

ACEC of Maine

“Keeping the Challenges of Risk in Check”
Panel Discussion

Panelists

- Rebecca Farnum, Esq. of Thompson & Bowie
- Gregg Ritter of Clark Insurance
- George Ames of Maine PE Board
- Moderator: John Nelson of Wright-Pierce

Tough Economic Times

- Clients shifting more risk to engineers without additional fees
- Tighter client budgets means tighter scopes
- Temptation to take on more risky clients or not have contracts as tight as normal
- Competing against more firms, both traditional and non-traditional competitors

Tougher Payment/Bankruptcy

- Financial review of clients before signing
- Use of retainer and don't work beyond it
- Be proactive with payment problems
- Mechanics liens

Mechanics Lien

- Maine's Mechanic Lien Statute establishes a lien on real property for the value of provided services.
- To preserve this inchoate right, you must
 1. File a lien in the registry of deeds within 90 days after ceasing to provide services with a copy to the Owner;
 2. File an Enforcement Action within 120 days after last service

Practical Tips

- Statutory Remedy must be followed precisely and fully
- Anticipate a Counterclaim in response to the Enforcement Action
- Inform professional liability carrier that you intend to file this type of action which may trigger the retaliatory action

PE Ethics and Rules

- Requirements for stamping
- Noteworthy disciplinary actions
- Most common disciplinary actions
- Unlicensed practice

Requirements for Stamping

- Laws and Rules are published yearly in Semi-annual Report and off year Supplement
- Refer to Rules section, Chapter 2, Section 11 – Licensure Seals, Page 224 for stamping requirements.
- Seals are not required when properly identified as preliminary or working documents submitted for review purposes.

Requirements for Stamping

- Apply seal, sign and date in the following:
 - All plans or documents filed with public bodies.
 - All plans, specifications, reports prepared by or under direction of engineer.
 - All plans, specifications, and documents issued for bids or estimates and for construction.
- Where documents are bound together, seal on cover sheet is permitted if statement of number of sheets is included.

Requirements for Stamping

- Any licensed engineer may apply a seal on any plan or documents, provided that:
 - Documents prepared or reviewed by or under engineer's supervision,
 - Engineer takes full responsibility for them,
 - Whether or not adequate compensation is received!
 - Again, “You stamp it, you own it”!

Noteworthy Disciplinary Actions

- There are no recent noteworthy actions!

Common Causes of Discipline

- Last 5 years there were 33 complaints against Engineers, of these 7 involved violations of the continuing education requirement
 - 14 - Resolved by Consent Agreements
 - 2 - Resolved by Hearing
 - 4 - Resolved by Letter of Guidance
 - 12 - Dismissed
 - 1 - Pending

Common Causes of Discipline

- Last 5 years there were 19 unlicensed complaints:
 - 8 referred to AG's office
 - 1 referred to Architect's Board

Unlicensed Practice

- PE Board (and all Boards) does not have “police powers”.
- PE Board has no authority over unlicensed practice, except for investigation of complaints.
- Board has recently investigated a number of firms who advertise “engineering”, but who have no licensees on staff.

Unlicensed Practice

- Best to submit a written complaint to PE Board.
 - Direct all complaints to Board office, not to individual Board members!
 - Complaint is investigated by Complaint Committee, then decided by full Board
 - If Board determines violation, then issue is turned over to Assistant Attorney General (AAG)
 - AAG writes letter directing them to cease offending activity

Electronic Documents and Risk

- What kinds of exposure do we have
- Rules regarding stamping and signing of electronic documents
- When should/can drawings be given electronically to contractors and what do we do to reduce the risk

Reduce Risk of Electronic Docs

- Contract terms
 - Changeable media, so accuracy cannot be guaranteed and hence stamped plans rule
 - Not for use by anyone else or for any other project
- Obtain signed waiver from receiving party
- Perform QA/QC on CAD data and files
- Contractors cannot use for construction, limit to record drawings...obtain waiver.

Electronic Documents

- Signature of responsible professional engineer must accompany the seal.
- Signature may be electronic, see definition in 10 MRSA Section 9402.
 - Sealed documents may be transmitted electronically.
 - Each licensee is responsible for the proper use of the seal.

Control of Electronic Documents

- Good idea to obtain signed waiver from the receiving party that specifies limits of how documents are to be used and release of liability of engineer if misused.
- For record CAD files to client, best to replace seal with disclaimer (NCEES recommends):
 - stating that drawing was originally stamped by (engineer) and (date) and
 - Warning that file may have been changed from original stamped drawing

Why have a written contract?

