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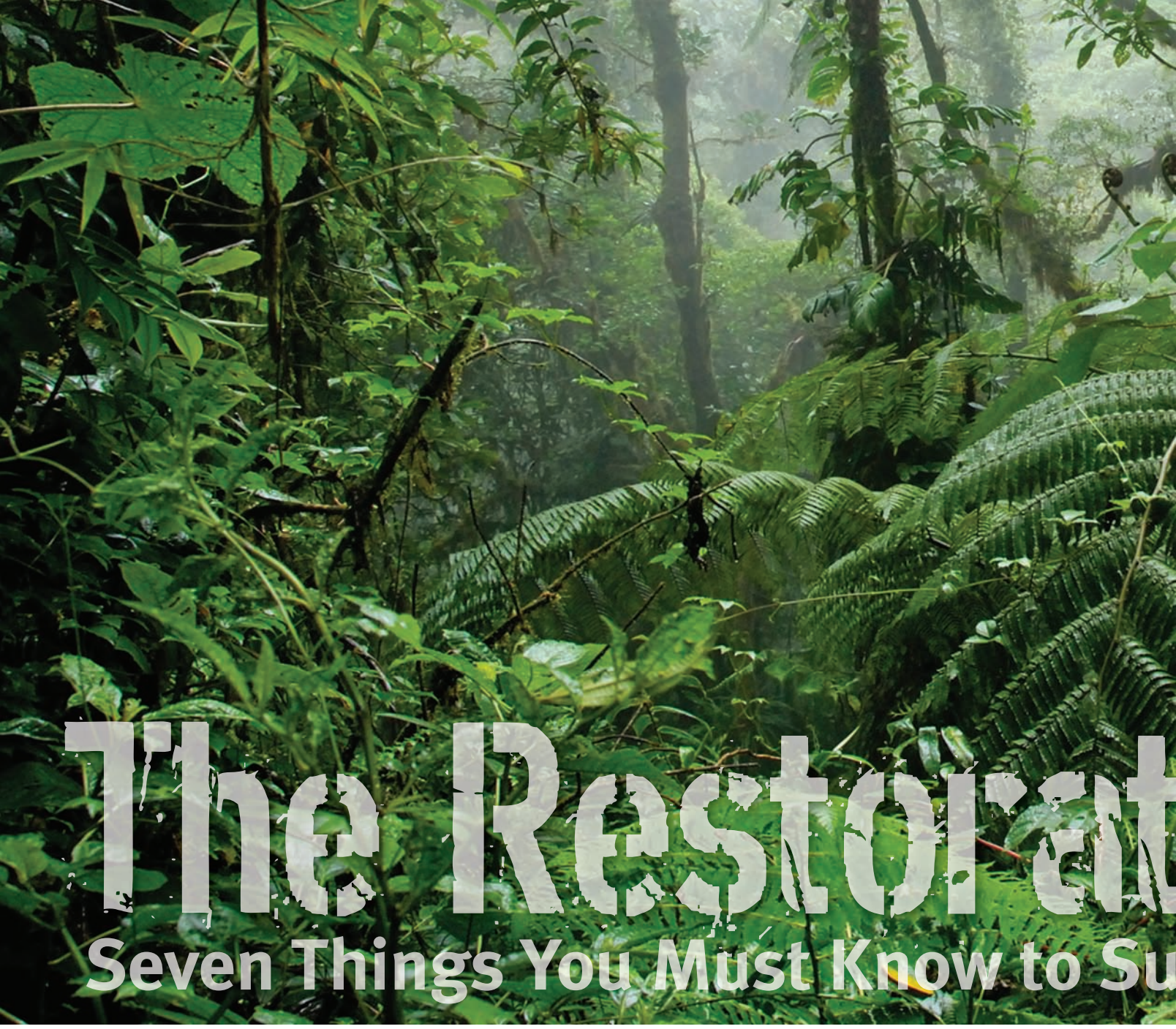

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Seven Things You Must Know to Su

Five hundred years from now, people will look back at us as players in a big game of Restoration Survivor, where contestants stranded in an isolated legal wilderness compete for cash and prizes. The game is based on a financial and legal system of progressive elimination, where customers and carriers "vote off" restorers until only one final remaining contestant wins the title of "Sole Restoration Survivor." The winner will have followed these seven tips for survival in today's legal environment.

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rvive in Today's Legal Environment

By Edward H. Cross, Esq.

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Tip #1: Throw away all of your work authorizations.

