

**WAGNER,
FALCONER &
JUDD, Ltd.**

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Inside this issue:

History of Wagner, Falconer & Judd	1
Hiring an Attorney for Your New Business	1
Email and the Electronic Age	2
The Federal Miller Act	3

The law firm of Wagner, Falconer & Judd, Ltd. (“WF&J”) now has 31 attorneys with offices in Minneapolis, Milwaukee, and LaCrosse, Wisconsin. However, the history of the firm dates back to 1932 when the firm was founded by Clarence J. (“C.J.”) Wagner. Mr. Wagner, born in 1907, was a large man with a gruff voice, but he was a gentle person known as a “teddy bear.”

In addition to his law practice, C.J. Wagner was a prominent Minneapolis businessman. At one time he was the president of a local bank. In 1953 he served as President of the Commercial Law League of America. In addition, in 1946 he was a co-founder of Murray’s Restaurant, which is

well known today as a leading fine-dining restaurant in downtown Minneapolis. In 1947 C.J. Wagner was a 20% founding shareholder of the Minneapolis Lakers basketball team that starred George Mikan and won multiple NBA championships in the early 1950s.

For many years C.J. Wagner’s law partner was Donald V. Bailey. The firm operated under the name of Wagner & Bailey, and concentrated its practice on commercial law and credit and collections law. The firm name was Wagner & Bailey until 1963, when Donald R. Johnston joined the firm and the name changed to Wagner & Johnston. Don Johnston came to the firm after

working in the credit department of Honeywell. Alan W. Falconer, who is now the firm’s senior partner, joined the firm in 1966 after working in Honeywell’s credit and legal departments. In 1967 the firm name changed to Wagner, Johnston, Falconer & Lindstrom, Ltd., and changed to Wagner, Johnston & Falconer, Ltd. in 1972.

C.J. Wagner retired from the firm in 1968 but remained as “of counsel” with the firm until his death in 1988. Don Johnston retired from the firm in 1991, and the firm name then was changed to the current name of Wagner, Falconer & Judd, Ltd.

The Positive Role a Business Lawyer can Play in helping a New Business be Successful

Special Points Of Interest

- Small Business Group Update– The Importance of a Solid Relationship
- Litigation Group Update– The Danger of Email
- Construction Group Update–Federal Miller Act Claim Procedure

When it comes to creating and successfully operating a new small business the Small Business Administration (SBA) maintains some interesting statistics. The SBA defines a “small business” based on the nature of the industry, but generally speaking it operates with less than 500 employees and no greater than 27.5 million in annual sales. About 25 million U.S. businesses meet this definition. According to the U.S. Bureau of Statistics, 60-80% of all new jobs in the last decade were created by small businesses. These businesses represent an important segment of the economy and frequently serve as a seed of growth for larger businesses.

Unfortunately less than 50% of new small business ventures survive to

see their fifth year of operation. Such high failure rates should be a concern for the new business owner, the communities where they operate, their employees and their advisors. An experienced business lawyer is one key advisor; accountants, bankers, insurance brokers, and real estate agents are also very important partners. Each plays a role in helping the small business owner be successful.

Experienced business attorneys think holistically about their client’s needs to provide both sound legal advice and pragmatic business suggestions. What follows is a partial list of areas where lawyers can help clients anticipate and prevent problems.

Forming a Business Plan

A solid business plan typically includes a description of the owner’s background, the anticipated legal structure, competitive marketplace, product or service to be offered, financing, anticipated revenue projections and a host of other important points. The business attorney can add value by reviewing the plan to anticipate key business, financial and legal needs. It can be a roadmap for the future and helps the business get off to a good start with its members, bankers, potential investors, landlord and other interested parties.

Selecting the Proper Legal

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Continued from Page 1

Entity

Most business people are accustomed to working with a lawyer to “set up” or legally organize their business. However, clients may not be savvy about the long term impact of their choices or the steps that must be taken daily and annually to limit liability, preserve valuable assets and take advantage of other valuable protections.

Lawyers working to organize a new small business should discuss the liability protection and other merits of setting up a limited liability company (LLC) or an S-Corp vs. a sole proprietorship or partnership. Since the first LLC statute was passed in Wyoming in 1977, “LLCs” have become a preferred legal entity for starting a new business. For example, in 1994 in Wisconsin only 20.5% of new businesses were organized as “LLCs” but by 2003 the figure had grown to 72.92%. “LLCs” are attractive primarily because the articles of incorporation can be filed on line, the filing fees are reasonable, the annual requirements are not unduly burdensome and the owner’s liability can generally be limited to the value of the owner’s investment in the LLC.

