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LEARNING OBJECTIVES

- 1) Understand the current legal issues relating to the new AIA contracts.
- 2) Negotiate favorable contract provisions.
- 3) Analyze issues relating to liens and securitization of debts.
- 4) Increase chances of getting paid on projects.



AIA - MOBIUS LA

Thursday, June 25, 2009

1:45 – 5:00



COLLINS COLLINS MUIR + STEWART LLP
ATTORNEYS AT LAW

HOW TO PROTECT YOURSELF & GET PAID

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HOW DO YOU GET PAID
IN
TODAY'S ECONOMY?

MOST IMPORTANT CONSIDERATION FOR GETTING PAID

- PRESERVE YOUR LIEN RIGHTS

A deep space photograph showing a vast field of stars. In the center, there is a prominent, glowing pinkish-purple nebula. To the right, a cluster of bright blue stars is visible. The background is a dark, rich brown color, densely populated with numerous smaller, fainter stars of various colors, including white, yellow, and orange. The overall scene is a rich, multi-colored stellar population.

**LIENS:
WHAT ARE THEY**

WHAT IS A LIEN?

A **SECURED** INTEREST
IN
A PIECE OF PROPERTY.

SECURED VS. UNSECURED

SECURED



UNSECURED



WHAT DOES A LIEN DO?

It provides a security interest in real property to those who improve or enhance the property of others.

WHO CAN GET A LIEN?

Anyone who furnishes labor, services, equipment or materials for use in a work of improvement - - including design professionals.

2 DIFFERENT TYPES OF LIENS ARE AVAILABLE
TO DESIGN PROFESSIONALS:

- MECHANIC'S LIENS

&.....?

DESIGN PROFESSIONAL LIENS



Definition of Design Professional

Design Professional (CA Civil Code § 3081.1) includes:

- Certified Architect,
- Registered Professional Engineer, and
- Licensed Land Surveyor

who furnishes services pursuant to a written contract with a landowner for the design, engineering, or planning of a work of improvement.

DESIGN PROFESSIONAL LIENS – WHAT ARE THEY?

- Must have contract with landowner.
- Lien for services rendered on work of improvement where work has not yet commenced.
- Commencement of work negates this lien.
- Does not affect mechanic lien rights.
- Exclusive to design professionals.
- Not applicable to all projects (ie – SFR where construction costs are less than \$100,000).

DESIGN PROFESSIONAL LIENS – STATUTORY REQUIREMENTS (CA Civ Code 3081)*

- Must have written contract with legal owner of property.
- A government approval or permit must have been obtained in relation to the services you provided.
- Default on payment or refusal to pay upon demand.
- 10 day written demand for payment.
- File lien with county recorder's office where property is located.
- Filed w/in 90 days of knowledge of either landowner not commencing work or reason to know landowner not commencing work.
- Foreclosure action must be filed w/in 90 days of lien being recorded



MECHANIC'S LIENS

MECHANIC'S LIENS – WHAT ARE THEY?

- Design professionals enjoy this right (but is it exercised?)
- Lien for services rendered on work of improvement where work has commenced and client has failed to pay.

MECHANIC LIENS – STATUTORY REQUIREMENTS (CA CIV CODE 3084)*

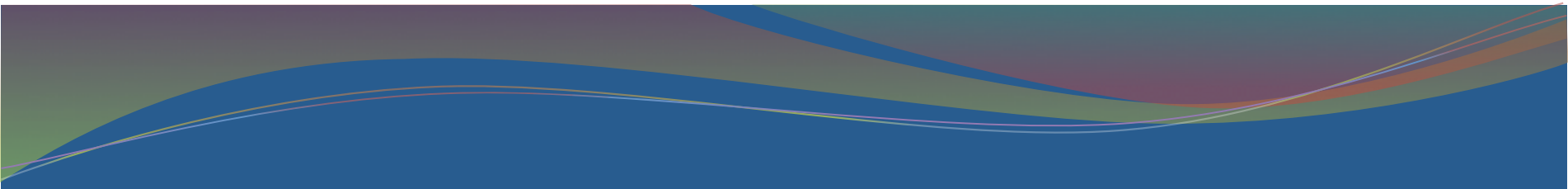
- Work of improvement must have commenced.
- If your contract is not with the landowner then lien rights do not commence until 20 day preliminary notice has been given to the landowner.
 - Note – This only captures the last 20 days of effort going forward.
- Strict timing requirements for when you can record a mechanics lien depending upon who you have contracted with.
- Lien must be recorded at county recorder's office.
- Foreclosure action must be filed w/in 90 days of lien being recorded.



