CHIUMENTO MCNALLY, LLC

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THE MINUTES

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SPECIAL ANNOUNCEMENTS

CM introduces its newest Associate, Adam Levy, Esquire.

Read all about Mr. Levy in our Attorney Spotlight of the Quarter on Page 6.

HAPPY HOLIDAYS FROM CHIUMENTO MCNALLY!

A holiday is a day designated as having special significance for which individuals, a government, or a religious group have deemed that observance is warranted. It is generally an official (more common) or unofficial observance of religious, national, or cultural significance, often accompanied by celebrations or festivities. To many, it conjures up emotions of joy, thankfulness, and appreciation. To some, it is commenced by shopping for the most coveted bargain during the wee hours of the morning the Friday after Thanksgiving.

For others, it signifies car rides to and from beloved family members' homes to enjoy the most delectable treats. And then to many, it is a time to reflect on their blessings, good fortunes and to "pay it forward" to those less fortunate but not less deserving.

For us at CM, it's a time to give thanks for the opportunity to be of service. We wish you and your families a happy healthy holiday season. Looking forward to seeing you in the new year.

-Ashley H. Buono, Editor and Associate Attorney

BREAKING NEWS:

In the last edition of *The Minutes* we reported on the recent developments in the law regarding Limitations of Liability clauses in New Jersey, including a recent victory in the New Jersey Superior Court, Appellate Division for one of our clients enforcing such an agreement. We are pleased to report that the New Jersey Supreme Court upheld that decision and denied Plaintiff's final appeal attempt on December 14, 2011. Please feel free to contact Gary Chiumento or Ashley Buono for more details on this result and how your firm could benefit from a carefully worded Limitation clause.

THE 2007 REVISIONS TO AIA CONTRACT DOCUMENTS AND THE REMOVAL OF MANDATORY ARBITRATION PROVISIONS.

BY: TERESA MUNSON, ESQUIRE

In every Master Agreement since 1888, the American Institute of Architects ("AIA") has included a provision requiring mandatory arbitration. In 2007, however, bowing to the demands of the industry, the AIA revised its Master Agreement to eliminate this provision. Perhaps even more startling, the new form establishes litigation as the default dispute mechanism. In a question, "Why?"

The AIA comments to the 2007 contract revisions note that arbitration had been the preference due to certain perceived benefits – arbitrators schooled in construction and design; limited discovery and motion practice; accelerated proceedings; lower costs. However, as claims increasingly have become more complex, multi-party arbitrations have become as time-consuming and as expensive, if not more so, than traditional litigation. The new AIA agreement allows the parties to select litigation or arbitration (or "other," which requires the parties to write in their choice). In the event the parties do not make a selection, the AIA's instructions provide that litigation is the default option. The AIA voiced concern that a court would conclude that a parties' failure to select a dispute resolution mechanism would unfairly result in the selection of a contractual right over a long-recognized right to "one's day in court."

The AIA's acknowledgment that litigation should be the default resolution method reflects current judicial thought that the benefits of alternative dispute resolution mechanisms, should not override the requirements of a knowing and voluntary waiver of a trial (with or without a jury).

The New Jersey courts have further echoed the AIA sentiments. In *Wilson v. Fields at Princeton Highlands, the* Appellate Division held that where an arbitration agreement does not specifically refer to statutory claims, a party is entitled to pursue those claims in a subsequent court proceeding. In *Elizabethtown Water Company v. Watchung Square Associates, LLC* the court upheld a party's right to commence litigation after receipt of an arbitration award where the award did not include any statement of reasons or findings and where the party specifically reserved the right to pursue state court proceedings for claims not presented in the arbitration. Lastly, in *NAACP of Camden County East v. Foulke Management Corp.,* the court ruled that where inconsistencies and ambiguities appear in consumer contracts, (regarding such issues as to which arbitration rules apply, what forum will be used, which statutes of limitations apply, who can serve as arbitrators, and what fees and costs should be awarded to the prevailing party) the consumer will not be found to have voluntarily waived the right to litigate his or her complaints.

Read together, these rulings stand for the proposition that while the courts do favor arbitration as an appropriate mechanism for resolving claims, the arbitration provisions must be clearly expressed and must clearly identify the claims to be arbitrated. If not, the parties will continue to have access to the courts. These rulings are consistent with the AIA's requirement that the parties carefully select a dispute resolution mechanism that best meets the parties' objectives. The "take away" message, therefore is read your contract thoroughly and make sure it expresses clearly the agreed upon methods for dispute resolution.

