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### YOUR CONSTITUTIONAL RIGHT TO A “BAD DEAL”

We all know about freedom of speech and the right to a jury trial. But what you may not know is that before those rights existed, the United States Constitution guaranteed your right to make a bad deal.

As a 25-year member of my law firm’s professional liability practice group, I have represented many design professionals and contractors who sought legal advice *after* having unwittingly exercised their “right to a bad deal”. Heightened awareness of the risks of signing a “bad” contract - or having no contract at all - and the rewards that result from improving the language of the contracts you sign is all important. I also understand that on many projects, the leverage you have to negotiate is limited. However knowledge of improvements that are attainable and still offer significant benefit by reducing your risk, such as mediation clauses, will give you the upper hand.

Let’s start with a brief history lesson.

Prior to the Constitution taking effect in 1789 State Legislatures commonly enacted laws specifically to relieve influential individuals of their obligations to pay debts. In order to end this unfair practice, the “Contract Clause” was included in the Constitution. It provides that “No State shall...pass any...Law impairing the Obligation of Contracts...” and essentially prohibits State Legislatures and Courts from interfering with contracts between private parties. Since 1789, it has guaranteed your right to make as good or as bad a deal as you choose. It wasn’t until the Bill Of Rights took effect two years later that freedom of speech and the right to a jury trial became a part of the Constitution.

What does the Contract Clause mean to your business today? It means that Courts enforce contracts *as written*. Whether you perceive a contract to be unfair, inaccurate, fail to recognize the “usual practice” or just plain dumb makes no difference. If you signed it, the Constitution guarantees that you are stuck with it.

I have represented hundreds of clients in matters involving construction projects in which an attorney was not consulted until after a dispute arose. Invariably, at the first meeting regarding

such a matter my first question is “May I see your contract?” More often than not, the response is “We don’t have a contract”, or “Our contract doesn’t accurately reflect what our actual obligations on the project were” accompanied by a “deer in the headlights” look. Although it is possible to prevail in these situations, doing so always involves the client in a time-consuming, stressful, risk-laden effort a well written contract would have made unnecessary.

Your freedom to contract can be a powerful and positive business tool for reducing your risk. A good contract can shorten the time during which you are subject to liability, limit your potential responsibility for damages and help you get paid for all of the services you provide. However, like any tool, the language of your contract must be appropriate for the use in which it is being applied. You wouldn’t use a screwdriver to drive a nail and you shouldn’t sign a contract that doesn’t fit the project.

One simple way to immediately start improving your contracts is to include language requiring mediation of disputes. Mediation is a non-binding process by which the parties to a dispute attempt to resolve it with the assistance of a qualified neutral third party. Skilled mediators can often motivate parties to settle their differences before they incur the emotional and financial costs of arbitration or litigation. Since it is non-binding, there is very little risk involved in mediation. In fact, in my experience, mediation teaches all parties something about the strengths and weaknesses of their positions even when their dispute is not resolved.

Your contract can require mediation be conducted by a particular organization, can require the parties to choose a mediator in a specified manner if a dispute arises, or can name the mediator in advance. Choosing the right framework is a function of many factors including the dollar value of the project, the geographic location of the parties to the contract, and the nature of the prior relationship between the parties.

Including the right mediation clauses in your contracts will save you time and money in the long run and keep you from mistakenly exercising your right to a bad deal.

*The Sugarman Law Firm, founded in 1909, provides a full range of legal service to professionals, business owners and individuals, through its offices in Syracuse, Auburn and Buffalo. For more information on issues related to practice as a design professional or construction law, please visit our website at [www.sugarmanlaw.com](http://www.sugarmanlaw.com) or contact us:*

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