HOW DO YOU PRESERVE
YOUR
LIEN RIGHTS?

1) CONTRACT WITH THE REAL OWNER
OF THE LAND; OR

2) GIVE THE REAL OWNER A 20 DAY
NOTICE BEFORE STARTING WORK



HOW DO YOU DETERMINE
WHO
IS THE REAL OWNER
OF THE LAND?

HYPOTHECTICAL #1

- You are in talks with Jim Smith to do a new mixed use condo over retail development.
- Jim says he's got a great site perfect for the development.
- Jim says that he works for Acme.
- Jim's letterhead says "Acme Development" on it.
- You've sent your proposal to Jim at Acme Development and you get a Contract back from Jim that shows the Contract signed by:

ACME DEVELOPMENT, LLC

HYPOTHETICAL #1 – PART 2

- You sign the contract and begin work.
- You've done work on the project and ACME DEVELOPMENT, LLC has not paid you for over 90 days.
- You've tried to resolve this with ACME DEVELOPMENT, LLC without results.
- ACME DEVELOPMENT, LLC keep telling you that they want to pay you and they are going to pay you as soon as their financing comes in.
- You can't wait any longer to get paid, so you call your attorney and ask your attorney to file a lien.

1st Question We Ask You Is...

Did you contract with the owner
of the land?

Your Response Is...

YES, I was dealing with Jim Smith
at ACME DEVELOPMENT, LLC.

(but is that the REAL landowner?)

OTHER RELATED ENTITIES...

YOUR CONTRACT IS WITH:

- **ACME DEVELOPMENT, LLC**

OTHER RELATED ENTITIES:

- ACME DEVELOPMENT II, LLC
- ACME DEVELOPMENT PARTNERS, LLC
- ACME DEVELOPMENT HOLDINGS, LLC

WHO REALLY OWNS THE LAND?

HOLDING COMPANY

ACME
DEVELOPMENT
HOLDINGS, LLC

ACME
DEVELOPMENT,
LLC

MANAGES SERVICES

ACME
DEVELOPMENT II,
LLC

OWNS LAND

ACME
DEVELOPMENT
PARTNERS, LLC

INVESTMENT ARM

So....

You contracted with **Acme Development, LLC**, who you thought owned the land.

But ...

Acme Development II, LLC actually owns the land.

WHAT DOES THIS MEAN?

- You DID NOT contract with the real landowner.
- Since you thought you contracted with the real landowner, you DID NOT GIVE the real landowner a 20 day notice.
- THEREFORE → YOU HAVE NO LIEN RIGHTS!

IN THE REAL WORLD

- You can't always contract with the REAL owner.
- If you don't contract with the REAL owner of the land, all is not lost, if you have properly given the 20 Day Notice.
- Problem: Most design professionals have never given a "20 Day Notice" and so when they hear that phrase they get VERY, VERY SCARED...





20 DAY NOTICE

CALIFORNIA PRELIMINARY 20-DAY NOTICE
 (For use on Private and Public Works)
 See Civil Code Section 3097 & 3098

CONSTRUCTION LENDER or
 Reputed Construction Lender, if any

 (name)

 (address)

 (city) (state) (zip code)

OWNER or **PUBLIC AGENCY**
 or Reputed Owner (private work) or (public work)

 (name)

 (address)

 (city) (state) (zip code)

ORIGINAL CONTRACTOR or
 Reputed Contractor, if any

 (name)

 (address)

 (city) (state) (zip code)

NOTICE TO PROPERTY OWNER

If bills are not paid in full for the labor, services, equipment, or materials furnished or to be furnished, a mechanics' lien leading to the loss, through court foreclosure proceedings, of all or part of your property being so improved may be placed against the property even though you have paid your contractor in full. You may wish to protect yourself against this consequence by (1) requiring your contractor to furnish a signed release by the person or firm giving you this notice before making payment to your contractor, or (2) any other method or device that is appropriate under the circumstances.

OTHER THAN RESIDENTIAL HOMEOWNERS OF DWELLINGS CONTAINING FEWER THAN FIVE UNITS, PRIVATE PROJECT OWNERS MUST NOTIFY THE ORIGINAL CONTRACTOR AND ANY LIEN CLAIMANT WHO HAS PROVIDED THE OWNER WITH A PRELIMINARY 20-DAY LIEN NOTICE IN ACCORDANCE WITH SECTION 3097 OF THE CIVIL CODE THAT A NOTICE OF COMPLETION OR NOTICE OF CESSATION HAS BEEN RECORDED WITHIN 10 DAYS OF ITS RECORDATION. NOTICE SHALL BE BY REGISTERED MAIL, CERTIFIED MAIL, OR FIRST-CLASS MAIL, EVIDENCED BY A CERTIFICATE OF MAILING. FAILURE TO NOTIFY WILL EXTEND THE DEADLINES TO RECORD A LIEN.

