

## Fences and Neighbors

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**“Good fences make good neighbors.”** ~ Robert Frost, [\*Mending Wall\*](#)

Risk managers and careful business owners definitely equate contracts and agreements with Robert Frost’s fences. The connection between fences and neighbors isn’t explained, but we can guess: good fences, like good agreements, clearly delineate property, responsibility, certain risks and expectations, to name but a few. And the best agreements, like well-made fences, may never, or rarely, need mending.

*Recently a client was troubled by his outsourcing of potentially dangerous operations to others – on just a handshake. “I’ve known this guy forever; he’d never do me wrong, but is this the best for both of us?” The operations had grown and evolved; the work was now different and more complex. It was no longer clear who was checking what, making sure licenses and permits were in order, hiring the right workers, buying the right insurance protections, etc.*

### Clarity is key ~

And that’s why all agreements must be written down. We’ve known for a long time that critical thinking is honed and clarified by writing. It’s easy to say, “I want a tuna sandwich.” The smart waiter will ask and note your options on the order – lettuce, tomato, mayo, brown, toasted, extra pickle, to go, rush, etc. Without that clarity, there’s a strong chance you won’t get what you expect and noses get out of joint!

Agreements, contracts, leases, even POs, must be carefully scrutinized to make sure everyone’s on the same page, expectations are being met, and nothing’s been left out. This scrutiny must really be done by *both* an attorney and an insurance professional (consultant or broker): it’s hopeless to just understand the risks without also understanding your protections.

*Construction agreements can be rife with unexpected and nasty clauses, called ‘risk transfer.’ Subcontractor clients are particularly at risk from ‘standard’ contracts with owners and GCs. Recently we were able to push back on some “you’re responsible for everything except my sole negligence” clauses to get a more balanced allocation of risk and liability. Then we were able to make sure the right waivers and insurance protections were in place – on both sides.*

### What needs your attention?

Agreements are your first line of prevention and defense. Use them to allocate risks to those who are best suited to understand and handle the consequences and losses.

- Agreements need to be fair – no one can lambaste a smaller or un-equal party with outrageous responsibility and get away with it in court; push back on the “you’re responsible for everything” clauses that make no sense.
- Make sure dispute resolution is handled upfront – spell out what you both want to happen – when, where and how– if you disagree.
- Watch out for ‘boiler-plate’ contracts from larger firms – they often do not clearly deal with your situation or needs: for example, don’t accept ‘venue’ or ‘choice of law’ that’s not local to your business.
- Be very careful about requirements for insurance protection – these are often poorly or incorrectly expressed and can make your compliance impossible.