Despite their popularity and the ease with which they can be organized, an experienced practitioner must ask the right questions to make sure the correct legal entity is chosen based on the owner’s preferred management style, business, tax and other goals. The business should also consider having an internal operating agreement to create a structure for running the company and preventing disputes among the members. The owner also needs to be counseled regarding the proper use of busi-

ness cards, letterhead, avoiding personal guarantees and the annual filings required to maintain liability protection and keep the business in good legal standing.

Contract Management & Commercial Negotiation

Once the business plan is in place and the legal entity is properly organized and registered, the lawyer should discuss the needs the business may have for contract drafting and commercial negotiation. In most instances the business may need help with drafting and negotiating a lease for space or purchasing property. Also, when goods are sold or services are provided the owners should always give consideration to credit and collection practices and avoiding liability they are legally and commercially entitled to circumvent.

For instance, in representing carpenters, electricians and other tradesman, this often involves drafting a form proposal to quote business and define the project, materials, labor, timing for completion, progress payments and other items of concern. These forms should also incorporate standard liability and warranty disclaimers and make certain that the contractor preserves the ability to collect attorney’s fees, costs and interest if payment is not timely. Finally, the lawyer should advise the business about any unique legal issues that apply to the type of business. Subcontractors and suppliers need to understand how and when they can place a mechanics lien on a project, and the important protections afforded homeowners by state law. *For example, in Wisconsin a homeowner has the*

right to cancel a home improvement contract if the contractor neglects to include a long laundry list of requirements in the proposal, including the estimated time of completion.

Compliance

To someone setting up a new venture, understanding the laws and regulations that impact the business can seem daunting. In the tax area alone you need to consider getting a federal tax ID and state withholding number and consider the need for a sales tax and seller’s permit. If employees are involved, the business may need to address social security, unemployment compensation, workers compensation and other withholding issues. Of course the business itself will also need to submit quarterly estimated tax payments. Finally, the nature of the business may require additional compliance measures that require local permits or state licenses. These are also areas where a lawyer should be consulted.

This article represents a partial list of areas where Wagner, Falconer & Judd, Ltd. can help a new or existing small business be successful at the outset and in the fifth year of operation. ***For a list of ten questions you should ask yourself before starting a business*** please write or contact Gary J. Van Domelen at gvan-domeln@wfiltd.com or (608) 785-0707.

ELECTRONIC DISCOVERY: The Risk to your Company

E-mail is a quick, convenient and now standard form of communication in corporate America. It is also a liability risk. Employee email is discoverable in litigation and may be used against a company as a party admission. Further, the costs and burdens of producing electronic communications can be immense. In order for a company to best protect itself from potential exposure, it must develop and implement a uniform system for retention and destruction of email messages and thoroughly educate its employees about authorized communications.

Companies often do not realize that employee emails create a permanent, digital paper trail that not only must be produced, but also can be used against the corporate entity in court. Under the Federal Rules of Civil Procedure, once a lawsuit is

filed, parties are entitled to the exchange of information and documents relevant to the case. This is called discovery. Emails, whether in hard copy or stored electronically, are generally discoverable. This information, even if potentially prejudicial, may be admitted into evidence in court, provided a party can demonstrate that the electronic communications were “generated and retained in the ordinary course of business”.

If emails must be produced and may be entered into evidence, why should a company preserve these communications? A party who alters evidence or fails to properly preserve property for another’s use as evidence in pending or future litigation, may be subject to court sanctions. While not an exhaustive list, sanctions can range in severity from: exclusion of certain evidence,

dismissal of the case, and/or attorneys fees and costs being taxed against the offending party. It is extremely important for a company to implement a retention/destruction system for its electronic communications in order to avoid these consequences.

