



Vol. 32 - No. 11
December, 2007

At a Glance

Safety: Is a workplace injury an accident or an incident?

Law Talk: Unlicensed corporations cannot recover on a payment bond

Meet our new worker's comp partner

... and more

The California Contractor

News for the Western Regional Master Builders Association

Recent important legislation

By Sam K. Abdulaziz
Abdulaziz, Grossbart & Rudman

It is the time of year again when some legislation has been passed and chaptered, meaning that it becomes law January 1, 2008. If it were urgency legislation, it would become law sooner. Otherwise, all legislation becomes law January 1st of the year after the Governor has signed it. These cases affect contractors.

AB 711 -- Emmerson

This law deals with landscape contractors. It essentially expands the work that a landscape contractor can do. The law authorizes a landscape contractor working within the classification to enter into a prime contract for an outdoor cooking center or an outdoor fireplace, provided that the work is included within the residential landscape project that the

contractor is supervising and, that in the case of an outdoor fireplace, it is not attached to the dwelling.

AB 243 -- Nakanishi

This next law deals with disciplinary actions. This law requires that a disciplinary action is to be taken against any licensee who has been convicted of crimes related to the qualifications, functions, and duties of a contractor within two years after discovery of the conviction by the Registrar of Contractors or the Board. The law also requires disciplinary action regarding an alleged breach of an express, written warranty by a contractor to be filed within eighteen months from the expiration of the warranty.

SB 138 -- Calderon

This law will provide that, except as specified, all agreements affecting

any residential construction contract and amendments to such a contract entered into after January 1, 2008, that purport to indemnify the general contractor or contractor not affiliated with the builder by a subcontractor against liability for claims of construction defects or other injury to property arising from, pertaining to, or relating to the negligence of the nonaffiliated general contractor or nonaffiliated contractor or their other agents, servants, or independent contractors who are directly responsible to the nonaffiliated general contractor or nonaffiliated contractor, or for defects in design furnished by those persons, or for claims that are unrelated to the scope of the work in the agreement, are unenforceable.

This is the language from the Legislative Counsel. Anyone who understands it upon reading it the first time gets to go to the head of the class.

Do you know where your company emails are?

Survey shows one in five businesses has settled a lawsuit to avoid the cost of recovering and searching through email

As the one-year anniversary of the amended Federal Rules of Civil Procedure (FRCP) approaches on December 1, a survey of professionals directly involved in legal discovery shows that a significant number of businesses have been negatively impacted by the challenges of e-discovery. In fact, one-fifth of the professionals say their business has settled a lawsuit to avoid the cost of recovering and searching through electronic documents such as email. The survey, conducted by iTracks for Fortiva, a leading on-demand email archiving provider, also showed that a majority of businesses are now actively taking steps to reduce risk and meet FRCP requirements by improving their e-discovery processes.

“As more and more lawsuits focus on electronic evidence, the cost – and risk – of being unprepared for e-discovery keeps going up,” said Eric Goodwin. “It’s clear that in the year since the amended FRCP went into effect, the majority of businesses have recognized that fact and are doing something about it. There’s still a long way to go, but these results are very positive and they

indicate that most companies are on the right path.”

The new FRCP states that all email is discoverable, and that parties to a lawsuit must meet within 99 days of a civil action being launched for a meet and confer session to disclose what information will be produced and the format in which it must be presented. As a result, businesses need to know where all emails are stored and for how long, and they need to ensure that they can access those emails and present them to opposing counsel in a reasonable timeframe. The new rules also require businesses to be prepared to enforce a litigation hold on any email that might be relevant to a potential case, meaning that those emails cannot be deleted until the issue is resolved.

Based on the results, nearly half (47 percent) of respondents do not agree that their legal team can effectively review relevant email in the 99-day window before the meet and confer session. To address this, 51 percent say they have implemented, or are planning to implement technology that allows them to easily search and review email. Similarly, more than one-third of businesses (36.7 percent) are already enforcing a formal retention policy for email, while another 40 percent are currently in the planning stage to enforce a formal policy.

Surprisingly, while 68 percent of

respondents face at least one litigation hold each year, just 37 percent have a formal litigation hold process in place. Once again, this appears to be changing as another 36 percent of respondents are currently planning to create and enforce a formal litigation hold process.