YOU ARE HEREBY NOTIFIED THAT . . .

 (name of person or firm furnishing labor, services, equipment or material)

 (address of person or firm furnishing labor, services, equipment or material)

has furnished or will furnish labor, services, equipment or materials of the following general description:

 (general description of the labor, services, equipment or material furnished or to be furnished)

for the building, structure or other work of improvement located at:

 (address or description of job site sufficient for identification)

The name of the person or firm who contracted for the purchase of such labor, services, equipment or material is:

An estimate of the total price of the labor, services, equipment or materials furnished or to be furnished is:

\$ _____

Trust Funds to which Supplemental Fringe Benefits are Payable or Laborers Due Compensation for the Project.

(Material suppliers not required to furnish)

 (name) (address)

 (name) (address)

 (name) (address)

Dated: _____

 Signature

Telephone Number () _____



20 DAY NOTICES ARE NOT SCARY....

HYPOTHETICAL #2

- Again, you have contracted with ACME DEVELOPMENT, LLC...
- BUT, this time you did your research and discovered that they were not the REAL owner of the land.
- ACME DEVELOPMENT II, LLC = LANDOWNER

WHAT DO YOU DO TO PRESERVE YOUR LIEN RIGHTS?

AFTER YOU SIGN THE CONTRACT WITH ACME
DEVELOPMENT, LLC...

YOU SEND A 20 DAY NOTICE TO ACME DEVELOPMENT II,
LLC, THE GENERAL CONTRACTOR, AND ANY
CONSTRUCTION LENDER.

So, if you don't contract with the REAL owner of the land, then make sure you give a 20 Day Notice to the:

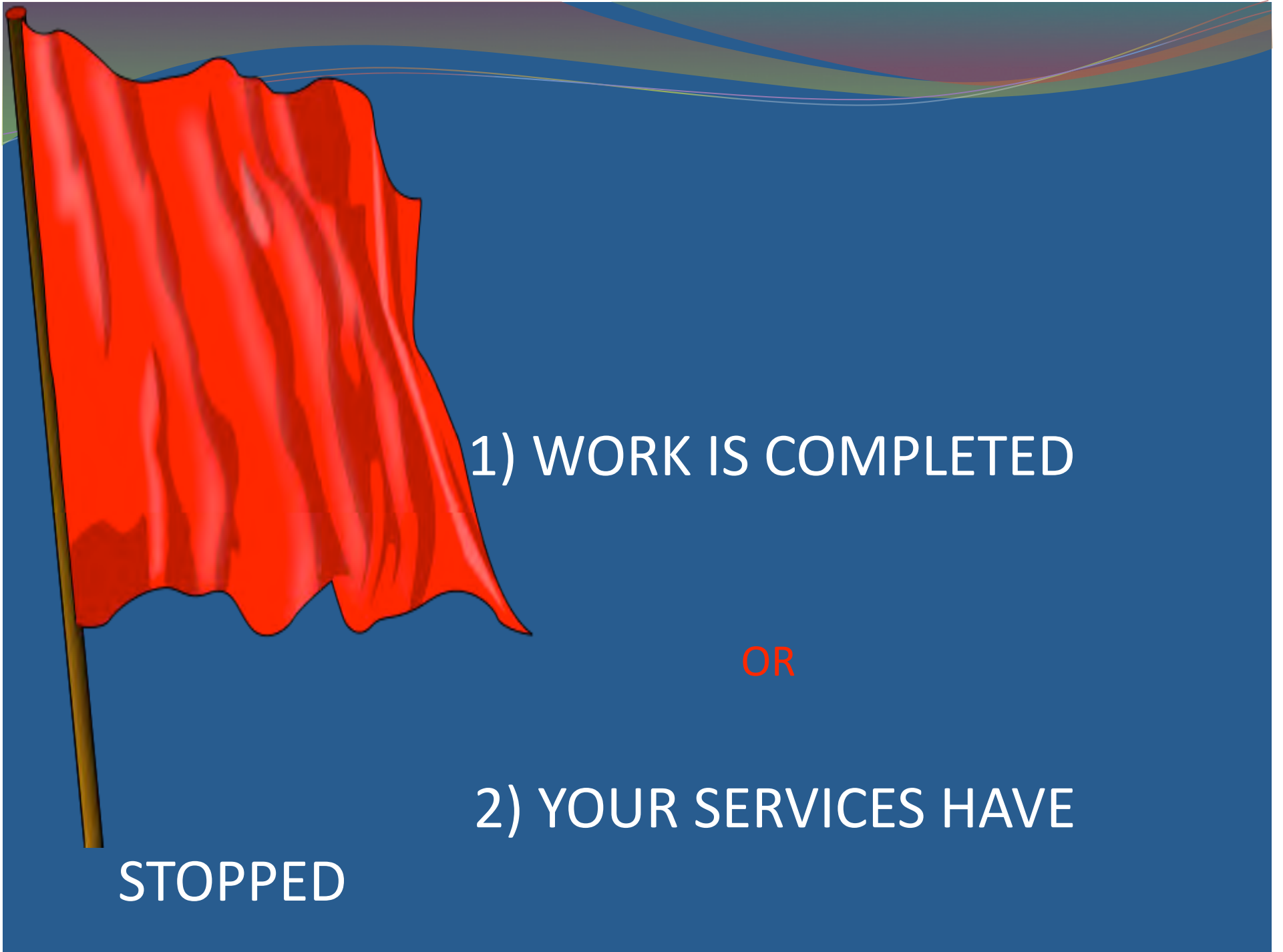
- 1) REAL owner of the land;
- 2) General Contractor; AND
- 3) Construction Lender



