

Avoid Litigation and Legal Fees with These Simple Steps



Legal Ease

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No one likes to pay legal fees, not even lawyers, but I guarantee that you will need to do so from time to time. The key is to keep the fees as low as possible, and there are steps you can take in order to minimize your legal expenses.

Be Pro-Active, Not Reactive: In maritime and commercial law, there are basically two types of legal services, transactional and litigation. The transaction work is forward looking: drafting or analyzing a charter party or towage agreement, or employment contract, due diligence prior to buying a vessel or waterfront parcel, negotiating a lease or simply ensuring that your security plan is up to snuff. Litigation, on the other hand, generally involves a dispute that cannot be resolved or an injury or accident that occurred in the past. Many people who think they are

saving money by doing the transactional work themselves, without an attorney, will find themselves paying far more in litigation costs down the road. If you consult your attorney before you sign that contract, you will find yourself in a much better position if a dispute arises.

Understand indemnity and hold harmless agreements: In any contract, it is important to consider, negotiate, and properly memorialize the risk allocation. In other words, which party agrees to accept the risk and duty to insure the venture? In some agreements, these clauses can be misleading at best, and may not be enforceable under state or general maritime law. Using a form or borrowing language from prior agreements can also be detrimental to your interest. Each agreement should be tailored to meet the client's revenue goal and risk expectation. Therefore, it is recommended that you have an attorney review the contract before you sign it. Again, it is more cost effective to get your lawyer's advice before you finalize the deal!

Insurance, Insurance, Insurance: This is more important to your business than anything else. Make sure that you have the right types of insurance for your industry, and that you consider the risk attendant to your activities and future contracts, understand exclusions contained in your policies, and the types of workers you employ. Jones Act, Longshore/Harbor Workers and state worker's compensation policies each insure

a certain type of worker and usually exclude the others. (There is a fine line between seamen and shore-based workers, and the law is currently in a state of flux.) A quick review of a few scenarios may help to illustrate our point.

Vessel Owner bareboat charters a barge to Charterer. Pursuant to the terms of the charter party, Charterer agreed to obtain liability insurance in the amount of \$1,000,000, and to have Vessel Owner named as an additional insured on the policy. The insurance would protect both companies in the event of an accident. Unfortunately, Charterer's employee is seriously injured on the barge. Because he is considered a seaman, he sues both Charterer and the Vessel Owner. Although there was an insurance policy covering both companies, the job (and charter) had been extended, but Charterer neglected to renew the policy, which had lapsed three weeks before the accident. Charterer did not have any assets, and therefore the Vessel Owner has to defend the lawsuit filed by the worker. Fortunately, Vessel Owner has its own insurance, which would cover both defense costs and any liability.

The moral: While Vessel Owner was prudent in insisting on a certificate of insurance (COI) for the duration of the charter term, the job went longer than expected, and Vessel Owner did not realize that the insurance had expired. It is very important that you check the dates of the insurance coverage, and calendar the expiration date.

b. A company enters into a contract to transport fireworks from point A to point B. It agrees that it will be responsible for the safe arrival of the cargo, and that it has cargo insurance which is sufficient to cover the value of the fireworks. The barge runs aground, and both the fireworks and vessel are damaged. When the barge owner notifies his insurer of the claim, he learns that his policy excludes the carriage of explosives.

c. An artist sells an expensive sculpture to a client, and agrees to deliver it to the client's yacht. As it is being brought across the gangway, it is accidentally dropped, falling into the river. The artist hires a salvage company to retrieve the one-of-a-kind object, which is damaged in the process. The salvage company disclaims liability, and the artist's property policy excludes waterborne risks. The client refuses to pay for the artwork. Litigation ensues.

d. A charter fishing boat is rented for Company's party. Caterers are hired by Company, and the guests include Company's employees and prospective clients. A member of the catering staff spills grease on the deck of the vessel, causing one of Company's employees to slip and fall. Company learns that its worker's compensation insurance has a watercraft exclusion, and there is no coverage for the injury. The caterer has agreed to indemnify the vessel owner, but its insurance carrier denies coverage for the same reason. More litigation ensues.

The moral: Before you enter into any contract or agreement, make sure to send a copy of the terms of the contract to your insurance broker, so that he can ascertain that the proposed job is covered. This is especially true if you are doing something a little out of the ordinary.

These are just a few scenarios that can arise if you do not tell your insurance broker/attorney what you are doing to ensure that you are covered in the event of an accident or unforeseen event.

Possession is 9/10ths of the law: It's an old adage, but a true one. Try to structure your deals so that you have a bargaining chip. If you pay for services in advance and the job is not done correctly, you have to chase down your money. If you are providing the service and are not paid, you have to chase down your money. Some attorneys will handle your claim on a contingency fee (percentage) basis on contract claims, but that is the exception to the rule. Putting the money in escrow is always an option.

Put it in writing: Many of my clients still do business with a handshake. I admire them for that, and it works 80% of the time. When it doesn't, the client is understandably upset that he has to pay an attorney to collect on the invoice. That is the "American Rule," each party pays for his own lawyers. (English law makes the loser pay the other side's attorney's fees.)

If your contract (or invoice) specifies that in the event of a dispute, the party who breached the contract (or failed to pay the invoice) must pay the other party's attorney's fees, our courts will enforce that provision.

Take government investigations seriously: In the event of a pollution incident, collision, or serious injury, contact your insurance company and/or attorney immediately. Do not be intimidated into giving a statement about "why or how" the accident happened to the Coast Guard, marine police, or environmental authorities. You must give the investigators the information necessary to address the immediate emergency only. For a spill, that includes identifying the source and type of the product, the estimated amount spilled and total potential spill. For an injury, that would include particulars of the injured party, the type of injury, current medical status and treatment. You are entitled to have an attorney present for any questions involving the "why or how" of an incident, and you should insist on it. Accidents which result in pollution or serious injuries can, and often do, give rise to criminal liability. For mariners, representation is crucially important as their license (and livelihood) could be in jeopardy.

Consider a legal audit: If your company does not have in-house counsel, an annual review is highly recommended. Some law firms will do this on a fixed fee basis. The attorney will review your contracts, invoice forms, insurance policies, employee practices and operational procedures, and make recommendations as to how you can limit your risk and save on insurance premiums.

There is nothing wrong with taking risks, and from the business perspective you are the person in the best position to make those decisions. The best decisions are informed ones, and the legal ramifications of those decisions are best informed by consulting with your attorney and insurance broker, both of whom should be familiar with your industry. This will save you money and reduce your legal expenses and liability exposure in the long run.

Lisa Reeves is senior partner in Reeves McEwing LLP. The firm includes attorneys with practical marine experience, at sea and ashore. If you have questions or want to schedule a legal audit, contact Lisa at 267-324-3773 or Brian at 609-846-4717, or visit our website at www.lawofsea.com.

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