A NEW BROOM SWEEPS CLEAN: ELECTION YEAR AND YOUR PUBLIC CONTRACT.

BY: ASHLEY H. BUONO, ESQUIRE

With an election season a month behind us, many professionals who have contracts with public entities find themselves in a changing environment. The old board they once knew (and with whom they may have entered into an agreement) is "out", and a fresh board with new faces, and perhaps on different party lines, is "in." How does one solidify their position with the incoming board? The answer is simple: have an enforceable contract.

Traditionally, the Statute of Frauds (law in New Jersey) governs the enforceability of a contract. It requires that under specific circumstances a contract must be in writing. Where one does not fall within the ambit of the Statute of Frauds but performance has occurred, equity and fairness principles may allow for an alternative recovery under an Unjust Enrichment or Quantum Meruit theory. However, for the professional hired by a public entity, those traditional legal theories are preempted by the Legislature's enactment of two laws: the Local Public Contract Law, **N.J.S.A**. 40A:11 *et. seq.* and the Public Schools Contract Law, **N.J.S.A.** 18A:18A-1 *et. seq.*, which govern a public body's contract.

According to the Acts, a contract is any agreement, including, but not limited to, a purchase order or a formal agreement. Both Acts require that for the Board to award a contract to a professional, it must state its supporting reasons for the action in the Resolution awarding each contract and cause it to be printed in the "official" newspaper. The newspaper "notice" is brief and states the *nature, duration, service* and *amount of the contract.* Therefore, if a dispute ever arises con-

cerning the terms of the contract, the newspaper is a primary place to look since the Resolution itself may not provide much detail. The Acts also require that the Resolution and the contract be on file and available for public inspection. Moreover, the contract must be in writing.

However, a word of caution to those relying on the authority of the Business Administrator or Superintendant to bind the public Board: while you certainly can negotiate the terms of your contract with them, the law provides that the final authority on the approval of the contract is the Board evinced by its Resolution. Stated another way, if you desire to be paid and protected from the wind of political change, there must be a Resolution entered by the governing body. Contracts without a Resolution are essentially meaningless to an incoming Board. Similarly meaningless are oral agreements and prior business conduct. There simply is no exception to the requirement of a Resolution.

Lastly, professionals cannot plead ignorance to the requirements of an enforceable contract as the law presumes that public contractors operate with the knowledge of relevant laws and the authority of officials with whom they deal. Therefore, it is a far better practice to review newspapers, attend hearings and ensure that the Resolution which approved your contract, in fact, included the correct agreed upon terms rather than assuming this to be the case. After all, we all know what happens when we assume.

THE SURVEYOR STATUTE OF REPOSE

BY: STEPHEN MCNALLY, ESQUIRE

Real estate and construction professionals have become familiar with the statute of repose, **N.J.S.A.** 2A:14-1.1, which precludes actions associated with design or construction of an improvement to real property after ten years. The statute has been in place since 1967, and there is an abundance of interpretive case law.

Less known is **N.J.S.A**. 2A:14-1.3 which offers a ten year statute of repose applicable to surveys of real property. There is no case law interpreting the statute. The courts have strictly construed Section 1.1 to preclude actions after ten years, and it is to be seen whether the strict construction will also be applied to 1.3.

An important difference between Sections 1.1 and 1.3 is that Section 1.1 pertains to claims associated with an improvement (e.g. a building) on real property whereas Section 1.3 does not involve structures. Section 1.1 also requires the existence of an unsafe condition. Indeed, the purpose behind 1.1 is to preclude actions for injury to person or property arising from unsafe conditions in the improvement. The courts, in interpreting 1.1, have held that it seeks "…to stimulate litigants to prosecute their suits diligently and to avoid burdening [the]…courts with stale claims." This rationale makes sense as an owner to real property will be responsible to maintain the building and during that period should be able to identify unsafe conditions. Additionally, over time failure to maintain the building could be the ultimate cause of the unsafe condition.

Section 1.3, on the other hand, does not require an unsafe condition nor does it require the services to be related to an improvement. **N.J.S.A**. 2A:14-1.3 provides:

No action, whether in contract, in tort or otherwise, to recover damages for any deficiency in a survey of real property performed under contract for any purpose other than for any improvement to real property shall be taken against any person performing or furnishing such survey more than ten years after the performance or furnishing such survey.

Thusly, Section 1.3 precludes claims against a surveyor ten years after performing the services regardless of when the defect was identified. Of course an owner who was provided the survey will have no reason to be aware of the defect, since, unlike 1.1, maintenance will not uncover the defect. Normally, a survey defect will not be uncovered until the owner sells the property and the new purchaser has a survey completed or an adjoining neighbor uncovers the defect. Given the length of time individuals tend to continue ownership of property, ten years can easily pass without becoming aware of a defect.