Once upon a time, it was okay to start on a job with nothing more than a work authorization; that is, a form that gives permission for a company to come onto a property and perform work. A work authorization is not a payment contract. To secure the right to payment, the Restoration Survivor has a bona fide *contract* that spells out how much the customer will need to pay and when (plus a bunch of other bad stuff that will happen if he or she doesn't pay — see below).

An assignment of insurance benefits is not a commitment to pay money. What's worse, work authorizations create evidence to support the age-old claim, "I thought you were working for the insurance company."

Work with a qualified attorney to develop a contract with a straightforward title such as "Restoration Service Agreement," "Remediation Contract," "Service Contract," or something else that sounds *binding*. Use "authorizations" as separate forms for things like the disposal of contents, access to property occupied by third parties, and the use of chemicals.

TIP #2: Write a good scope of work.

The Restoration Survivor looks at the scope of work as the most important part of any restoration contract. More than half of the lawsuits filed against restorers arise from disputes regarding the scope of work. Most of them can be prevented with a detailed written scope of work signed by the customer before the work begins. "Return 123 Main Street to its pre-loss condition" is not a

scope of work! The scope should be in sufficient detail so as to allow a third party with absolutely no knowledge of the job to review the file and understand what you intend to do, where you intend to do it, and what you do *not* intend to do.

TIP #3: Write lump sum contracts whenever possible.

Writing an agreement that is silent on pricing is like painting a big red target on your invoice. In legal effect, the price becomes the usual price charged by your competitors. But as a practical matter, if the adjuster picks his buddy at the lowest-priced competitor in town to play Monday morning quarterback and write a so-called "competitive bid," you may accidentally end up with the lowest prices in town.

The Restoration Survivor deflects attacks on his prices by getting a written agreement on the price before the work begins, and immediately sending the carrier a copy of the contract. In fact, in some states, time and materials contracts appear to be prohibited for residential projects. With a lump sum contract, as long as you didn't completely foul up the job, the insured is liable for the full price — even if you have the highest price in town.

If the insurance company complains that your price is not "usual and customary," here's your response: (1) thank you, but the price has already been negotiated and agreed upon by my customer in a binding written contract executed before the work began; (2) the work is now complete; (3) I relied on the customer's agreement and am not willing to reopen the price negotiations after the fact; (4) I performed 100 percent of the agreed-upon work and intend to collect from the insured 100 percent of the agreed-upon price; and, (if the carrier's price complaint comes after the job) (5) I sent you the price before I began the work and your complaint is untimely.

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If the carrier refuses to pay the invoice in full, you have the right to sue the customer, which will expose the carrier to a lawsuit for bad faith. It often costs less to pay the higher price than to defend a lawsuit.

What about emergency service? Estimating prices on emergency service projects is not always easy. Then again, neither is litigation. It's perfectly acceptable to write a lump sum contract based on a ballpark estimate and adjust the price with a change order on day two or day three after you've had a chance to more thoroughly inspect the loss.

There is enough similarity between many losses to allow an experienced restorer to ballpark a price. As a last resort, write a time and materials contract if it is permissible in your state. Attach a price list that is less than 1,000 pages long. Have the customer initial every page of two copies of the price list. Take one and leave one with the customer, and send a copy to the carrier.

TIP #4: Make liberal use of written change orders.

Under certain limited circumstances, written contracts may be modified by oral agreement. However, in the legal jungle, the Restoration Survivor's credo is: "If it's not in writing, it didn't happen." Execute a change order any time there is a change in the scope, price or payment terms.

Some restorers are embarrassed by change orders. Get over it. The Restoration Survivor makes liberal use of change orders. A change order is not necessarily a confession of a mistake that will get you voted off the customer's island. Think of it more as a sign of refinement and attention to detail. Even if there is a mistake, it's far better to confront it when you still have some control than to have it decided a year or two later by 12 people who are not smart enough to figure out how to get out of jury duty.

The Restoration Survivor recognizes his own potential for error and is savvy to the many variables of restoration contracting. Therefore, he never uses "not to exceed" prices. Instead, he uses a contract based on a "good faith estimate." His contract indicates that the estimate "is not a guarantee of the final price, but is based on an initial visual observation, and is subject to change as inspections continue."

He explains to the customer his inspection process and its limitations, as well as the reasons why the final price may be higher if additional damage is discovered. Otherwise, the customer may contend that the estimate was intended as a ceiling on the final cost. Even if it is undisputed that the estimate was not a guaranty, the customer may refuse to pay the invoice if it greatly exceeds the estimate. A written change order is the best survival tool to avoid this problem.

