



2012 Risk Management and Professional Liability Law Seminar

**Presented to:
Foundation Performance Association
October 10, 2012**

Litigation Lessons Learned

- 1) Contract – make sure it is complete and comprehensive

- 2) Design Phase
 - a) owners expectations and informed consent
 - b) environmental conditions
 - c) value engineering

- 3) Construction Administration (“CA”)
 - a) Submittal Phase
 - i) procedure/process
 - ii) forms/required information
 - b) Requests for Information (“RFI’s”)
 - i) procedure/process
 - ii) forms/required information
 - c) Site Observations
 - i) know expectation of client
 - ii) document progress
 - iii) reporting to client and general contractor

Risk Management Starts Before The Firm is Retained

- Location of Project
- Sophistication and Expectations of Client
- Expertise of Entire Design Team
- Clear Contract Documents
- Forum for Dispute Resolution
- Defined Document Retention Policy

Sophistication of Client

- Are you dealing with a local, state or federal governmental entity.
- What expectations does the client have of you and your firm.
- Is the client known for being highly litigious?
- Informed Consent

Great your engineering firm has been hired! Now what?



- Create and maintain possession of ALL contract documents for a project
 - Executed A/E Contract
 - *A Clear and Unambiguous Written Contract is the key to both avoiding legal disputes and limiting liability*
 - Project General Conditions
 - Prime A/E Design Contract
 - Project Manual
- Assimilate qualified design team with clear understanding of the firm's scope of work and required contract terms
 - Project Engineer and Managers "must" know terms of contract documents and defined scope of work

Key Contract Terms

Scope of Engineers Basic Services

- Design Phase
- Submittal/Bidding Phase
- Construction Phase
 - Contract Administration (CA);
 - Periodic Site observations only with no duty to “inspect” work of contractor;
 - Not responsible for errors of contractor for inadequate construction means and methods;
 - Not responsible for job site safety or training

Key Contract Terms - cont'd.

- Owner's Responsibilities

- If more than one prime contract, designate person or entity that will have authority to coordinate all activities of design team.

- Furnish to PE all pertinent information regarding the project, including reports, previous designs or investigations at or adjacent to site.

- Provide timely written responses to alternative designs.

What do I do if I am concerned about a potential future claim?

- Gather all available information concerning the scope of any potential claim
- Assimilate project file and preserve all available evidence
- Notify Professional Malpractice Insurance Carrier
 - Many insurance carriers will retain counsel at their expense
- Retain and consult legal counsel
 - Creates a legal privilege that may protect information from disclosure
- Investigation and Documentation
- Notify other interested members of the design team

Time Limitations to Assert a Claim and Potential Claims

- Texas Statutes of Limitations
 - Negligence: 2 years
 - Breach of Contract: 4 years
 - Breach of Warranty: 4 years
- Statute of Repose (CPRC 16.008)
 - 10 years from date of substantial completion of project
 - Recent Exception - Pochucha v. Galbraith Engineering Consultant, Inc., 243 S.W.3d 138

REQUIRED STANDARD OF CARE

By what standards will I be judged in the event of litigation?

- applicable standard of care is often specified in A/E contract

“Professional negligence in the context of engineering services means doing that which an engineer of ordinary prudence in the exercise of ordinary care would not have done under the same or similar circumstances, or failing to do that which an engineer of ordinary prudence in the exercise of ordinary care would have done under the same or similar circumstances.”

- Highest Standard of Care vs. Ordinary Duty of Care

 - Insurance Coverage Concerns

 - Significantly lowers burden of proof required of claimant

Document Retention Policy

- IRS requires you to maintain documents related to tax returns for 5 years.
- Company policy of retaining/destroying documents in place at time of litigation.
- Duty to preserve documents when a party reasonably anticipates litigation.
- This includes preservation of hard drives and/or backup tapes for electronically stored information.
- You should consider keeping your project files for a minimum of 10 years after the date of substantial completion.

Presented By:





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MARSHALL G. ROSENBERG

Marshall Rosenberg joined the firm in 2011, after nearly twenty years at another Houston firm. Marshall has a state-wide practice and serves as regional counsel for multiple publicly traded corporations. His practice areas include construction defect disputes, commercial real estate litigation, and professional liability actions involving architects, engineers, surveyors, and real estate professionals. He further maintains an active practice providing consulting services and contract review for a variety of design professionals, contractors, builders, and developers. He also defends national retailers and restaurant chains in a variety of tort actions.

Marshall has completed the required training and testing to obtain the designation of "Certified Graduate Builder" by the National Association of Home Builders and is the only known full-time practicing attorney in the United States to obtain such recognition.

Marshall has written and lectured for various continuing legal-education programs. He is an active participant in construction industry organizations and programs. He regularly attends building industry classes and has successfully completed both on-site and classroom training involving commercial and residential construction.

Marshall received an AV ("Preeminent") peer review rating, the highest attorney rating available from Martindale-Hubbell.

Mr. Rosenberg was chosen as a *Texas Rising Star*® in the field of construction litigation by Thompson Reuters in 2005. He was selected for the Top Lawyers list by H Texas Magazine in 2005.

He was elected in 2012 to serve on the Board of Directors of the Foundation Performance Association, a nonprofit professional organization dedicated to advancing the knowledge, performance, and standards of engineering, construction, and repairs related to foundations, soil and structures.

AREAS OF PRACTICE

- GENERAL NEGLIGENCE AND COMMERCIAL CLAIMS
- CONSTRUCTION
- PREMISES LIABILITY
- PROFESSIONAL LIABILITY

EDUCATION

- Baylor University School of Law, J.D. 1991
- University of Texas at Austin, B.B.A., Finance

BAR & COURT ADMISSIONS

- Texas
- U. S. District Court for the Southern District of Texas
- Fifth Circuit Court of Appeal

PROFESSIONAL AFFILIATIONS & ACTIVITIES

- State Bar of Texas (Construction Law Section member)
- Houston Bar Association
- American Bar Association
- Texas Association of Defense Counsel
- Greater Houston Builders Association
- National Association of Home Builders
- Foundation Performance Association
- Urban Land Institute

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