For surveyors, **N.J.S.A.** 2A:14-1.3 offers a generous level of protection. For homeowners and title insurers, it could deny legitimate claims after ten years. Regardless of which side you find yourself, familiarity with the Section is important in protecting your rights.

COVERING YOUR ASSETS: (CYA) A GUIDE TO COMMUNICATING IN THE MODERN PROJECT ERA: PART TWO.

BY: GARY CHIUMENTO, ESQUIRE

This article is a continuation from Gary's last submission, which can be accessed on our firm's website within "The Minutes."

It is the intent of this article to remind design professionals of the importance of clear, efficient and effective communication and to provide strategies for communicating with clients, their contractors and others. In the previous issue, a number of common problems with written communications were discussed and particular attention was focused on emails. In this edition, General Guidelines to communication of various types are explored.

General Guidelines for Communication

Purpose. Think about the purpose of the communication. Is it to convey information or seek it? Is it to memorialize an event or a decision? Be clear about your purpose and don't be afraid to state your purpose "up front."

Organization. Invest time thinking about what you want to say and how you want to say it. An old adage about organization is "tell 'em what you're going to tell 'em, tell 'em, tell 'em what you told 'em." This is especially helpful where your message has multiple parts. Introducing the message itself, perhaps in the subject feature of the e-mail or the "Re" section of the letter, can suffice for short messages. A more comprehensive treatment of the same subject may require a sentence or two of explanation. After listing and explaining your message, a recap at the end identifying the need for further action and the party undertaking the action can be an appropriate finish. This will leave the reader with the impression you are organized.

Level of Formality. Employ proper grammar and spelling. Do not rely strictly on spelling/grammar software checks. Keep a dictionary and grammar guide close at hand. Ask others in the office to proofread, not just for form but for content as well. Jargon and Acronyms ("ASHRAE Foundation," "SMACNA Guidelines,") are acceptable as long as the receiver knows what you are talking about. Otherwise, define the term or acronym before using it. Avoid profanity and inside jokes. It will be lost on jurors at best and at worst destructive of the professional attitude you want to cultivate.

For these same reasons while it is important to explain where appropriate your reason for a decision or a suggested course of action, it is ill advised to engage in a running debate in correspondence. Do not engage in editorializing or personal disparagement no matter how provoked. When writing a response to a particularly provocative letter from a contractor or owner's representative, draft the letter you would like to send and wait 24 hours to write the letter you need to send. For such letters it is often better to respond by "snail mail" rather than zip out an immediate e-mail to allow the opportunity for reflection and a measured response. Go through several drafts.

The Basics. All such communications should include reference to the date, the addressee, the subject of the correspondence and identification of the sender's position if this is the first communication. The correspondence should conclude with the full name of the sender, his/her organization and how the receiver may reply.

The Body of the Correspondence. Of course, content depends in large measure on the purpose of the letter. If scheduling a conference, the letter should indicate date, place and time, the participants, the subject and agenda for the meeting, advance preparation recommended and anything the participants should bring with them to the meeting. It is usually appropriate to seek a response as to availability.

If the letter is a report on an observed event, the date, place and time of the event, along with a concise but complete statement of what occurred, is appropriate. Other information which may be advisable includes the names of other participants or observers, the field conditions, the extent of any damage, injury or cost incurred or the impact this event has or is likely to have and the availability of photos, drawings or sketches depicting the conditions.

If the letter is responding to a request for the writer professional's opinion, it should restate as clearly as possible the actual question posed by the requesting party, or, at least, an explanation of how the sender is interpreting the question. The opinion should state underlying facts and any assumptions the writer is making. Remind the reader that the professional opinion offered is only as valid as the accuracy and completeness of the information provided by the party requesting the opinion. If there is missing information on which the opinion could turn, this should be identified along with any time sensitive issues.

The purpose of this paper has been to remind the busy design professional of the challenges of communication in the modern world along with highlighting some issues in communicating information in specific circumstances. Communicating effectively today will pay dividends in the future and help you to cover your assets.

WHAT TO DO, WHAT NOT TO DO, AFTER YOU ARE SUED.
BY: ADAM LEVY, ESQUIRE

"You've been sued!" This phrase can strike fear into the heart of even the most seasoned professional. However, there are actions that you and your organization can take to minimize the impact of a pending law suit. This article will provide you with affirmative steps and safeguards to help ensure that the impact of a lawsuit is minimized from its onset.