Despite the generally pro-active approach most businesses appear to be embracing, the survey showed there is still reason for businesses to be diligent about this process. Other findings from the survey include:

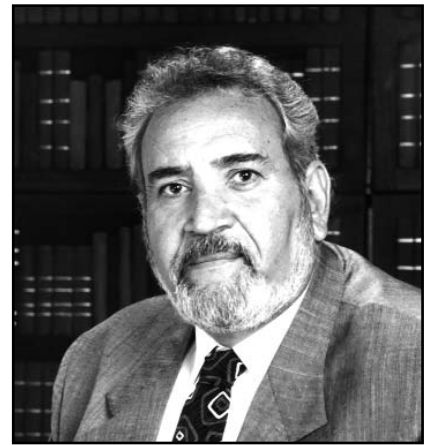
- 37 percent of respondents conduct more than 21 searches through old email to gather information for legal reasons each year;
- Nearly half of respondents (40 percent) reported that their organization searches through email five or more times each year in response to a formal legal discovery request;
- 35 percent are not confident that emails are fully reviewed to ensure attorney-client privilege is not waived before being sent to opposing counsel during Discovery;
- Of those who were familiar with the costs of litigation, more than half (51 percent) claimed the average cost of litigation (excluding settlement costs) was over \$200,000, with 8 percent putting the average cost over \$1 million.



LAW TALK



By Sam K. Abdulaziz
Abdulaziz, Grossbart & Rudman



Unlicensed corporations cannot recover on a payment bond

This is somewhat of a convoluted case. However, the decision is not all that surprising.

William Opp was at all times relevant to this case, a licensed building contractor. Mr. Opp also was president of an entity known as Mountain Connection, Inc., a California Corporation ("MCI"). MCI never held a contractor's license.

In July 2003, Mr. Opp, as president of MCI, signed a subcontract with Mauldin-Dorfmeir, a general contractor for work at California State University, Stanislaus. Mr. Opp insert-

ed his individual contractor's license number where the various contract documents called for a license. St. Paul Fire & Marine Insurance Company issued a payment bond on behalf of Mauldin-Dorfmeir.

Sometime later, Mauldin-Dorfmeir filed for bankruptcy. MCI, sued St. Paul to collect on the payment bond. Not surprisingly, St. Paul stated that MCI was unlicensed and therefore unable to collect. William Opp then filed an amended complaint substituting "William Opp dba Mountain Connection and Mountain Connection, Inc." St. Paul then filed a

The Appellate Court stated that the issue was not "who did the work" but "who was engaged in a business or acting in the capacity of a contractor."

...Being engaged in a business or acting in the capacity of a contractor is what is required.

motion alleging that Mr. Opp was never a party to the contract and therefore could not bring the action.

Mr. Opp responded with two different arguments. First, Mr. Opp tried to establish that he supervised most of the work that was done under the subcontract. Second, he attempted to show that everyone involved, including Mauldin-Dorfmeir, had treated MCI as the alter ego, or fictitious name, under which Mr. Opp did business. Again, not surprisingly, the court disagreed.

The court concluded that MCI was in fact the party to the contract and had performed the work under the contract, and not William Opp. Most importantly, the court also concluded that MCI was not entitled to recover on the payment bond because of Business & Professions Code §7031, kept it from recovery as being an unlicensed corporation. The use of the license number did not make Mr. Opp a party to the contract. That would be like renting your license.

Both the Trial Court and the Appellate Court decided the case against Mr. Opp.

The Appellate Court stated that the issue was not "who did the work" but "who was engaged in a business or acting in the capacity of a contractor." This makes a great deal of sense because many workers might "do the work" as employees. However, being engaged in a business or acting in the capacity of a contractor is what is required. The Court also cited another appellate opinion in G.E. Hetrick:

"In G.E. Hetrick, the corporate plaintiff was alleged to be unlicensed as a building contractor. Gary Hetrick was a licensed contractor doing business as G.E. Hetrick & Associates, a sole proprietorship, and he was the owner of the corporation, G.E. Hetrick & Associates, Inc. The corporation was unlicensed when the contract was made and performed. Gary Hetrick had been continually

licensed at all relevant times."

One of the arguments in the G.E. Hetrick case was the doctrine of "Substantial Compliance."

It was therefore also important that the Doctrine of Substantial Compliance be discussed. However, even this would not help the unlicensed contractor. That was because the person who engaged in the business of contracting (MCI), never held a contractor's license. That is one of the requirements for the Substantial Compliance Doctrine.

