

When to Call a Lawyer

by Bryant H. Byrnes

Contractors tend to avoid calling for legal help. Partly this is because they're used to solving their own problems, and partly it's because they don't want to rack up attorney's fees. But certain circumstances — let's call them legal emergencies — absolutely require immediate legal counsel.

So what constitutes a legal emergency? Here's my list. If you find yourself in any of the following situations, don't be foolish. Call a lawyer.

Service of Process

When someone asks your name and then throws some legal paperwork at you, it's called "service of process": You're being summoned to court because either you or your company is being sued or subpoenaed.

This is a true legal emergency. If someone sues you and you fail to show up or otherwise respond, the judge can issue a default judgment against you. That would mean you'd lost the case, and you'd have to pay as a judgment whatever the plaintiff was suing you for.

You can get into trouble by failing to respond to a subpoena, too — regardless of whether you actually did anything wrong. A contractor I know got dragged into a nondisclosure suit between the new and previous owners of a house. The new owner claimed that the sellers failed to disclose a defect they knew about — defects the contractor must have told them about when he remodeled the house several years before.

The contractor was subpoenaed to provide information in the case. But he was busy and didn't want to get involved, so he blew off several deadlines. The judge responded by citing him for contempt of court, which is punishable by a fine or — in extreme cases — imprisonment. Suddenly it was the contractor who was in trouble.

What he should have done was call his attorney the moment he got the subpoena. An attorney probably could have negotiated with the attorney who issued the subpoena about what information and records the contractor needed to supply, and whether he had to be in court to testify.

Buried Contract Terms

"If this contract is not signed by 5 p.m. today, you don't get the job." While this statement may sound like business as usual with a pushy homeowner, it merits a call to your attorney — especially if you didn't draft the contract or there have been major revisions made to it by the other side.

The sign-now-or-forfeit-the-job threat could be a strategic way of getting you to overlook buried unfavorable terms in your rush to get the deal done. The other week, a client came to me with a contract he was being rushed to sign. Hidden in all the legal verbiage was a clause requiring the contractor to continue working even if there was a dispute about his being paid. It was very unfair to the contractor — but probably enforceable if we hadn't spotted and removed it.

You should also think twice about signing a contract that comes back from the other party with items crossed out that you have not discussed or agreed to. Even if they appear to be minor issues, a quick once-over by your attorney — and perhaps a "wait a damn minute" comment — could save you a lot of time and money.

Wrongful Discharge

Employment law can be very tricky, especially if you fire someone and the parting is less than amicable. It's important to be aware of the legal parameters when you dismiss people, especially if they were injured on the job or are in a protected class (see "When Can You Fire Someone?," *Legal*, 6/05).

Though not every firing is a legal emergency, it's best to consult an attorney ahead of time if you sense that the employee could become very upset or angry. Your general construction-law attorney may not specialize in this field, but he or she will almost certainly be able to refer you to someone who does.

OSHA Inspection

Safety rules are sufficiently numerous and complex that — despite your best efforts — you or your employees

are probably in violation of something. And if OSHA decides that safety rules are being intentionally flouted, you could be facing stiff penalties for “serious and willful” violations.

An OSHA inspection can also snowball into closer scrutiny by your workers’ comp insurance carrier, especially if an on-the-job injury was the impetus for the inspection.

The OSHA inspector might call to set up a meeting, but he’s more likely to show up unannounced. I tell clients to cooperate but to say as little as possible until it’s clear what he’s looking for and whether there’s a problem.

If you’re charged with a violation, consult with an attorney or safety specialist. Our office — with the aid of a safety specialist — has had a fair amount of suc-

cess in negotiating down the penalties. And sometimes it’s possible to negotiate the category of the citation from “serious and willful” to something substantially less dire.

Workers’ Comp Audit

If your workers’ comp insurance carrier audits you and finds recording irregularities, miscoding of work performed, or the like, you could face sizeable back premiums, penalties, and interest. Worst case, you could be charged with fraud.

At minimum, give your attorney a heads up if your insurance company contacts you about doing an audit. It’s best not to handle this alone, because a contest between you and the insurance company is not a fair fight. If your attor-

ney isn’t sufficiently familiar with the technical details of workers’ comp, he or she should be able to find someone who is. When my clients get audited, I bring in a freelance insurance specialist who knows the drill and can mitigate the consequences to the contractor.

The mere fact that the contractor has legal representation communicates to the auditors (whether they are working for the insurance company, OSHA, or anyone else) that they are in line for some kind of pushback. Human nature being what it is, the people coming at you may ultimately decide that easier pickings can be found elsewhere.

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