First and foremost DO NOT ALLOW THE LAWSUIT TO DISTRACT YOU FROM THE JOB OF LEADING YOUR COMPANY. If you lose your focus and begin making mistakes and losing opportunities, these costs could exceed any damages awarded. So remember to do your job.

The complaint's allegations may be covered under an insurance policy which you have already purchased, such as your professional or General liability policy. Gather all insurance policies (including any insurance purchased by third parties for your benefit) and make copies. The first person you contact should be your insurance broker. If you have an attorney that you are comfortable with, perhaps one that has handled other claims against your organization, call that attorney first. Your policy may even allow you to choose that counsel to defend your interests. Your attorney can help you present the claim to the carrier so the carrier can review the suit to make coverage decisions favorable to you and assign appropriate counsel.

Secondly, immediately fax or email a copy of the complaint to your attorney, broker or carrier. Informing the carrier right away expedites the filing of responsive pleadings - an attorney's ability to act in your best interests is hampered by the passage of time between your being served with suit and the time that the attorney actually gets to read the papers.

Third, identify a "point person" in your firm who will be in charge of coordinating your firm's defense. If you have one, an in-house counsel is an obvious choice. If not, consider having a designated employee (perhaps one who deals regularly with insurance issues) as the Risk management person. This employee could communicate regularly with the insurance claims personnel and attorney as the company's liaison. Have the point person identify (a) the employees who have the best understanding of the overall project and (b) the employees who have the best understanding of how the project was actually undertaken.

Fourth, start a separate file for the legal action. Do NOT put insurance or litigation documents in with your ordinary business records / project file (which can be demanded in discovery). All documents created in the litigation process should be placed in a separate file (i.e. in a different filing cabinet in a different office). These newly created litigation documents should be addressed to legal counsel. Using this method should protect those documents from discovery under the legal theory of work product and/or attorney/client privilege. There is no way to "un-ring the bell" once opposing counsel has descended on boxes of information that accidently contain otherwise privileged materials.

Evidence is critical. This would include the project file and all its contents such as plans and contracts between your firm, the client and any other parties. It is imperative that all evidence be preserved in a safe place—thus, any document retention policies that require the systematic destruction of documents should be suspended temporarily. This would include electronic documentation such as email on any servers used by your company (on-site or off). Any systems that automatically delete documentation should be reprogrammed to preserve those materials. All documents should be preserved, both good and bad for your case. Do not destroy evidence—aside from being unethical, it is also illegal.

Fifth, months or even years may have passed since the incidents alleged in the lawsuit occurred. As such, many favorable witnesses may have moved on to other jobs. Thus, as part of your overall business policy, it is imperative that you collect contact information for each employee who leaves your employment (email addresses are invaluable because they do not change as often as telephone numbers and home addresses). Lawsuits can be lost because key witnesses who have left your employment cannot be located.

Lastly, when served with a Summons and Complaint, there is sometimes an impulse to call the opposing party in an attempt to resolve the matter—avoid this temptation. Call your attorney instead. Avoid discussing the lawsuit with others, especially through email or in writing. All this information may be discoverable in litigation and may be used against your interests.

With these steps in mind your firm will be in the best position to get through litigation with the best possible outcome. One final note, keep communication open between you and your attorney. This should help lower your stress level and thereby allow you to focus on your job.

Visit CM on the Web:
WWW.CMSFIRM.COM

CHIUMENTO MCNALLY, LLC

Cherry Tree Corporate Center
535 Route 38 East
Suite 360
Cherry Hill, New Jersey 08003
Phone: (856)317-9122
Fax: (856)317-2215

ATTORNEY SPOTLIGHT OF THE QUARTER:
ADAM LEVY, ESQUIRE

Chiumento McNally, LLC's newest Associate, Adam Levy, has been an attorney for the past 15 years. Originally from Margate, New Jersey, Adam attended Richard Stockton College and went to law school in Michigan at Thomas M. Cooley Law School. Not only is Adam a talented attorney, he is a talented musician. He enjoys playing the guitar, drums and listening to music. A book Adam recommends reading is Cryptonomicon by Neil Stephenson. Adam's greatest career accomplishment to date was his successful defense in a personal injury action where all of the other defendants settled in the tens of millions. Adam's client, rather than settling the case, tried it resulting in a "No Cause" verdict from the jury. Adam has significant experience in the fields of Insurance Defense in Personal Injury actions, Insurance Subrogation of Construction claims, Insurance First Party Coverage Claims and Insurance Coverage Defense.

Please join us in welcoming Adam to our firm.