Opp lost on all fronts

Attorney Sam Abdulaziz of Abdulaziz, Grossbart & Rudman has been practicing construction law for 30 years. He has written a book called "California Construction Law" which is updated annually. He represents numerous construction trade associations and contractors. He appears at Contractors State License Board meetings and has argued a number of cases before the appellate courts, including the California Supreme Court dealing with the "Pay-If-Paid Clause." Abdulaziz, Grossbart & Rudman provides this information as a service to its friends & clients. The documents are of a general nature and are intended to highlight areas of the subject matter and should not be used as a substitute for specific legal advice. You should seek the aid and advice of a competent attorney and/or accountant instead of relying on the presentation and/or documents. Sam Abdulaziz can be reached at Abdulaziz, Grossbart & Rudman, P.O. Box 15458, North Hollywood, CA 91615-5458; (818) 760-2000, Facsimile (818) 760-3908; or by E-Mail at info@aglaw.net. On the Internet, visit our Website at www.aglaw.net

Meet our New Workers Comp Partner!

HEFFERNAN INSURANCE BROKERS
A Member of the Heffernan Group

As you may already be aware we have partnered with HIB for Workers Compensation for our members.

The options available through Heffernan will provide significant premium savings, while also providing exceptional service.

New Program Attributes:

- "A" Rated, Financially Strong Carriers
- Exceptional Claims Handling
- Commitment to your Industry
- Immediate and Knowledgeable Service
- Excellent Loss Control and Safety
- Quick Certificate of Insurance Turnaround

If you are not already working with HIB for a renewal quote, contact them today or fax over the form below with your information.

Call or Fax us at:
Toll Free: **866.500.6359**
Fax: **925.934.8278**

Company Name: _____ Contact Name: _____
Address: _____
Phone: _____ Fax: _____
Email: _____ Website: _____ FEIN: _____

Please provide your estimated annual payrolls by class code below or simply provide a copy of your most recent State Fund payroll report.

Classification	Code	Rate	Estimated Payroll
		\$	\$
		\$	\$
		\$	\$
		\$	\$

Heffernan Insurance Brokers • 1350 Cariback Avenue, Walnut Creek, CA 94596 • Toll Free: 866.500.6359 • Fax: 925.934.8278 • Email: info@heffgroup.com • License #0564249

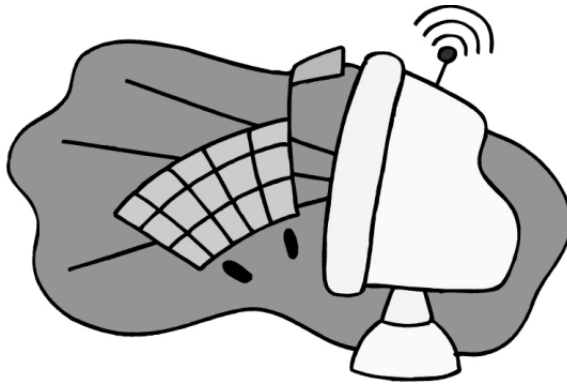
Be a savvy cyber-shopper

As soon as the Thanksgiving turkey is reduced to a pile of bones, the shopping rush begins. Last year on Dec. 11th \$661 million was spent in online purchases. Two days later purchases were made in the amount of \$667million. Those figures are expected to be broken this year as more and more shoppers are turning to the Internet to find bargains and avoid the crowds.

The convenience of shopping in you P.J's from home is hard to beat, but there are dangers to be aware of so that your shopping trip doesn't turn into a nightmare.

If you find a site offering a \$100 laptop, or a \$50 iPod, take a step back and say to yourself, "Isn't this too good to be true?" Scammer's sites are out there ready to offer you unbelievable bargains. A tip for recognizing them is if you see numbers at the beginning of the URL, such as <http://55.308.543@.594335.38883%4EF%>, it's probably a scam.

Internet security experts say online shopping can be done safely if consumers abide by a few basic safety tips. Following these guidelines should make your shopping season enjoyable and safe:



^ Before you start shopping, make sure your anti-spyware and anti-virus programs are up to date. Install a firewall and update your operating software on a regular basis.

^ Never shop online while using an unencrypted or open wireless network. Hackers can use your open wireless network or the store's to break into your computer and retrieve your financial information. Don't buy anything from a site unless you see a certificate from VeriSign or another organization that secures online transactions in the corner of the browser.

^ Shop with reputable companies. The bigger sites like Amazon.com is putting their name on the line when they send you to other sites. If you go with a smaller site, you can check it out by calling them and speaking to a real person or asking them to send you a catalog. If they don't have a phone number or only have an e-mail address, that's a huge red flag. Sites like www.Buysafeshopping.com put merchants through a screening process to verify the merchant's identity, online sales experience and their ability to deliver its products, so that you can have confidence in the retailer.

