

## Getting Paid in These Challenging Times

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On April 30th, three attorneys from Warner Norcross & Judd LLP and a broker-attorney from KW Commercial gave a well-received "Fifth Friday" presentation to CREW Detroit that gave advice on how members can ensure they are paid throughout the course of a commercial real estate project in these tough economic times. The program was moderated by CREW member Meg Van Meter, LEED AP and senior counsel at Warner Norcross. Following are important take-aways from the presentation.

**Q: What steps need to be taken upfront to protect yourself from "unworthy" clients?**

**A: Lisa Loesel, LEED AP, Associate Broker at KW Commercial in Ann Arbor**

Operating a business in this economic environment is a challenging work in progress. What worked yesterday may not be enough to protect yourself today or tomorrow. When money was easy and flowing, there was always another deal around the corner, so the little bumps didn't hurt as much.

As you work to establish, maintain or grow a business, there are certain requirements that you should set for your business to protect yourself financially and legally – as well as mentally, spiritually and physically. Having these in place will help you when you are dealing with an "unworthy" client.

- **Set up policies and procedures.** Set up written operating policies, such as requiring signed agreements before starting work or requiring up-front retainers. I have mine on the wall of my office, so that whenever clients or prospects walk in, they know immediately what my policies and procedures are.
- **Know your policies and procedures and stick to them – and to your instincts.** The client who was difficult to begin with almost never gets easier to deal with as a business relationship goes on. Have someone who is unwilling to sign a contract upfront or pay on a timely basis? You probably won't get paid in the end. So stick to your policies, even when someone asks you to bend the rules.
- **Get it in writing.** People used to do business on the basis of a handshake – now, it can take a 40-page document to set forth the duties and obligations of each party involved. Having a signed document gives you greater bargaining power if something goes amiss – after all, how can you enforce an oral agreement if the other party disputes what was said and you have no record? Not only will this remove uncertainty as to expectations, it will also protect your business and your family.
- **Protect your value.** Women in particular can have a difficult time in placing a monetary value on their time and services. Have you thought about your per hour wage and what you'd like it to be at the end of the year? Don't be afraid to ask for what you know you are worth – and move on if you don't get it.

**Q: What should businesses do upfront in a commercial real estate transaction to ensure they will get paid?**

**A: Melissa Collar, Realtor® and Partner, Warner Norcross**

Due diligence is a critical first step in setting up any new business relationship. As Lisa mentioned above, you will occasionally run into the "unworthy" client or business partner out there. Spending time upfront could help you avoid aligning yourself with a company that is slow to pay, won't fulfill its obligations, or is a company with ties to organizations with whom you'd rather not be affiliated.

It's important to conduct some research into who your prospective client or business partner is, how he or she operates and what skeletons might be lurking in the closet. After you Google someone – and be sure to read past the first screen – you should consider:

- **Credit checks.** As the old saying goes, follow the money – all the way back to the bank. Conduct a credit check to determine if you will be working with someone who has appropriate credit resources and a history of paying bills on time.
- **USA Patriot Act.** The Patriot Act was established in the aftermath of 9/11 and created a federal database of people who pose or who have executed a terrorist attack. The legislation was designed to minimize the use of real estate transactions to launder money or finance terrorist projects. Be sure to search the database at <http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.
- **Proper registration and licensing.** Since most states require real estate professionals to be licensed, be sure to review and confirm that the proper license requirements are in place and current (<https://www2.dleg.state.mi.us/colaLicVerify/ISearch.jsp>). In Michigan, you can also do a business entity search on the Department of Energy, Labor & Economic Growth web site ([http://www.dleg.state.mi.us/bcs\\_corp/sr\\_corp.asp](http://www.dleg.state.mi.us/bcs_corp/sr_corp.asp)) and authenticate that the business is registered in Michigan.
- **Litigation history.** Have your attorney conduct a review of the litigation history, which tells a lot about a business or person and how they will handle potential conflicts. Have they filed many lawsuits? Been sued a number of times? How do these lawsuits get resolved?

