



WAGNER, FALCONER & JUDD, LTD.
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WFJ Supports Conference for the National Association of Credit Management

On October 15, 16 and 17, 2008 the National Construction Group of the National Association of Credit Management ("NACM") held its three day fall meeting in Minneapolis at the Downtown Embassy Suites Hotel.

John Schragger, an attorney with WFJ's Business Services Team spoke in the morning session on October 16th on the importance of "Writing Smart" when using email in the work place. He explained that "writing smart" means focusing on the content, goal and distribution of every email. His presentation covered a broad scope of the do's and don'ts with recommendations to avoid litigation and disputes. The lively Q & A by the conference attendees that followed showed

the timeliness of this topic.

The entire afternoon session was a live, formal, interactive performance of a "mock trial" presented by WFJ attorneys, staff and WFJ client representatives. The case involved a "lawsuit" brought by a supplier against a general contractor and its surety. The conference attendees were the "jury" who carefully listed to the testimony in the case and later deliberated to render a "verdict".

The case addressed important issues such as:

- The proper form of guarantees.
- Who should serve as a guarantor.
- Relying on bond protection

when you are a supplier to a supplier

-General collection best practices to follow

-Evidence issues, including the credibility of witnesses when there is no supporting documentations.

Once the "jury" deliberated and brought in their "verdict" there was time for a discussion and Q & A session. After some meaningful discussion, Court was adjourned.

WFJ was honored to be a part of the NACM's Fall Conference.

Top 10 Commercial Lease Issues

No matter the size of your company, entering into a commercial lease agreement for any amount of land, space or use, is an important decision. Commercial leases are generally long-term commitments that should not be taken lightly. Taking your time and understanding your lease agreement is an important process. All lease agreements are different, but below are ten key items all lessors and lessees should pay close attention to before entering into a lease agreement.

1. Confirm that all the terms from the Letter Of Intent are properly reflected in the lease.

Pay special attention to the financial terms and square footage of the lease space.

2. If the lease is a triple net lease, be sure you understand all of the Common Area Maintenance ("CAM") Charges. If you are the tenant, is there a CAM cap? Are certain items specifically excluded from this cap? Do you have a right to audit the landlord's charges? If you are the landlord, are you comfortable with a CAM cap? Can you reasonably exclude those items the tenant wants to exclude? As the landlord, try to keep the audit rights to a

minimum.

3. As a tenant, you want to be able to use the lease space for as many uses as possible. This will cover you if your business expands into new markets or services. As the landlord, you will want this provision to be very specific so you remain in control of what kind of businesses are renting from you. This is also important if you are leasing more than one space and you are granting tenants exclusive rights clauses.

4. Make sure responsibility for repairs is carefully defined.

Minneapolis Office

1700 IDS Center
80 S. 8th Street
Minneapolis, MN
55412

Milwaukee Office

325 North Corporate Drive
Suite 100
Brookfield, WI
53045

La Crosse Office

205 5th Avenue South
Suite 328
La Crosse, WI
54601

Does the lease space have any special repair needs or requirements? Can the landlord pass its costs for repairs to the tenant through CAM charges?

5. Indemnification in the commercial lease setting can be different from other arenas. Make sure you understand what rights you are giving up and what you must do to invoke this provision. As a tenant, do not be alarmed if the landlord has a different negligence threshold than you.

6. If the lease contains a personal guaranty, does it allow for termination at a certain time? What happens if the lease is assigned or sublet?

7. The ability to assign or sublet the premises can be an important right for both parties, especially in a franchise setting. If you are a tenant franchisee, it is important

to reserve the right to assign or sublet the lease to the franchisor or possibly even another franchisee. As a landlord leasing to a franchisee, allowing the tenant the right to assign or sublet to the franchisor provides you with a better opportunity to continue receiving rent, as many franchisors are better off financially than their franchisees.

8. Be specific with each party's remedy rights. What happens in the event of a default by either party? Can the non-defaulting party cure the default and charge the defaulting party? What are the options if the premises become unusable due to a fire or other destruction?

9. Improvements and changes to the lease space can be important to both parties as well. What are the tenant's rights to improve the space? Must the landlord approve

any or all improvements? Who will pay for the improvements? Does the landlord have the right to make improvements or changes to the space? Are there any limitations placed upon either party?

How will the lease end? The termination rights of both parties should be clearly defined in the lease. What kind of events will trigger a right to terminate? Will a bankruptcy? What about a transfer of rights, or one of the parties being sold or coming under new ownership? Be sure you are aware of the renewal rights as well and what the time deadlines are.

While this certainly is not an exhaustive list of items, the items discussed above should put you on the right path to entering into a lease agreement that you can be satisfied with for years to come.