The existence and structure of a retention/destruction system may also help to offset a negative presumption by the court with regard to the destruction of documents. In reviewing whether a company’s deletion of pertinent documents should give rise to a negative presumption, the court considers the following three factors: (1) Whether a record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents; (2) Whether the policy was

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adopted in bad faith; and (3) Whether lawsuits have been filed or complaints made that would suggest that certain categories of documents should be retained. Generally speaking, no evidentiary presumption is drawn about the destruction of documents pursuant to routine procedures and there is no set time period for which electronic communications/data should be retained prior to deletion. Courts have found that such communications/data should be preserved at least as long as any applicable statute of limitations or regulatory review period.

In developing an email retention/destruction system, companies should consider defining and differentiating “official” versus “unofficial” electronic communications. This delineation helps minimize the risk that a personal (unauthorized) employee email will be used against the company

in litigation. Official email should be subject to regular document retention policies, whereas unofficial communications should be routinely deleted.

Along these lines, companies should make a concerted effort to comprehensively educate employees about permitted email usage. The goal is to discourage employees from engaging in personal email exchanges that may cause future embarrassment or liability. Once employees are informed that the company has the right to read their emails and that “deleted” does not mean permanently erased, they may be less likely to send these types of communications. Companies should consider putting the email usage policy in writing and requiring that each employee sign an acknowledgment of the policy so it is well-documented.

In addition to separating types of emails, compa-

nies should consider the following as part of a structured retention/destruction system: (1) Efficient organization of electronic data, including backup materials; (2) Identification and preservation of necessary business documents; (3) Designated individuals/departments to track and monitor retention/destruction of electronic communications; (4) Limitation on number of emails that may be saved in employee folders; and (5) Regular destruction of emails after a set period of time.

Electronic communications are a target for discovery and may create unexpected liability. Companies should obtain legal counsel and ensure the appropriate policies and systems are in place to guard against the potential for future exposure.

PAYMENT BOND CLAIMS UNDER THE FEDERAL MILLER ACT

On federal construction projects, subcontractors and suppliers are not entitled to assert mechanic's lien rights as security for payment because the doctrine of sovereign immunity prohibits liens against government property. However, under federal law commonly known as the “Miller Act,” the prime contractor is required to furnish a payment bond from a surety to ensure that its subcontractors and suppliers are paid.

Federal government contract administrators technically have no authority to assist subcontractors and suppliers in collecting amounts owed by the prime contractor. They also lack authority to withhold payments from the prime contractor if the prime contractor fails to pay its subcontractors and suppliers. On federal projects governed by the Miller Act, a subcontractor or supplier entitled to enforce a claim against the prime contractor's surety must be careful to comply with all requirements for preserving and enforcing its claim. This article briefly summarizes the applicability of the Miller Act and the procedures for enforcing a Miller Act payment bond claim.

WHEN MILLER ACT PAYMENT BOND REQUIRED

The Miller Act requires the prime contractor to furnish a payment bond for any contract of “more than \$100,000.00” for the construction, alteration, or repair of any public building or public work of the Federal Government. On smaller Federal construction projects, federal regulations require the Federal Government to require alternative forms of security for payment.

The Federal Government is permitted to waive the Miller Act payment bond requirement on projects in foreign countries or fast-track projects. The Miller Act payment bond requirement may also be waived on “cost-plus-a-fixed-fee”

and other “cost-type” projects for the Army, Navy or Secretary of Transportation.

Caution dictates that subcontractors and suppliers on federal projects take steps early in the project to confirm whether payment protection is in place. Although a customer or other parties in the contract chain may be willing to supply relevant information, the most reliable source of information is the Federal Government's contracting officer.

Since federal construction projects may be located in any state, it is important to distinguish construction projects undertaken by the Federal government, which are governed by the Miller Act, from construction projects undertaken by State and local governments, which are governed by the laws of the state where the project is located. Although most states require some form of payment protection on public projects, the type of protection, scope of coverage and requisites for enforcing payment bond claims on state and local government projects may be different than federal projects governed by the Miller Act. It is crucial for subcontractors and suppliers to confirm the identity of the project owner before starting work in order to evaluate what payment protections may be in place.

PERSONS ENTITLED TO ASSERT A CLAIM

Not everyone supplying labor and material for a federal project is protected by a Miller Act payment bond. Parties entitled to enforce a Miller Act payment bond claim are (1) subcontractors, material suppliers and laborers under contract with the prime contractor, and (2) subcontractors, material suppliers and laborers under contract with a subcontractor of the prime contractor. Parties further down the contract chain are not entitled to any protection under a

Miller Act payment bond. It is critical for a subcontractor or supplier to ascertain the identities and relationships of the parties above it in the contract chain in order to know whether a Miller Act payment bond provides payment protection.

