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## Selvaggio, Teske & Associates

RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

### Dealing With Mr. Handshake

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

You are no doubt familiar with the stereotypical Mr. Handshake; the highly successful self-taught, rough-hewn businessman who, when offered a written contract, says something on the order of:

“Son [or Young lady], where I come from, we establish a good business relationship with a firm handshake. It was good enough for my daddy; it’s good enough for me.”

A number of design firms, particularly those who serve small towns and rural areas, indicate they still run into such individuals fairly often. Even in the big cities, you’ll sometimes hear a client say something along the lines of:

“Y’know, Such & Such Associates has a contract that’s about one-tenth as long as yours. It’s like a breath of fresh air.”

Mr. Handshake’s overriding assumption seems to be that a thorough contract is unnecessary if not insulting because, chances are, nothing serious will go wrong. And if something does go wrong, a frank person-to-person chat will set things right.

Often a designer and client can indeed iron out problems with a quick conversation. But rarely does that happen when there is a lot of money involved. All of a sudden, Mr. Handshake isn’t quite so amicable and those verbal agreements you entered into become quite fuzzy.

So how do you deal with this situation? How do you convince Mr. or Ms. Handshake that a comprehensive written contract is far better than a simple short-form letter or, worse, a verbal agreement? Consider the following when negotiating with someone who thinks comprehensive written contracts are a waste of time.

#### **The Verbal Agreement**

“A verbal agreement ain’t worth the paper it’s printed on,” Louis B. Meyer is supposed to have advised. Still, a verbal agreement can be binding. When you start to perform services for a client, or your client starts to

pay for future services, you both act as though a contract is in effect. Therefore, in the eyes of the law, one is in effect. The verbal agreement that started this transaction, no matter how brief, is a contract.

What happens if a problem arises? In that case, you and your client will refer to your respective understandings of what was agreed to. Not surprisingly, those understandings often differ. So who determines what each of you really said and meant? That responsibility falls to a trier of fact — typically a judge, jury, arbiter or mediator. Unfortunately, the trier of fact was not there to hear the verbal agreement, may not fully understand the types of services you render and may be unfamiliar with the prevailing standard of care for delivering such services. So when a client tells you that a written contract is unnecessary, you might reply:

”You know, Mr. Handshake, I don’t like the time and expense of these written agreements any more than you do. But I sure as heck would rather have you and I determine our fate rather than a bunch of expensive lawyers and folks who don’t know us from Adam. A written agreement will help us make sure that should a dispute arise, it will be settled in accordance with the facts we agreed to, not the opinion of some outsider.”

Mr. Handshake also needs to be reassured that having a written contract does not indicate a lack of trust or weaken the importance or impact of personal diplomacy. If anything, it can enhance trust and diplomacy by creating a reasonable framework for after-the-fact discussions and modifications. A written contract can call for face-to-face meetings or alternative dispute resolution techniques such as mediation in the event disputes arise.

### **Written Contracts Can Be Amended**

Actually, when Mr. Handshake says “We don’t need a piece of paper to tell us what’s right and what’s wrong,” he’s absolutely correct. No matter what a written agreement may say, it can be amended through mutual consent of the parties involved. A written contract does not prevent you and your client from reaching creative solutions as problems may arise.

Consider this: You and your client both sign a contract. Each of you put a copy in a file. A problem arises. What’s the first thing you do? Refer to the agreement? Unlikely. The first thing you probably do is call one another and try to work it out. Your client, whether he or she knows it or not, often has the upper hand in such “work-outs.” You want to keep your client satisfied in order to obtain future business. Let the client know that:

”We don’t look at a written contract as a weapon, Mr. Handshake. We see it as a repository for understandings we have agreed to. When it comes to what your project needs relative to my discipline, I’m the doctor and you and your project are the patients. Likely, we will need to discuss a lot of issues to make things right, and we need to keep track of what it is we discussed. If we don’t talk and we don’t record what we talked about, one of us — or both of us — stands the risk of being in for an unpleasant surprise. I don’t know about you, but I don’t remember everything said in a lengthy meeting. Sometimes our memories differ or fade. By putting our agreement in writing, we can have a meeting of the minds, based on what we see as the road ahead. Now, as we start down that road, we may run into a few unexpected curves or detours. We’ll talk about it and do our best to resolve problems because you want your project done right and I want to keep you as a client.”