Dram Shop Liability

Establishments that are hosting a holiday bash, an office party or other gathering to celebrate the New Year should understand Minnesota's Dram Shop Act. Vendors should be mindful of who they are serving in order to keep patrons and other individuals safe and to help limit their liability. This article highlights the important aspects of the Minnesota Dram Shop Act which imposes liability upon an establishment for an illegal sale of intoxicating liquor which results in harm to an innocent third party. Even though this article focuses on the Minnesota Dram Shop Act, a majority of states have enacted Dram Shop Acts with varying degrees of liability for vendors and social hosts and we encourage you to understand the Dram Shop Act in your state.

The purpose of Minnesota's Dram Shop Act is to punish an offending vendor and deter others from making illegal sales of liquor, and to compensate those who would under ordinary circumstances or other tort principals obtain no recovery for their injuries. Minnesota's Dram Shop Act imposes liability on liquor establishments and individuals for the illegal sale of alcohol which results in an injury to a third person or their property. While the intoxicated person who consumes the alcoholic beverages may not file a lawsuit under the Dram Shop Act for his or her injuries, the intoxicated person's spouse, child, parent or other third party who is injured by the intoxicated person has a right of action against the establishment or

person who caused the intoxication. In Minnesota, the Dram Shop Act imposes liability when an illegal sale of intoxicating liquor results in harm to an innocent third party.

To establish a claim under Minnesota's Dram Shop Act, the plaintiff must prove the following five elements:

- An illegal sale of liquor (including 3.2 beer);
- Which causes or contributes to the intoxicated person's condition;
- The plaintiff's injuries were caused by a person's intoxication;
- Plaintiff's damages are recoverable under the Dram Shop Act; and
- Defendant received written notice of plaintiff's intent to make a claim for damages within the timeframe required by the Act.

Under the Dram Shop Act, liability is imposed for the illegal sale of alcoholic beverages, and sales that are considered illegal include, but are not limited to:

- Sales to obviously intoxicated persons;
- Sales to minors;
- Sales after hours;
- Sales on prohibited days; and

-Sales at prohibited locations.

For a person to be considered obviously intoxicated, the evidence of intoxication must be so obvious that a person using his or her reasonable powers of observation can or should recognize that the prospective customer is intoxicated. Common indicators of obvious intoxication include, but are not limited to:

- Slurred speech;
- Unstable walking;
- Boisterous behavior; and
- Bloodshot eyes.

The Dram Shop Act provides a right of action for a spouse, child, parent, guardian, employer, or other person who incurred losses in person, property, or means of support, or who incurs pecuniary losses. The term "other person" refers to any person injured by the intoxication, if that injured person played no role in the intoxication.

To prevail under the Dram Shop Act, a plaintiff needs to present evidence to prove:

- The illegal sale was a cause of the intoxication; and

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-The intoxication was a cause of plaintiff's injuries.

Vendors or individuals can be liable under the Dram Shop even for selling a minimal amount of alcohol to an obviously intoxicated person, even when the sale has minimal effect on the person's intoxication or the plaintiff's injuries.

Types of losses that are recoverable under the Dram Shop Act include:

-Injury to person, which can also include unforeseen medical complications that develop from the original injury;

-Damage or destruction of property;
-Loss of means of support; and
-Pecuniary losses.

Loss of means of support is defined as an actual decline in the plaintiff's standard of living. Pecuniary losses are defined as damages for loss of aid, advice, comfort, assistance and protection. A claim for pecuniary losses is an independent action, which is usually brought by a spouse who is dependent on the injured person's support.

Finally, under the Dram Shop Act there are certain statutes of limitations that require swift notice to be given to an alleged party

who may have illegally sold intoxicating liquors. A plaintiff who brings a claim under the Dram Shop Act must be able to prove that the party who illegally sold intoxicating liquors had notice of any possible claim within the statutory notice period.

If you have been injured by an intoxicated person or if you believe that you have illegally sold intoxicating liquors and someone was injured by this, contact Brad Hauswirth at WFJ as soon as possible so that your rights can be protected. Here, at Wagner, Falconer & Judd, Ltd. we have experienced attorneys that can help assist you with your case.

Writing Smart: *The Intelligent Use of Email*

Everyone emails, every day. But, in every email are we showing our best selves? Ask the pharmaceutical company that brought the diet pill Phen Fen to the market. In a class action brought against the company by consumers who alleged that they had been hurt by undisclosed side effects of the diet pill, an internal email between two executives was brought to light as part of the discovery process:

"...Do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?"

How do you convey that you care about your customers when the disrespectful tone of an internal email such as this one is likely to ring in the ears of the jury throughout the deliberation process? In any litigation, it is hard to recover from such a gut punch. In the case of the Phen Fen class action, this email led to a quick, multimillion dollar settlement in favor of the plaintiffs. That's millions of reasons to think before you email.

The problem with email stems from one of its best characteristics – it is quick and one-sided. You can dash off a note to a coworker, vendor or customer and not have to bother picking up the phone to find out if they are at their desks to engage in a conversation. My point is that there are downsides to this ease and convenience that can be avoided by thinking before you hit the send button.