After you go through your due diligence, spend a little more upfront time to document the relationship between yourself and others involved in the project. Be sure that the document has a clear scope, detailing who is responsible for doing what by when – and the consequences for not meeting a contractual obligation. Agreements that should be put in place include:

- Development agreement and/or operating agreement between all partners or project investors
- Brokerage agreement
- Architect agreement

- Construction management agreement
- Consultant agreement

**Q: How can a business minimize the possibility of disputes – or deal with them effectively when they arise?**

**A: Andrea Bernard, Partner, Warner Norcross**

Problems can – and will arise – in the course of commercial real estate projects. Having a set of procedures in place upfront will increase your ability to resolve issues quickly before they become major headaches. It's equally as important to follow those procedures to the letter if one of the parties fails to fulfill a contractual obligation.

Timing is especially key when working to minimize or resolve a dispute. Slow or no payment problems typically don't improve with time, they worsen. Select a very short time period to resolve payment issues and be sure to put all notices in writing. Businesses can also consider asking for a deposit, lien rights, mortgage guaranty, personal assurance, etc. to ensure payment.

Despite everyone's best efforts, though, communication can break down and a problem can escalate into a full-blow dispute that requires more focused procedures. Again, these should be spelled out upfront and could include:

- **Arbitration.** Arbitration is an increasingly popular approach that allows the parties involved to select an impartial third person or tribunal to review their dispute and decide on a resolution. Both parties must agree to participate in the process – and to abide by the arbitration decision. Arbitrations are typically handled by knowledgeable professionals, making the process fast and relatively inexpensive, although that is not always the case. On the downside, it can be difficult or impossible to appeal a decision.
- **Mediation.** Similar to arbitration, mediation requires two willing parties who choose a third party to help resolve a dispute. Unlike arbitration, though, the mediator works to reach a negotiated compromise with the parties that is not binding unless and until the parties reach and sign a final agreement. Mediation is typically the fastest and least expensive form of dispute resolution. The downside, here, though, is that a compromise necessitates give and take on both sides, often resulting in neither side getting everything they want.
- **Litigation.** Litigation is the almost always the longest and most expensive way to resolve a dispute. When one party decides to take another to court, no agreement is needed. Unlike the arbitration process, litigation may result in putting the decision-making process into the hands of people who lack experience and knowledge in that area of dispute. The final judgment in a lawsuit can be enforced, but it can also be appealed, which makes the process drag on.

**Q: How can a business effectively protect its confidential information?**

**A: Robert Cleary, Partner, Warner Norcross**

Information is the lifeblood to any business, and companies are going to greater length these days to protect their customer lists, contracts and account information, proprietary processes and marketing initiatives. Yet businesses face challenges at every corner – from the ease of accessing internally stored electronic information via office computers to employees who help themselves to documents and files when they leave. Add to that the internal and external access to company information, and it's easy to see that there really are no secrets.

Yet employers can – and should – take steps to safeguard confidential information, including:

- **Employment policy manuals:** Be sure to spell out an employee's responsibility to safeguard proprietary information – and what you consider that information to be. Don't forget to include electronic transfer and access in those policies. Finally, be sure to spell out what's appropriate when it comes to using company property, such as computers and PDAs, and returning it.
- **Restrictive covenants:** Employers have a variety of tools in this area, including confidentiality agreements, non-competes and non-solicitations – of accounts, customers, vendors, employees, etc. But just because you have one of these in place doesn't mean that it will be enforceable if an employee – or his or her new boss – takes you to court. You need to consider the reasonableness of the business interest you are trying to protect, the length of time and the geographic scope when setting up these agreements. There are also steps to take to enhance enforcement outcomes when an employee suspected of potential mischief leaves, including:
  - Conducting an exit interview
  - Securing the former employee's e-mail in-box and restoring deleted e-mail 90 days prior to separation
  - Inventory all stored and deleted electronic data to analyze customer interactions
  - Inventory all confidential and proprietary information known or accessible to see if the former employee was "snooping" in restrictive areas
  - Determine whether customer information was downloaded, copied or printed
  - Where appropriate, interacting with customers to inform them of the employment change and to ascertain if the former employee is attempting to pirate the customer account or business
  - Where appropriate, advising the new employer of your former employee of the existence of the restrictive agreements – care is required if this option is considered