### **Don’t Forget Third Parties**

One important reason for a written agreement is its ability to prevent third parties from gaining the standing they need to sue you and/or your client based on a contention that they are third-party beneficiaries of your agreement. And if the agreement is verbal, the third parties may enjoy an advantage. Juries are sympathetic to third parties, especially those with whom they can readily identify as “the little guy.” Tell Mr. Handshake:

”Your Daddy was a wise and fair man indeed. But he didn’t have to deal with all the litigious stuff we have to contend with today. It’s a whole different world.”

Your written agreement with a client can address third-party liabilities. It can help prevent unauthorized third-

party reliance, and can be attached to appropriate deliverables (such as reports) to help ensure any third party reviewing them understands the contractual limitations (scope, schedule, fee, general conditions) affecting them.

### **Where There's a Will There's a Way**

Chances are Mr. Handshake has a will — in essence, a written contract with the future. It presupposes mortality. You may point out to Mr. Handshake that, if anything happens to either of you, the project will be affected, problems will be likely, dollars will be involved and disputes might arise.

”A written agreement, to a very real extent, is your will for the project, Mr. Handshake. Should something happen to either one of us, the written contract will tell our survivors what to do. They can't have our understandings. They need that guidance. We owe it to them.”

### **Is It Insurable?**

Suppose you and Mr. Handshake enter into a verbal agreement and later have a dispute you can't resolve. You go before a judge or jury who, based solely on your verbal testimonies, issues a judgment in Mr. Handshake's favor. Mr. Handshake should be happy, right? Well not necessarily.

Suppose the wording of the judgment, written by someone not well versed in laws and standards governing the design and construction industry, is perceived by your insurer as uninsurable? Mr. Handshake won the battle, but he may have just lost the war. Unless your firm can cover the damages, he may have just lost his design firm and jeopardized his project. Tell Mr. Handshake:

”I think long-winded written agreements are a pain, too. But I have a great insurance company, solid coverage and a fantastic agent. They can help us review our written agreement and assist us in making sure that it's insurable. This benefits you as much as me. An uninsurable agreement, verbal or otherwise, doesn't do either of us any good.”

### **Short Is Not Always Sweet**

Some clients will grudgingly agree to sign brief letters of agreement or similar “short-form” contracts, but they remain averse to long agreements that require more time to draft and review. The problem is that short-form agreements are, by nature, silent on a number of issues. Once again, outside triers of fact are asked to resolve disputes without the benefit of a comprehensive written agreement.

So what do you say when Mr. Handshake, says, “I don't want a contract this long”? You might reply:

“What is the harm of having a long contract rather than a short one? A long one serves to cover a range of issues that are of benefit to both of us, especially regarding third-party claims. As long as the contract is well written in reasonably understandable terms, what is the drawback? Some of the added issues might come up, and we'll be glad we took the time to include them. And if they don't come up, what's the harm?”

You might also add:

“A big advantage to drafting and reviewing a thorough contract is that it allows us to discuss the ‘what-ifs’ and address the answers. The more we know about the project and reach agreement on various issues, the more we set out what we expect from one another. That's not a bad thing.”

### **True Value**

Arguably, the greatest value of drafting a comprehensive contract is not the words that go onto the paper, but the process through which important issues are identified and discussed. The client can gain a better understanding of your mutual risks and what the two of you can do to manage them. The client can learn what the both of you can do to lower the likelihood of errors or omissions. And you can both set up a framework in which any problems that do arise can be addressed in a fair and equitable manner that focuses on problem resolution rather than finger-pointing and disagreement as to what you had verbally agreed to.

The contract-formation process, more than any other aspect of your project involvement, gives you the opportunity to demonstrate your professionalism and generate the communication, coordination and cooperation required for project success. And that's something every Mr. Handshake can give a thumb's up to.

### **Can We Be of Assistance?**

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*