WHEN DO YOU NEED TO FILE A LIEN?

ACT QUICKLY

- There are very STRICT timing requirements for when a lien must be filed depending on different circumstances, such as:
 - who you have contracted with;
 - Whether a notice of completion has been recorded;
 - Whether a notice of cessation has been recorded;
 - Whether work has completed...
- **BUT, for purposes of our discussion today...**



1) WORK IS COMPLETED

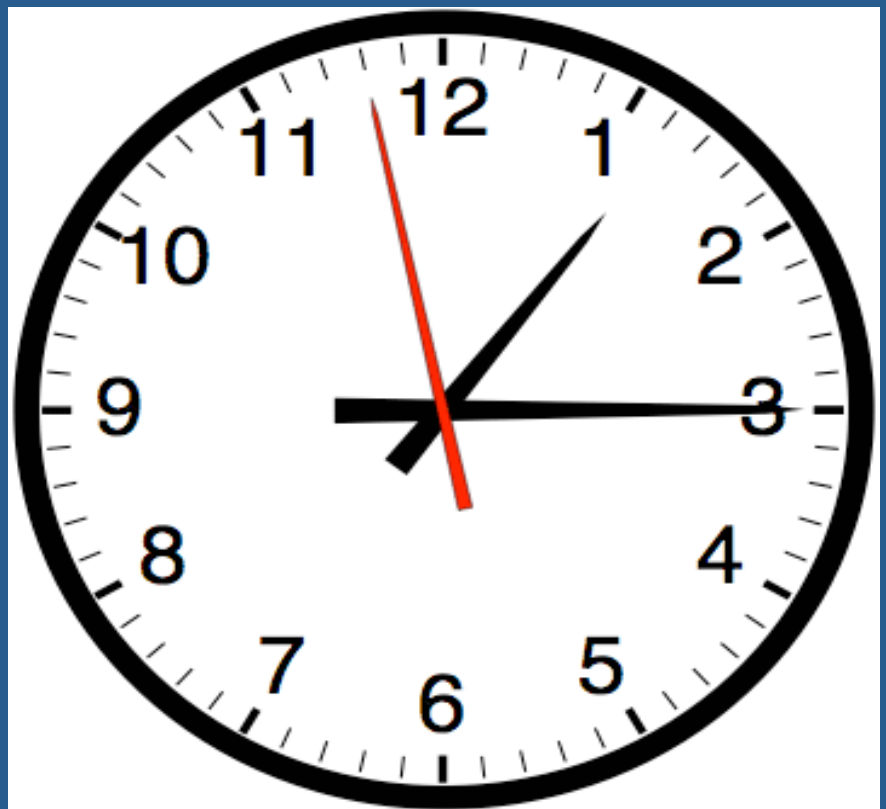
OR

2) YOUR SERVICES HAVE
STOPPED

WHEN EITHER OF THOSE 2 EVENTS HAVE OCCURRED
YOU NEED TO BEWARE AWARE...

