

Choosing Your Legal Team



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All construction subcontractors and suppliers eventually will seek legal assistance. Some use attorneys on a regular basis while others use them only on certain occasions. Some seek legal advice to prevent legal problems while others use lawyers only when legal problems arise.

However, one thing is certain: All subcontractors and suppliers need legal help at some point, if they stay in business long enough. Many of them will find a good lawyer to suit their needs, but others will not. Many will be pleased with legal services they receive. In fact, a great number will value the relationship with their attorneys. Unfortunately, some will experience the opposite and view their legal experience with distaste.

This white paper is intended to assist construction subcontractors and suppliers in choosing their legal team so that the relationship with their attorney will be a rewarding one.

When to Begin

Recognizing that employing legal counsel is practically inevitable, when should subcontractors and suppliers begin the process of selecting an attorney? Of course, it can be done at any time. However, one should start before the need for legal services arises. Such decisions are best made without time pressure.

How to Start

Before choosing an attorney, identify your legal needs. Do you contemplate using the attorney to resolve disputes or to assist in perfecting lien rights and bond claims? Do you plan to use the lawyer to review, advise or negotiate contracts? Is your most immediate need to obtain advice on how best to structure your business or plan for its continuation after you leave the company? Sometimes a single attorney is not the best way to satisfy all of your needs.

There are a number of good sources that can help you identify an attorney to meet your needs. Perhaps, the most reliable is personal referrals. Other construction subcontractors and suppliers are more likely to know lawyers that can meet your needs. Most subcontractors are more than happy to share their experiences with professionals serving the industry. Consult subcontractors who you respect and whose companies are situated similarly to your company in size and the type of projects in which they are involved.

Another good source is industry professionals. Surety bond producers who specialize in the construction industry usually know the better qualified construction lawyers. If you are the bond producer's client, he or she has a personal interest in you receiving the

best legal advice. Accountants and insurance agents who primarily serve the construction industry also may know lawyers suited to your needs.

Membership and involvement in construction trade associations is another indication of an attorney's qualifications. At the very least, a high degree of activity in such an association means that the attorney is interested in the construction industry and likely is knowledgeable about industry legal issues. Hence, trade associations are a good source to find a qualified attorney. A lawyer heavily involved in ASA is likely well suited to serve subcontractors and suppliers.

The Selection Process

From the names you obtained from your various sources, you hopefully will have a list of candidates to interview. Interview those who you feel are the most likely candidates ultimately to be selected. The two main qualities are qualifications and personal factors. Qualifications refer to the lawyer's technical ability to meet your needs. Personal factors mean the degree to which you trust and like to work with a person. After all, the attorney-client relationship is highly personal.

The following is a list of suggested categories to consider. It certainly is not all inclusive, but should provide a basis of ideas to consider in the selection process.

Accessibility

Don't delegate the task of lining up interviews. If a lawyer is hard to reach by telephone, he or she is of little help even if that person is the most technically-qualified candidate on the list. By personally setting up the interview, you will get an idea of how accessible the lawyer will be to you.

Knowledge of Construction Law

How long has the candidate been a construction lawyer? Someone with little experience might be a disappointment. Does the candidate have knowledge of construction law? During the interview, describe some of the recent legal problems encountered by your business. For example, ask him or her about lien filing deadlines, if that is one of the services you expect to use. Does he or she seem comfortable analyzing the issues? Be aware, however, that no lawyer knows all laws. An attorney who never says "I don't know" is suspect. Nevertheless, the attorney should demonstrate that he or she is comfortable with the subject matter.

Knowledge of the Construction Industry

An understanding of the construction industry by the attorney is important. The industry uses the English language in a specialized and unique way. The ordinary layperson may not know what construction personnel mean when they refer to "progress payments," "retainage," "take-offs," and "back charges," to name only a few. A

seasoned subcontractor or supplier may become very frustrated attempting to communicate with an attorney who is not familiar with construction jargon.

In addition, subcontractors' methods of billings are very different than that of most businesses. An attorney with no knowledge of the construction industry will need an explanation of the concept of billings based upon percentage of completion. He or she also undoubtedly will need to have the typical billing format explained. People not experienced in construction may find it difficult to determine the amount being billed in a typical payment application. Retain an attorney who is already familiar with the construction industry to avoid paying legal fees to educate your attorney.

Knowledge of the Construction Trade(s)

Also consider the attorney's knowledge of your specialty trade. If you are a concrete contractor and your attorney understands what "buff" concrete and "gray" concrete mean, your initial meetings with him or her are likely to be more productive. Likewise, an attorney who understands a specification calling for a paint job that is "free of pinholes" is more likely to be comfortable handling technical issues facing a painting subcontractor. Whatever the trade, however, one must remember that the lawyer is being interviewed for legal services and not as a construction consultant. It is impractical to expect a construction attorney to possess a high degree of knowledge of all the construction trades.

