real property after the filing or foreclosure of a lien will be subject to the lien claim. The failure to name a party who acquired interest prior to recording of a lien claim does not bind that party to the foreclosure judgment. ORS 87.060(7).

Also, the filing or foreclosure of a lien claim does not create an ownership interest in the property (although the foreclosure judgment can lead to an ownership interest). The case also discusses the recovery of attorney fees under ORS 87.060(5).

Tualatin Valley Builders Supply v. TMT Homes, 179 Or App 575 (2002). This case discusses ORS 87.076 and bonding off liens. The court's decision turned on whether you can recover a "lien foreclosure" against a bond when proper notice was not given per ORS 87.078. The court's answer was no.

Westwood Construction Company v. Hallmark Inns & Resorts, Inc., 182 Or App 624, 50 P3d 238 (2002). The parties' contract and quantum meruit claims were submitted to arbitration. Pending the outcome of the arbitration, the trial court abated the lien foreclosure action. After the arbitration, the court reactivated the lien foreclosure action and Westwood moved for summary judgment based upon the findings of the arbitrator.

The trial court ruled that the arbitrator's decisions on certain critical issues were binding on the court. The Court of Appeals agreed with that ruling under the facts of the case, notwithstanding the prior decision in Westwood Corp. v. Bowen, 108 Or App 310 (1991).

The court distinguished Westwood v. Bowen because that case involved claims within the same action, while in Westwood v. Hallmark, the Court of Appeals held that the arbitration was not part of the action pending before the trial court. Therefore, the arbitrator's findings were entitled to preclusive effect.

Safeport, Inc. v. Equipment Roundup & Manufacturing, A112787 (Nov. 6, 2002). The court addresses a number of issues concerning construction lien foreclosure actions. First, the court allowed attorney fees to a lien claimant that failed to plead compliance with ORS 87.057. Second, the court upheld the priority of a lender over the materials portion of a labor and materials lien claim when the claimant did not give notice pursuant to ORS 87.025. Third, in dicta, the court noted that a lien foreclosure might not prevent a quantum meruit claim against an owner. Finally, the court held that a party retains its right to a jury trial on legal claims even though the court decided "all other pleaded issues" under ORS 87.060(3).

International Brotherhood of Electrical Workers Local No. 48 v. Oregon Steel Mills, Inc., 168 Or App 101 (2000). The court held that ERISA does not preempt a trustees' lien under ORS 87.010(4). The court also held that neither the trustees nor the union could foreclose a lien under ORS 87.010(1).

Public Works Bond Claims

United States ex rel J.D. Fields & Co. v. Gottfried Corp., No 00-60668, 2001 WL 1381194 (5^{th} Cir. Nov. 6, 2001). For purposes of the federal Miller Act, a rental company's last day is determined from the terms of the rental agreement (i.e., the date it is picked up) rather than from the date the renter stopped using the equipment.

Walton Technology v. Westar Engineering, 290 F3d 1199 (9th Cir. 2002). A pay if paid clause is not a defense to a federal Miller Act payment bond claim. The court held that such clauses were in direct violation of the express terms of the Miller Act. The court left open the issue of whether a "clear and explicit" waiver of a subcontractor's rights under the Miller Act would be enforceable.

State ex rel Dept. of Administrative Services v. United Pacific Insurance Co., 172 Or App 435 (2001). A contract for clean up of tires from a contaminated site was not a "public improvement" under ORS 279.011(8). Thus, the State was not liable for not requiring the prime to provide a payment bond.

Also, the fact the performance bond incorporated by reference the prime contract (which included a prompt payment clause as required by statute) did not provide a right of action by a third party subcontractor or supplier.

The contrary opinion in Wiley Co. v. Home Indemnity Co., 213 Or 493 (1958), involved a situation where the obligee on the performance bond was the person making a claim. In that situation, because the surety guaranteed the subcontractor's performance to the prime contractor, it also guaranteed the subcontractor's obligation under ORS 279.312 to pay for all materials (even though the sub's performance bond did not include payment bond language, it incorporated the public contract, which did include prompt payment language).

Contracts

Keith Brown Lumber Yard v. B & L Electric, 182 Or App 279 (2002). The claimant's liens failed because it had not applied payments as directed. The court reiterated the existing rule: payments must be specifically applied if the supplier knows or should have known that the payments were directed to specific accounts. Direction can be express or implied from the circumstances.

Here, three of the checks included a project site address on the "tear-off" portion of the check; the fourth check did not. The court held that the site address notation was sufficient direction as to how the three checks should have been credited. As to the fourth check, the court found that the amount of this check was an exact match for the amount owing in regard to a specific project, which was sufficient manifestation of the debtor's intent.

Note that the court did not fully address issue of claimant's contractual agreement that allowed it to apply payments to other accounts.

