



## Kenney & Sams, P.C. News & Updates

February 2017

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## *Recent Successes*

**Kenney & Sams Beats Statute of Limitations to Win Major Jury Verdict**



In a recent jury trial in federal court in Boston, Massachusetts Chris Kenney and Tony DeProspo successfully defended their client, a national sales executive, against a recoupment proceeding, and succeeded in obtaining a \$2.8 million judgment for the client against his former employer.

Our client worked for a major solar energy company. Over the course of several years he achieved numerous sales that resulted in over \$37 million in revenue to his employer. He was paid on a commission basis, with a monthly draw advanced toward the commissions. However, every time he asked to have his commissions paid up, the employer first

congratulated him on his outstanding work, and then asked him to be patient while they waited for their financial condition to improve so they could pay him. This charade continued for several years until the employee firmly insisted upon full payment. At that point, the employer engaged in strategic revisionist history by denying that the employee actually sold the systems himself, and claiming that he had submitted fraudulent expense reimbursements that they intended to recoup from him. When he protested, they fired him.

Attorneys Kenney and DeProspo vigorously defended their client against the expense recoupment, and prosecuted claims for his earned commissions which constitute unpaid wages under the Massachusetts Wage Act. They defeated the employer's statute of limitations defense by successfully arguing that the employer's deceptive conduct in falsely promising payment warranted an equitable tolling of the statute of limitations.

After a six day jury trial, the employer dropped its recoupment claims and the jury found in favor of our client on his Wage Act claims. The jury awarded damages of approximately \$1 million, which the court tripled pursuant to the Wage Act for a judgment of over \$2.8 million. The court also ordered the defendants to pay our client's attorneys' fees and costs on top of the damages awarded.

**Mike Sams, Sakib Khan and Lindsay Burke** obtained partial summary judgment in a construction defect case based on the existence of a release, and because of related statute of limitation issues.

**Tony DeProspo** recently obtained summary judgment in the amount of \$140,000 on behalf of a petroleum client on a breach of contract claim. The Court's judgment included almost \$65,000 in accrued interest. The Court also ordered the opposing party to pay all of our client's legal fees. Tony subsequently obtained an *ex parte* attachment order and froze the defendant's bank account in the full amount of the judgment.

**Mike Sams and Lindsay Burke** represented the founder of a Boston fitness company in the successful negotiation of a severance and non-competition agreement with a co-founder.

## **What is an Insurance Agent's Legal Duty?**

By: J. Nathan Cole

What is an insurance agent's legal duty? In Massachusetts, an insurance agent is usually considered to be an "order taker." This means that an insurance agent must get its customer the insurance that the customer requested or the insurance that the agent promised to obtain. If the agent is unable to do so, then the agent must tell the customer. In certain situations, however, the agent is expected to act as an insurance advisor to its customers -- and not merely as an "order taker." When an agent markets itself as an "expert" or "specialist" in a certain area of insurance or business, then that agent is potentially increasing his or her legal duties (and, therefore, legal liability) from that of an order taker to the higher standard expected of an advisor.

The difference can have huge consequences for agents and customers if the customer is later sued for an accident or loss that insurance does not cover.

[READ FULL ARTICLE HERE](#)

## **Should You Even Bother Filing a Mechanic's Lien?**

By: Ross Wecker

Imagine a hypothetical construction project where a second tier material supplier has completely performed its contract and its customer, a first tier subcontractor, abandons the project after receiving ninety percent (90%) of its contract price, but without paying for the material supplied. This first tier subcontractor simply disappears with the money that is owed to the second tier material supplier.

Under the hypothetical presented above, a second tier lien will only "trap" the amount of money that was owed when a Notice of Identification was served or when a lien was filed. Thus, if the second tier subcontractor waits to file a lien until after the first tier subcontractor has abandoned the project and absconded with 90% of its contract price, the second tier lien will trap almost nothing. Conversely, if the second tier material supplier serves a Notice of Identification early in the project, preferably before it has furnished anything, it can likely trap its entire contract price in a subsequently filed lien.