Type of Clientele

The lawyer's type of clientele can be important for several reasons. A law firm that represents a large number of general contractors or sureties frequently may be prevented from providing services for subcontractors and suppliers because of conflicts of interest. If one lawyer in the firm recently represented a particular general contractor, all other lawyers in that firm may be precluded from representing other clients with interests adverse to that general contractor. While that situation cannot always be avoided, it would be frustrating and nonproductive if it happened frequently. Also, an attorney who primarily represents design professionals or owners may not be as knowledgeable about the needs and concerns of subcontractors and suppliers as one would expect.

Finally, a law firm that represents mainly large institutional clients may not be as well suited for small, closely held or family-owned businesses and vice versa. Large institutional companies sometimes have bureaucracies. Some attorneys who work well in a bureaucratic atmosphere do not fare as well when working with principals of small businesses. Also, the billing expectations of smaller businesses may be different from those of larger companies.

Rates

A critical factor to consider is what you will have to pay for your lawyer's services. Generally, the most common compensation methods for attorneys are hourly rates and contingent fees.

Evaluating hourly rates is not as simple as it seems. Like anything else, you get what you pay for when purchasing legal services. A lawyer is just as entitled to fair compensation for his or her services as is a subcontractor. The only thing a lawyer has to sell is his or her time, knowledge and advice. Keeping that in mind, the actual amount of an hourly rate, while pertinent, is not the only critical factor. Productivity of the attorney drives the amount of the ultimate fee as much as the actual amount of the rate. Productivity and quality are the two factors that determine if the lawyer is worth his or her hourly rate. One way to determine this is to consult existing or former clients.

A contingent fee means the lawyer gets paid an agreed percentage of any recovery. If there is no recovery, the lawyer does not receive a fee. Since the attorney assumes a risk, the percentage rate usually is designed to yield a larger total fee than if the matter had been handled on an hourly basis. A contingent fee may be appropriate only if affirmative relief is the goal. A contingent fee may be inappropriate if you are defending a claim or if you seek only advice from the lawyer. Further, many fine construction lawyers do not accept matters on a contingent fee basis. This is because construction lawsuits are labor intensive, requiring much legal effort and time before they are resolved. Unless the claim is very large, the chances are good that the attorney's contingent fee will be less than it would have been if the attorney was compensated on an hourly basis.

A natural question is to ask an attorney is, "How much will the fee be, based upon the hourly rate?" Such a question is like asking a subcontractor or supplier to bid a project with only a broad general description and no plans and specifications. There are so many variables that any answer to the question is little more than a guess.

There are, however, ways to regulate the amount of the fee, at least to some degree. Budgets can be established for the various stages of your matter. A review of fees can be made after or during each stage. Attorneys and paralegals in the firm with lower hourly rates may be used. Finally, a clear understanding between you and the attorney of your philosophy pertaining to cost versus potential return can assist in keeping fees in line with your expectations.

Depth of the Personnel Bench

Are there other attorneys and paralegals in the attorney's firm with construction expertise? As mentioned above, there are times when it is best for someone with a lower hourly rate to handle all or portions of a particular matter. This can be accomplished effectively when less experienced personnel are supervised closely by

the more experienced, but more expensive attorney. Be sure to inquire about the degree of supervision by the more experienced attorney. Too often, senior attorneys are tempted to work on other matters and neglect what another lawyer is doing. Depth also is important when senior attorneys are primarily in charge of a matter. Legal work often requires teamwork within a law firm. Lack of qualified backup personnel in the law firm can hamper the effectiveness with which your matter is handled.

Ability to Handle Adversarial Matters

Dispute resolution is a large portion of the legal work in the construction industry. Some construction attorneys possess exceptional knowledge of construction law, but lack experience in court and arbitration proceedings or have permitted those skills to become rusty. Trying lawsuits in court requires a high degree of knowledge of the law of procedure and evidence. These areas have nothing whatsoever to do with construction law *per se*. Furthermore, some lawyers feel uncomfortable trying a case before a jury rather than a judge.

Whether a dispute ultimately is to be resolved in court or in arbitration, there are certain skills of persuasion required of the attorney in order to properly present the case. If your dispute cannot be settled outside of court or arbitration, you should be sure that the attorney presenting your case is well qualified to do so. Ask the attorney about his or her trial experience. If he or she lacks experience in this regard, find out whether other members of the law firm possess the necessary experience and determine whether they will be available to try your case. Also, find out about the trial attorney's experience with construction law.

Personal Factors

You must have confidence in the people with whom you work. Therefore, personal factors should play a large role in your decision. Consider the chemistry you feel while interviewing the attorney. Keep in mind that you place a great degree of trust in your attorney. He or she will be your representative to others. You will rely upon your attorney to place your interests above his or her own. You will trust him or her to bill you fairly for services rendered. In short, the lawyer's integrity is of supreme importance.

Conclusion

It is practically impossible to devise an all-encompassing checklist of factors to consider when hiring an attorney. If the factors discussed in this white paper are considered, subcontractors and suppliers should be well on their way to selecting a lawyer with whom they will have a long and valued relationship.