^ When it comes to making a payment, always use a credit card. The last thing you want to use is a debit care. Credit cards have protection if someone rips you off. According to the Federal Trade Commission, federal law limits your liability to \$50 in charges, should someone use your credit card fraudulently. Debit cards pull money right from your bank account and you may never see it again.

^ Finally, use common sense. Don't hand over personal information such as birth date or social security number.

Now Available to All Members: FREE Discount Coupons!

Call the Association office to request these coupons for you and your employees!!!



Los Angeles Zoo



Sea World San Diego

Six Flags Magic Mountain



Knott's Berry Farm

Coupons include discounted admission and more ...



Aquarium of the Pacific



San Diego Zoo and Wild Animal Park

Universal Studios



Call the Association office at (800) 823-4038!!!

AVAILABLE NOW!

We have some 2008 WRMBA calendars still available. They can be purchased for \$10 each. Please make checks payable to WRMBA and send them to:

**Western Regional
Master Builders
Association
(WRMBA)**

301 E. Ocean Blvd.
Suite 1970
Long Beach, CA 90802



SAFETY ... IT PAYS

Workplace injury: accident or incident?

Online community of safety professionals voice strong opinions on whether a workplace mishap is an accident or an incident.

SafetyXChange.org (<http://www.safetyxchange.org>), the online community for safety professionals, has been turned into an arena for one of the most hotly contested topics in occupational safety: the great "accident" vs. "incident" debate.

The debate involves whether the word "accident" should be used to describe workplace mishaps, particularly those involving personal injury or property damage. Critics contend that the word "accident" implies a certain inevitability and breeds a passive acceptance of risks that directly contributes to the occurrence of accidents; defenders contend that the word "accident" is linguistically and clinically appropriate and that attempts to substitute the word "incident" artificially manipulate the language and distance the safety profession from the real world.

Does any of this matter? "To an outsider, this might all seem like a battle over semantics and the splitting of hairs," notes Glenn Demby, Editor-in-Chief of SafetyXChange.org. "But for safety professionals, it goes right to the soul of workplace safety and the role of the professional in protecting workers against risks."



The response of safety professionals seems to bear Demby out. In response to the debate, (which was initially triggered by the article, "The Real Cause of Accidents" written by SafetyXChange Advisory Board Member Wayne Pardy and the rebuttal by Calgary HSSE director Greg MacDonald), more than 50 safety professionals from the U.S., Canada and other parts of the world have written to SafetyXChange.org to express their views. And two days later, the responses are still coming.

SafetyXChange.org was planning to publish all of the responses on October 4 in its regular Wednesday Safety Economics newsletter. But the sheer volume of responses has caught them off guard.

Says Demby, "This newsletter is supposed to be a short and quick read and I don't see how we're going to be able to do justice to all the respondents in such a format."

Still, Demby admits it's a pleasant problem to have. "Provoking thoughtful debate and discussion is what SafetyXChange is all about. How can I complain about the zeal and passion being exhibited by the members of SafetyXChange?"

To read the original article and join the debate, visit www.SafetyXChange.org. You'll find the archived article in the Financing Safety section of the Knowledge Center.

Periodicals
Postage PAID at
Sacramento, CA

Web Corner

The Internet is a growing resource for the construction industry. Web Corner is a place for you to share websites that have helped you in your business life. Please send recommendations to greleht@aol.com for inclusion in the column.



www.smallbusinessadvocate.com

Jim Blasingame, a journalist and radio show host, is an expert in the field of small business. His website, The Small Business Advocate, offers hundreds of free articles on all aspects of planning and running a small business, as well as a way to hear his syndicated talk show.

Internationally recognized as "the voice of small business," Blasingame is also a keynote speaker and panel moderator, a syndicated newspaper columnist and author of two books: *Small Business Is Like A Bunch Of Bananas*, and *Three Minutes to Success*, which have sold almost 100,000 copies combined. And Blasingame's daily feature, "A Small Business Minute," airs daily on XM Satellite Radio's talk and sports channels.

"When we began," says Blasingame, "we wanted to provide a home for entrepreneurs -- the heroes of the marketplace -- where they could find information, inspiration and the resources they need to start, run and grow their small businesses."

The U.S. Small Business Administration recognized Blasingame as the 2002 Small Business Journalist of the Year, and he is a member of the SBA's National Advisory Counsel.

THE CALIFORNIA CONTRACTOR
4153 Northgate Blvd., #6
Sacramento CA 95834