If you are considering doing business with a customer that has questionable credit, a consultation with a qualified construction attorney should be part of that decision to learn about how interests can be protected by asserting a timely mechanics' lien.

[READ FULL ARTICLE HERE](#)

## **Legalization of Marijuana** **What, Exactly, Does this Mean for Employers?**

By: Jaimeson Porter

On December 15, 2016, recreational marijuana use became legal in Massachusetts. The new law legalizes the use and possession of up to one ounce of marijuana in public, and up to 10 ounces of marijuana at home for individuals 21 and older. The law also permits possession of up to six marijuana plants per person, with a maximum of 12 plants allowed per household.

Employers remain free to prohibit the use of marijuana in the workplace if they want to, and remain free to require a drug-free workplace. Further, the new law expressly prohibits marijuana smoking anywhere that cigarette smoking already is prohibited. Thus, any policies employers already have in place concerning smoking cigarettes on or around the premises, now also automatically extend to smoking marijuana.

[READ FULL ARTICLE HERE:](#)

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## **Are e-signed Contracts Binding?**

By: Lindsay Manning Burke

Many of our business clients are interested in moving from traditional "paper" contracts to e-signed contracts. This shift can save time (and paper!), but clients should take steps to make sure these contracts are binding. Here are a couple of the questions we have received about the use of e-signatures:

### **Q. Are electronic signatures legally binding for contracts?**

A. Yes.

Under the Massachusetts Uniform Electronic Transactions Act ("UETA"), a contract is formed when someone accepts a written offer electronically, and such a written contract is enforceable under Massachusetts law.

*See G.L. 110G, § 7(b) ("A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."). This law applies when the course of dealings between the parties demonstrates that they agreed to conduct their transaction by electronic means - in other words, when both parties intend to be bound by the electronic signatures. See G.L. c. 110G, § 5(b) ("This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct transactions by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."). An electronic signature is "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." G.L. c. 110G, § 2. *Clean Properties, Inc. v. Riselli*, No. MICV2014-04742, 2014 WL 4082266 (Mass. Sup. Ct., June 20, 2014).*

### **Q. Is there particular information that should be included within their signature stamp? For example, is the date/time stamp required?**

A. The signature is all that is required under the statute, but you should consider adding some more elements to be sure it will hold up if challenged.

- To show that the signatory does intend to be bound, there should be some language like "I agree" or "I sign" next to the signature stamp. This will be helpful if the signatory later tries to argue that s/he did not really mean to sign the contract.

- You may also want to consider adding in a procedure to verify the identity of the person signing, to be sure it is "attributable" to the signor (if there is a fight about whether or not the counterparty actually signed it, courts will look at the efficacy of any security procedure applied). Verification procedures can be very technical, but would be worth considering if you are using a large volume of e-contracts.
- You will also need to protect the integrity of the signed electronic document - make sure that the document in your system is identical to the document signed, and keep an audit trail to ensure that you have good records of which documents were signed, and when.
- If the contract contains a waiver of warranty, that waiver must be conspicuous. MA Gen. Law. Ch. 106, Section 1-201(10). The terms and conditions should be listed on the signature page, or you should provide a hyperlink, in a different color, to a page where the terms and conditions can be accessed.
- The electronic contract must contain all of the same elements it would require if on paper. So, if it is a contract that needs to contain a specific seal, for example, an e-signature would not be a good choice.

## Happenings



### Leadership Academy

The MBA's Leadership Academy hosted its first "Profiles in Leadership" training session for 21 fellows selected last fall. Fellows heard presentations from four prominent Massachusetts Leaders: Hon. Karyn Polito, Lieutenant Governor of Massachusetts; John Fish, Chairman and Chief Executive Officer, Suffolk Construction Co.; William Sinnott, Esq. of Donoghue, Barrett & Singal; and MBA Past President Valerie Yarashus, Esq.

MBA Treasurer and co-chair of the steering committee, Chris Kenney also noted the commitment the MBA has made to each fellow as a future leader.