If a mathematical error is discovered in an estimate, the restorer can usually withdraw the estimate before it is accepted. However, a subcontractor may be unable to withdraw its bid if the prime contractor relied on it in preparing the prime bid. Trying to use the court system to fix mistakes in contracts entails major warfare. A court may rescind (cancel) a contract that contains a material mistake, but only if the mistake was such that the customer should have known or suspected that a mistake was made. A court may reform (rewrite) a contract to correct errors, but only when the contract does not express the intent of *either* party.

Therefore, although a contract entered after an estimating mistake is made may not reflect the contractor's intent, a court will not correct the mistake if the contract correctly reflects the customer's intent. Rescission and reformation both require considerable legal expense, and should be considered only as a last resort.

TIP #5: Become an expert on mechanic's liens.

Mechanic's liens are the most powerful weapons available to a restorer. A mechanic's lien is a security interest in real property, which can be foreclosed like a mortgage. It clouds the title to the property, even though the policy of the law is to discourage clouds on title. When a lien foreclosure action is pending, the claimant can record a Notice of Pendency of Action (a.k.a. *lis pendens*), which warns everyone who might acquire the property that he or she may be bound by an adverse judgment. A subsequent purchaser of the property will take title subject to the outcome of the foreclosure suit. Thus, a lien can interfere with the owner's efforts to sell, lease or borrow against the property. It can also impair his credit score. As a result, it is a real attention-getter.

However, like any weapon, a mechanic's lien can be dangerous if not used in accordance with the manufacturer's instructions. Most of the procedural rules for mechanic's liens must be followed precisely. Many procedural errors invalidate the lien rights and make recording the lien unlawful. An unlawfully-recorded lien can subject the contractor to criminal liability, disciplinary action from the contractor's license board, civil liability for malicious prosecution, substantial damages for the improper filing of a *lis pendens*, and perhaps even an "elder abuse" claim if the property owner is over a certain age.

California, for example, has the following rules about mechanic's liens:

1. The contractor must provide the residential customer with a statutory notice of the lien laws before any work begins.
2. Subcontractors must serve the owner with a Preliminary Notice within 20 days of first providing labor or materials on the project.
3. The lien must be recorded within 90 days of substantial completion of the work. The work is substantially complete when all work of any substantial nature has been done, regardless of whether pick-up, warranty or call-back items remain to be done.
4. A lawsuit to perfect the lien (foreclose) must be filed within 90 days of the recording of the lien. If the foreclosure deadline is missed and the lien is not released, the contractor is liable for the owner's attorney's fees and other penalties.
5. The time to file the foreclosure action may be extended if the contractor gives credit to the owner and records notice of the credit. Even with extensions, the foreclosure lawsuit must be filed within one year after the work is completed.
6. A mechanic's lien claimant with a contractual right to attorney's fees is not entitled to have its attorney's fees included in the mechanic's lien.

Of course, lien laws vary from state to state. Find a current guidebook on the lien laws in your state and study it carefully. Locate a lawyer who is well-versed in lien law procedure and don't hesitate to challenge him or her with information you find in your book. The Restoration Survivor does not assume that the lawyer — or the book — will always be correct.

TIP #6: Don't forget asbestos or lead.

Millions of tons of asbestos and lead have been abated and safely disposed in the last 20 years, but don't let your guard down. These materials remain abundant in both commercial and residential structures, regardless of whether you're working in low income housing in Detroit or the most chic penthouse in Manhattan. And now, the new EPA lead regulations have increased the risks for the unwary. The lead regulations are not exactly simple, so when in doubt, give the lead notice. Many good publications are available to explain the regulations. (See, for example, *Cleaning & Restoration*, "EPA's Lead Paint Disturbance Reg: What Contractors Need to Know" by David Governo, *April 2009*.)

If you are imposed with a fine for violating asbestos or lead regulations, investigate the violation thoroughly and consider filing an appeal. It may put you into a position to negotiate a discount on the fine. Yes, they are sometimes negotiable, especially if you have no prior violations and the violation did not result in bodily injury.

The three rules for avoiding asbestos and lead violations are: 1) Training; 2) Training; and 3) Training.

TIP #7: Don't be afraid to walk from a bad job.

In lean economic times, there is a great temptation to take every job that comes through the door. This temptation is an evil and powerful force that must be resisted at all costs. Focus on quality over quantity. One bad job can foul up your whole year. Customers are on their best behavior at the beginning of the job — because they *need* you. Don't underestimate their ability to turn into three-headed monsters after you've invested your time, energy and precious resources and they don't need you any more.

If it walks like a duck, quacks like a duck, and smells like a duck…it's a bad job. Politely decline before starting work and let your competitor have the nightmare. It's the best chance to win immunity from liability.

Can you be a Restoration Survivor? Watch your back…and good luck. ■

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