Metropolitan Property & Casualty v. Harper, 168 Or App 358 (2000). Breach of contract claims do not preclude tort remedies even if the contract includes a generalized standard of care (the contract stated the contractor would perform its work in a "timely and workmanlike manner"). "In short, contracting parties are entitled to enforce commitments to perform contractual obligations in accordance with a general standard of care."

Young v. Continental Crane & Rigging Co., 183 Or App 563 (2002). An indemnity provision in a rental lease agreement was inconspicuous as a matter of law and, therefore, unenforceable. The opinion includes a review of numerous cases on the issue of "conspicuousness" under the UCC.

Construction Contractors Board

Parthenon Construction & Design, Inc. v. Neuman, et al., 166 Or App 172 (2000). Under the prior ORS 701.065, there is no "substantial compliance" exception for licensing. "The work" means all of the work, not just the unpaid work. This reinforces the strict compliance impact of the old statute. Given the substantial revisions to ORS 701.065, a practitioner should be cautious about relying upon case law arising out of prior versions of the statute.

Tandem Properties v. Construction Contractors Board, 184 Or App 28 (2002), the court held that a developer must be licensed as a contractor. The Court held that, because neither the landowner nor either of its members intended to live in the house being built, then the structure was being built "for another" and the plaintiff was required to be licensed with the CCB. The court also held that the plaintiff was not exempt from CCB licensing under the "owner" exemption of ORS 701.010(5).

Peplinski v. Construction Contractors Board, 183 Or App 419 (2002). The court found that the CCB should not dismiss a claim for being untimely if any portion of the claim may be timely. Parties wishing to use or rely upon the Peplinski case should be aware that it was decided under the former version of ORS 701.143. Thus, for claims filed after January 1, 2002, claimants should examine the statute carefully before deciding whether or not a claim should be timely.

Administrative Law

The Building Department LLC v. Dept. of Consumer and Business Services, 180 Or App 486 (2002). Certain DCBS rules were statutorily (and summarily) invalid because the notices of rulemaking did not include a legally sufficient statement of fiscal impact (the notice stated: "whether there is an increase or decrease is undetermined at this time").

Statutes of Limitation

Gladhart v. Oregon Vineyard Supply Company, 332 Or 226 (2001). Under ORS 30.905(2), the statute of limitation for product liability actions begins to run on the date the damage occurs (usually, the date the product was provided), not on the date of discovery.

Tribal Law

C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001). The Court found a waiver of sovereign immunity when the Tribe entered into an AIA form contract that incorporated the rules of the American Arbitration Association.

IMPACT OF ENTITY CHANGE ON CCB LICENSES

Alan Mitchell
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Contractors who change their form of business entity (most commonly, from a sole proprietorship to an LLC or S corporation) generally want to keep their prior CCB license number. This is particularly important if the license number is a low one, since sophisticated consumers may be aware that the CCB license number system is sequential, such that the lower the number, the longer the business has been licensed.

For many years, the CCB granted these requests if the new business shared at least one owner or officer with the prior business. In May of 2002, however, the CCB Board voted to cease the practice of allowing the transfer of a CCB license number to a new entity. Thus, if a construction business changes the form of its business, the CCB now requires that the new business submit a new license application, which will result in a new CCB license number.

The new rule is OAR 812-003-0000(1):

> (1) A license and its identifying license number will be issued to one entity only. Other entities shall not be included in that license, but each shall be separately licensed and shall separately meet the licensing requirements. No entity may perform work subject to ORS chapter 701 through the use of another entity's license.

Of course, there are ways in which a business can change its ownership while still keeping its prior CCB license number. For example, if there is just a change in the owners of an entity such as a corporation, then there is no entity change and there is no need for a new CCB license. This allows the normal succession that often occurs in family-owned closely held companies. Of course, this does not work if the company is a sole proprietorship.

One situation to watch out for, however, is when the sole RMI leaves the company. At that point, the company should be ready to immediately notify the CCB that it has a new, properly-qualified RMI.

Two methods of transferring interests in companies are an asset sale versus a stock sale. In an asset sale, the purchaser only buys certain specific assets of the selling company and generally specifically avoids purchasing the seller's existing liabilities. In that instance, the CCB would likely consider the purchaser to be a new entity and would not transfer the seller's CCB license number to the purchaser.

In a stock sale, on the other hand, the purchaser "steps into the shoes" of the selling shareholders by purchasing their stocks. Thus, the new shareholders hold all interests of the selling shareholders, including all assets and liabilities. In this instance, there is no new entity and the CCB should not require a new CCB license number.

There are other issues that may relate to a change in form of business entity. A second impact of forming a new business entity is its effect upon existing contractual relations. For example, if a sole proprietor is in the middle of a project when he incorporates, which entity now has an obligation to continue the contract. Is it the sole proprietor who entered the contract or is it the new entity?