The MBA Leadership Academy was developed to better prepare young attorneys to assume leadership roles at the bar, in their firms or organizations and in government.

The MBA's Leadership Academy is a 12-month program that provides Academy fellows the opportunity to network, collaborate and build relationships with bar leaders; develop and enhance leadership skills important to their future in the legal profession; and get an insider's look at the important role the MBA plays within the legal system.



### Contract Musts and Mistakes for Builders

## and Remodelers

Mike Sams recently spoke at the Remodelers Council Meeting and Education Session of the Builders and Remodelers Association of Greater Boston concerning contract risk issues and risk transfer. We're here to help you on these issues too when you need it! Give us a call to discuss risk issues or drop me an email at [mpsams@kandslegal.com](mailto:mpsams@kandslegal.com).



## MBA Pinnacle Awards



The Massachusetts Bar Association (MBA) presented the 2016 Pinnacle Awards to Anton's Cleaners and Polkadog Bakery.

The MBA Pinnacle Awards recognize companies each year - one large and one small - which have demonstrated the highest commitment to their customers by taking affirmative steps to improve the consumer experience in Massachusetts.

In addition to the MBA Pinnacle Award ceremony, the symposium featured panel discussions about the future of mandatory arbitration clauses in consumer and employment contracts, healthcare and other industries.

Chris Kenney chairs the MBA's Consumer Advocacy Task Force. Jaimeson Porter and Sakib Khan of Kenney & Sams are Task Force members. The Task Force was established in 2013 to advance the MBA's commitment to protecting consumer rights.

Please visit the MBA's Consumer Law Resource Center on [www.MassLawHelp.com](http://www.MassLawHelp.com) to see helpful links, tips and videos that address some of the most frequently asked consumer questions.

## National Institute of Trial Advocacy



David Kerrigan and Mike Sams recently taught trial skills to lawyers from around the country who came to Boston for the National Institute of Trial Advocacy's Building Trial Skills program. NITA is the nation's leading provider of legal advocacy skills training, and it utilizes trial experts such as Mike and David to teach training programs in cities across the United States.

## How to Right Construction Projects that Go Astray

Chris Kenney recently participated on a construction panel hosted by Simpson Gumpertz & Heger debating the benefits and challenges to building successful projects in today's demanding design and construction markets.



Best-laid plans can often go astray, both for typical and atypical projects. How disruptive or acrimonious challenges become often depends on how team members react to issues when they arise. This panel discussed the best practices to address how to plan for and react to unexpected problems and how to protect your firm from

## A Day of Expert Witness Training

Mike Sams recently participated as faculty in a day of expert witness training for members of the Massachusetts Chapter of the National Association of Certified Valuators and Analysts, to help prepare them while delivering their services in the litigation context.



**National Association of  
Certified Valuators and Analysts**



## Defense Counsel Training Manual

Chris Kenney authored a chapter in the Defense Counsel Training Manual on effective discovery techniques for civil litigation.



## Boston Collegiate Charter School

Kenney & Sams takes home the trivia trophy during the recent Boston Collegiate Charter School fundraising event. The school was founded to help prepare children in the Boston community for college by providing a quality education in a challenging atmosphere.

## Kenney & Sams Supports Razia's Ray of Hope Foundation

Razia's Ray of Hope Foundation promotes education as a key to positive, peaceful change for current and future generations, empowering girls and young women to work toward bright futures in the villages of Afghanistan and beyond.

To learn more, click here:  
[Razia's Ray of Hope Foundation](#)

*As founder of the Zabuli Education Center, I thank you for your support. Your sponsorship of these students will empower them with high quality education and a brighter future.*

*Together we are changing the lives of our students and the future of Afghanistan.*

*Thank you.  
Razia Far*



Trial-Think ['tri(ə)l thingk] *noun*

1. An approach to dispute resolution and risk management that brings trial experience, preparation and effectiveness to everything we do for our clients.

**Litigation - Construction Law - Employment Law - Business Law - Insurance Law - Risk Management**

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