It is important to understand that it is not safe to assume that any email you send will

be kept confidential and will stay within your company. There are several reasons for this. First, emails generally are discoverable in litigation. More and more, the process of "e-discovery" is becoming a central focus of litigation efforts. Some studies estimate that as much as 70% of all written communications in business are done by email. This means that there is and will be an increasingly intense focus on attaining emails from the other side in litigation. Because you do not know when your company may sue or be sued, it is crucial to use best business practices regarding each and every email you send. Second, emails can be forwarded quickly and easily – either accidentally or by a disgruntled employee – to parties that the email sender never intended to view the email they wrote.

An important question to ask yourself before you hit the send button is whether the context of what you are trying to communicate is appropriate for email. Are you trying to communicate constructive criticism? It is extremely hard to convey constructive criticism by email without having the format of the email – impersonal and quick – convey a "hidden" message that you didn't want to send, i.e., that you have time to criticize the recipient of the email but you didn't have the time or concern to offer the criticism in a more personal manner. Beyond standard and appropriate workplace emails, it is an important cautionary note to remember that emails are considered by plaintiff attorneys as veritable treasure troves of evidence to prove harassment and discrimination in civil suits.

Let's say you are trying to communicate

with a customer that has already expressed their dissatisfaction with your company for a perceived flaw in the products or services that your company offers. The best way to ensure that a customer never does business with you again is to address his or her concerns by email without attempting to engage that person in a conversation. By doing so, you have sent the "hidden" message that their current concerns and future business are not even worth your time to pick up the phone to call them.

Another example when the context of your intended communication should indicate that using email is inappropriate is when you are trying to convey complex ideas or train on a new process. Due to the fact that most people feel that they are inundated with too many emails and that it takes a long time to read an involved, complicated email, another form of communication is more appropriate to communicate these types of ideas. It is helpful to remember that there are many other forms one could use to communicate in the workplace instead of email. For example, you could drop by someone's cubical to discuss an issue face to face or organize a group meeting. If location is an issue, you could use the telephone or organize a webinar.

Problems can also arise from not knowing who you are attempting to communicate via email. A best email practice is not to use the "reply all" button unless you are 100% sure of who are all of the recipients on the email chain. If the sender has inappropriately listed someone on the email, should you assume responsibility for his/her mistake by hitting the "reply all" button? An-

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other common mistake is to not pay sufficient attention to who is on the send line. People may know many “Johns” in their business and professional lives and often email programs will “suggest” the recipient’s address as one is typing in the first few letters of the recipient’s name. While this is designed to save time, it is a recipe for disaster. While mix-ups can be humorous, from a legal standpoint, these types of mix-ups can have serious consequences. For example, take a valuable trade secret such as the recipe for a certain brown fizzy soft drink known throughout the world. What would happen if the recipe was accidentally emailed to a competitor, vendor, or for that matter, to any unintended recipient. In such a case, valuable trade secret protection may be lost forever even though the disclosure to a third party was unintended.

Certain best practices arise when one thinks about the problems of unknowingly emailing important information to an unintended party. For example, certain information such as the recipe for Coca-Cola alluded to above is too valuable to ever send via email. There was a reason that J.K. Rowlings outrageously hyped last book in the Harry Potter series, *Harry Potter and the Deathly Hallows*, took the slow route to America (under the “seat” of a trusted agent on a plane) rather than

winging its way nearly instantly as an email attachment to its American printing house. Another best practice is to write out and proof read an email before you address it. To avoid sending the wrong attachments – which is a very frequent email mistake – carefully label your attachments (i.e., user, version date, etc.) and keep the attachments filed orderly in appropriate directories. If you give your online libraries the same attention that your hardcopy file cabinets and file directories typically receive, your chance of sending the wrong attachment will be low.

What is the most important rule regarding emails and contract formation? It is to remember that with only a few exceptions, contracts are formed very easily. Some types of contracts can be oral. Contracts can also be created by emails exchanges. While one party may intend an email to be a preliminary communication and not evidence of a binding contract, it is a best email practice to include a standard disclaimer that one can point to as evidence that the emails exchanges are only preliminary communications and that it not reasonable for the other party to rely upon these types of communications as the basis for a binding contract. For example, a company may decide to put a standard disclaimer on the bottom of all of their employee’s emails: “Note: The Company never enters

into contracts by email and no employee of the Company is entitled to override this Company policy.”

The most important point about emails and litigation is that we never know when our company will sue or be sued and that is why it is important to develop best email practices for each and every email you write. But, what if litigation is imminent or has been commenced? In certain circumstances, the destruction of evidence (e.g., deleting a worrisome internal email in the Phen Fen case) when litigation is imminent or under way can lead to an inference that the party destroying the evidence is trying to hide relevant information. If you believe the litigation is imminent, it is important to raise the alert appropriately within your organization and seek guidance in compliance with the email policy that your company likely has on file for such circumstances. Please contact John David Schrage of Wagner, Falconer & Judd, Ltd. With any questions regarding this article. He can be reached at 1700 IDS Center, 80 South 8th Street, Minneapolis, Minnesota 55402, 612 339-1421 or via email to jschrager@wfltd.com.

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.wfltd.com