Also, what is the impact upon the contractor's various credit agreements with suppliers. Is the sole proprietor still bound to the existing credit application? As to this latter question, the answer is generally yes. In Knez Building Materials Co. v. Manikas, 113 Or App 220 (1992), the court held that the supplier's acceptance of payments by the corporation did not relieve the partnership's liability when there was no evidence the supplier had agreed to release the partnership from its obligations and substitute the corporation.

Another issue is what is the impact on construction lien rights. Oregon generally holds that lien rights are not assignable before they are perfected (i.e., the lien is recorded). Brice Mortgage Co. v. Wodtke, et al., 215 Or 192, 194 (1958). Thus, both the buyer and the seller will want to investigate whether there are any lien rights that may be impacted by the sale.

UPCOMING CLES

December 6, 2002: "2002 Practitioner's Guide to the CCB"

This CLE will be an update on the bi-annual Practicing Before the CCB series. Topics include recent legislative and administrative rule changes, CCB enforcement issues and bankruptcy issues. Speakers include Bill Boyd of the CCB, Chris Martin, Alan Mitchell and others.

This CLE will be a half-day (morning) seminar (lunch included) and will be held on December 6 at the Sweetbriar Inn in Tualatin. The section's annual meeting will be held after the CLE. For details, contact Alan Mitchell at (503) 620-4540.

Use the form on the following page to register. ⇨

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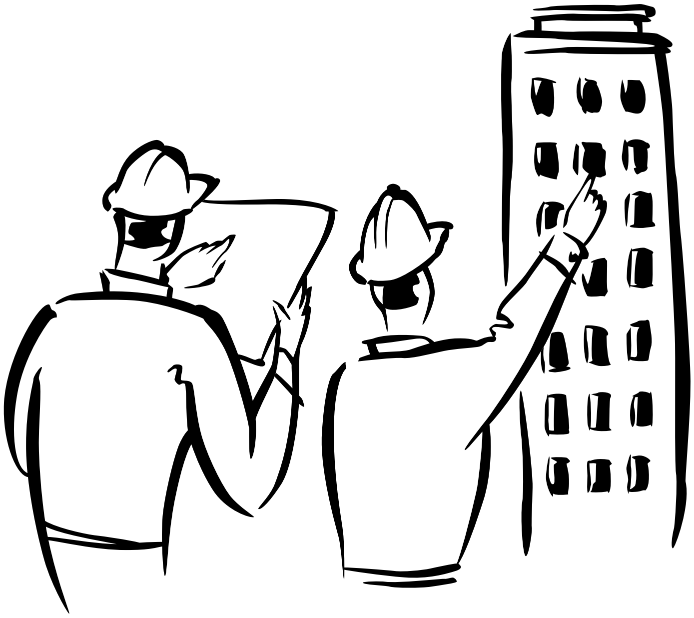
Construction Law Section



Continuing Legal Education Seminar
3.5 MCLE Credits (pending)
and
2002 Annual Business Meeting

Friday, December 6, 2002
8:30 a.m. to 12:00 noon
followed by lunch and the
Annual Section Meeting
at the Sweetbriar Inn in Tualatin
7125 SW Nyberg Road (I-5, exit 289)
Tualatin, OR

The OSB Construction Law Section is sponsoring a half-day continuing legal education seminar entitled:

2002 Practitioner's Guide to the
Oregon Construction Contractors Board.

This program will feature:

- Licensing Issues
- Filing Claims
- Hearings Process
- Enforcement
- Miscellaneous Issues

Annual business meeting: Immediately following the seminar, during the lunch hour, the Section will hold its 2002 annual business meeting. The meeting should last no more than 30 minutes. The principal item on the agenda will be election of officers and members-at-large of the Section Executive Committee. The Section's nominating committee will email a proposed slate of officers to all section members prior to the meeting.

Use this form to register:

Oregon State Bar Construction Law Section
Continuing Legal Education Seminar and
2002 Annual Business Meeting

Name ______________________________

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Program Registration:

Construction Section Members:

☐ $60 - Yes, sign me up for the CLE seminar.......... $ _____

☐ Yes, lunch, too (included)

☐ Yes, sign me up for the Construction Law Section Annual Business Meeting.

Non-Members:

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Three Ways to Register or Order:

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FAX this form with credit card information to the attention of the CLE Registrar at (503) 968-4456. Do not mail a copy.

PHONE the CLE Registrar at (503) 684-7413, or toll free in Oregon 1-800-452-8260, ext. 413 with your credit card information.

Cancellations:

Cancellations must be received at least two days before the seminar. Fax your request to 503-684-1366, Attn: Carole Woodruff. There is a $15 cancellation fee.

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