NOTICE OF CLAIM

A payment bond claimant who contracted directly with the bonded prime contractor may, but is not required to, give notice to the contractor and surety within 90 days after furnishing its last item of labor or material. However, a payment bond claimant who contracted with a subcontractor must give notice to the bonded prime contractor within 90 days after the claimant's last item. Service of the notice may be made (1) “by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence,” or (2) by personal delivery by a process server.

Methods for Serving Notice of Claim

Methods of serving the notice that provide “written, third-party verification of delivery” are registered mail, certified mail or any private overnight delivery service that requires the recipient to sign a receipt. Courts in some jurisdictions have held that the prime contractor must actually receive the notice of claim within 90 days after a claimant's “last date”. Simply mailing the notice within the 90-day period is insufficient if the prime contractor does not actually receive the notice until after the 90-day deadline expires. For this reason, payment bond claimants have to be careful when selecting the method for serving the notice.

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We recommend that claimants, at minimum, serve the notice of claim by certified mail, return receipt requested. Service of the notice of claim by certified mail alone may be sufficient if there is enough time before the expiration of the 90-day deadline to confirm that the bonded prime contractor actually received the notice. It can take some time for the postal service to return the signed return receipt card back to the sender, although the status of delivery can now be tracked online through the postal service's website using the certified mail number identified on the stub retained by the sender. If for some reason the claimant does not receive a signed return receipt from the postal service prior to the expiration of the 90-day deadline, the claimant should re-serve the notice by other means before the deadline expires.

If the notice is served close to the 90-day deadline, it may be necessary to serve the notice of claim by overnight delivery service or even have it personally served by a process server. Although more costly, these methods provide written verification of delivery more quickly than certified mail. We still recommend that claimants also serve the notice by certified mail, even if the prime contractor isn't expected to actually receive the notice served by certified mail before the 90-day deadline. When a payment bond claim is a claimant's only hope for receiving payment, it doesn't make sense to skimp on the method used for serving the notice of claim on the prime contractor.

It is also a good idea to fax a copy of the notice of claim to the prime contractor and retain the fax confirmation sheet. A payment bond claimant should not rely on a fax as its only means of serving the notice on the prime contractor, since it has not been established that a fax confirmation sheet meets the requirement of "written, third-party verification of delivery." Actual notice is not a substitute for written notice using one of the methods required by the Miller Act. However, it never hurts to show that the prime contractor actually received notice of the claim prior to the expiration of the 90-day deadline.

Contents of Notice of Claim

When required, the notice of claim must state the amount claimed, the name of the party for whom the work was performed, and that the claimant intends to enforce a claim against the surety that issued the prime contractor's payment bond.

Service of Notice of Claim on Surety as well as Prime Contractor Recommended

Although not required by the Miller Act, a payment bond claimant should serve a copy of its notice of claim not only on the prime contractor but also on the surety that issued the prime contractor's payment bond. Claimants should serve the notice of claim on the surety at the same time the notice is served on the prime contractor. It is a good idea to serve the notice on the surety by one of the methods that pro-

vide written, third-party verification of delivery. The surety's early involvement may make it more likely that the prime contractor will pay the claim without the need for a lawsuit.

DEADLINE TO START LAWSUIT

If the payment bond claim is not voluntarily paid by the bonded contractor, surety or other interested party, a claimant must start a lawsuit to enforce a Miller Act payment bond claim within one year after the date the claimant furnished its last item of labor or material for the Federal project. If a lawsuit is not started within the one-year period, the payment bond claim is forfeited.

CONCLUSION

Subcontractors and suppliers furnishing labor or material for federal projects should be familiar with the Miller Act's payment bond provisions, and establish internal procedures to ensure that claims against Miller Act payment bonds are preserved. WFJ has advised its clients on thousands of projects on the preservation and enforcement of mechanic's lien and payment bond claims on both state and federal projects. For advice on any particular project, please contact our Construction Law Group.

Wagner, Falconer & Judd Ltd.
1700 IDS Center
80 S. 8th Street
Minneapolis, MN 55402-2113

Phone: 612.339.1421

Fax: 612.392.3999

Website: www.wfjlld.com