THE CLOCK HAS
STARTED TICKING
AND YOUR WINDOW
TO FILE A LIEN IS
RAPIDLY DECREASING.

CALL YOUR ATTORNEY!



HYPOTHETICAL #3

- You have contracted with ACME DEVELOPMENT, LLC.
- You're in the Construction Administration Phase and ACME tells you that it is suspending the project so you need to stop working.
- ACME is already 90 days late on payment.

WHAT DO YOU DO?

ACT QUICKLY

- The clock has started ticking!
- If you don't act quickly, you may lose any lien rights that you have.
- Call your attorney!

WHY DON'T DESIGN PROFESSIONALS PROTECT THEIR LIEN RIGHTS?

- Don't know about their lien rights.
- Historically averse to protecting lien rights.
- Don't want to upset relationship with the owner.



OWNERSHIP OF DOCUMENTS

AFTER YOU HAVE IDENTIFIED THE REAL
LANDOWNER TO CONTRACT WITH
(OR YOU HAVE GIVING THE 20 DAY NOTICE),
THEN MAKE SURE THAT YOU...

OWN YOUR DRAWINGS!

WHAT DOES OWNERSHIP MEAN?

OWNERSHIP OF DRAWINGS

&

OWNERSHIP OF COPYRIGHTS IN DRAWINGS



BENEFITS OF OWNERSHIP

- If you OWN the copyright in your drawings:
 - Owner needs your permission to use them.
 - You can take your drawings back!
 - Owner's (and others') unauthorized use of your drawings will violate federal and state copyright laws.
 - Owner will have to pay someone else to redo all of the work so as not to violated copyright laws.



YOU OWN YOUR DRAWINGS,
UNLESS
YOU WAIVE CERTAIN RIGHTS
IN YOUR CONTRACT.

HYPOTHETICAL #4

- 1) Your contract with owner is silent on ownership of drawings.
- 2) You've completed your drawings.
- 3) Owner is 90 days late on \$15,000 payment.
- 4) Project is dead and a NEW OWNER comes in and wants to build the project with your documents.

What can you do to get paid?

- Contract is silent
 - You own your drawings, and
 - New owner needs your permission to use them.
- So even though you have no contract with the new owner, you can demand that the new owner pays the old owner's debt to you, if the new owner wants your permission to use your drawings.

HYPOTHETICAL #5

- 1) Your contract with owner is silent on ownership of drawings.
- 2) You've completed your drawings.
- 3) Owner is 90 days late on \$15,000 payment.
- 4) Owner terminates your contract and says that he is going to hire a new architect to finish the project.

What can you do to get paid?

- Contract is silent:
 - You own your drawings, and
 - Owner still needs your permission to use them.
- So you can take back your drawings and tell the owner he can't use them.
- This mean that the owner will either have to:
 - Pay the new architect to recreate your drawings from scratch (potential copyright violations); or
 - Pay you to use your drawings.

IF CONTRACT IS SILENT AS TO OWNERSHIP OF DOCUMENTS:
→ THEN YOU OWN YOUR DRAWINGS, INCLUDING THE
COPYRIGHTS!


IF CONTRACT DISCUSSES OWNERSHIP:
→ THEN YOU HAVE TO CAREFULLY READ WHAT
OWNERSHIP RIGHTS YOU MAY BE GIVING UP.

B101 OWNERSHIP LANGUAGE

Article 7

“The Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights...”

“Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. “



**WHAT ELSE CAN YOU DO TO
PROTECT YOURSELF
AND
INCREASE YOUR CHANCES OF
GETTING PAID?**

OTHER CONTRACT PROVISIONS

- Termination provisions –
 - When can you terminate?
 - When can the owner terminate?
 - Do you have to continue to work during a dispute?
- Payment provisions –
 - When do you get paid?
 - Is it tied to the owner getting paid by someone else?
 - How are disputed amounts resolved?
- Assignment of contract provision –
 - Did you tie the owner's right to assign the contract to be conditioned upon payment?

REMEMBER → PROTECT YOURSELF BY:

1) PRESERVE YOUR LIEN RIGHTS BY:

- 1) contracting with the REAL landowner; or
- 2) giving the 20 day notice.

2) Maintaining ownership of your documents.

IF YOU DO THAT, THEN YOU INCREASE YOUR
CHANCES OF GETTING PAID!



Thank you for your time!

QUESTIONS??

This concludes the American Institute of Architects
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