- Achieves a Mutual Understanding
- Opportunity to Educate Your Client
- Defines Scope of Work
- Identify and Allocate Project Risks
- Reduce Potential for Disputes
- Makes Your Lawyer Happy!



Overview of Contract Terms

- STANDARD OF CARE
- INDEMNIFICATION CLAUSES
- GUARANTEES/WARRANTIES
- PAYMENT ISSUES
- AVOIDANCE OF MEANS
METHODS,TECHNIQUES
- REUSE AND OWNERSHIP OF DOCUMENTS

OTHER ESSENTIAL CONTRACT PROVISIONS

- Risk Allocations Provisions
- Insurance
- Electronic Communications
- Dispute Resolution Provisions
- Safety Obligations
- Termination

Standard of Care

- Consensus Documents: The Architect/Engineer represents that it possesses the requisite skill, expertise and licensing to perform the required services.
- Generally should have a statement in the contract that makes clear that Engineer will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession in similar situations.

Practice Pointers

- When negotiating the scope of professional services, delete the word **all** which typically will appear as follows:

“all applicable statutes, codes, regulations.”

Compliance may not be possible. Try to insert, as best as practicable.

This standard of care is insurable.

Indemnification Provisions

- What are they?
- Indemnification is an agreement to assume a specific liability in the event of a loss. It may mean shifting a risk to another party who, but for this contractual agreement, may not be responsible for either that risk or the damages arising from it

Sample Indemnity Clause

- The Engineer agrees to the fullest extent permitted by law, to indemnify and hold harmless the Client, its officers, directors and employees against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Engineer's negligent performance of professional services under this Agreement and that of its subconsultants or anyone for whom the Engineer is legally liable

Practice Tips

- Read the Requested Language Carefully
- Request that the Scope of Your Indemnification be Insurable – Get Help from Your Insurance Agent
- Limit the Indemnification to Damages Arising Out of Your Own Negligence
- Try Not to Agree to Defend or to Cover Attorneys' Fees and Other Defense Costs
- Recent Duty to Defend Cases

Practice Tips (con't)

- Try to Limit the Indemnification to Your Legal Liability
- Remember to Incorporate Similar Clauses if You Have Subconsultants or Subcontractors

Limitation of Liability Clauses (LOL)

- What are Limitation of Liability Clauses?

Limitation of liability clauses are contract provisions which establish the maximum liability the party will be responsible for to the other party on the project

Purpose of LOL

- To Allocate a Project's Risk in Some Reasonable Proportion to the Profits and Other Benefits to be Derived by Each Party
- Limitation of Liability Clauses Do Not Completely Insulate You from Liability –Merely Places a Monetary Limit on the Party's Liability

Sample: Limitation of Liability Clause

- To the maximum extent permitted by law, the Owner agrees to limit the Engineer's liability to the Owner and to all Contractors and Subcontractors on the project, due to the Design Professional's negligent acts, errors or omissions, such that the total aggregate liability for any and all claims, losses, costs or damages of any kind, resulting from the provided professional services, shall not exceed \$50,000 or the Engineer's total fee for services on this project, whichever is greater
- The Exact Terms under Which Limitation of Liability Clauses Are Enforceable in Maine Are Not Clear

Practice Tips

- In Maine, You Must Include the Word “Negligent” (Superior Court decision)
- You Can Use the Cap “to the Amount of Available Insurance”
- Do Not Hide this Clause – Make Sure it is Discussed and Agreed to!
- Have a Reasonable Cap
- May Need to Have a Signed Contract –Not Simply a Letter Confirming Agreement
- Coordinate the Limitation of Liability Clause with any Indemnification Language

Certifications/Warranties

- Engineer acknowledges that Client is relying upon Engineer's skill and judgment in the performance of the Services. Engineer expressly warrants to Client (a) that the Services will conform with all applicable standards in effect at time of performance, including, without limitation, any applicable federal, state or local law, regulation, rule, requirement, standard, code, ordinance or order, or any applicable insurance or industrial codes in effect as of the date of performance of the Services (including, without limitation, applicable OSHA and environmental protection laws and regulation), (b) that the engineering services provided hereunder will satisfy the design of the applicable project, (c) that Engineer's work will conform with the requirements set forth in the applicable Scope of Work, (d) that Engineer will perform its work in accordance with sound generally accepted practices in effect at the time of performance of the Services, and (e) any work product generated by Engineer will be free from defect, omission or error as applicable.
- For Demonstration Purposes Only!

What's wrong with this clause?

- Suggestion That There Is Total Accuracy and Confirmation of Absolute Compliance With Standards
- Imposes Liability Without Negligence – Making Your Best Efforts and Judgment Insufficient
- No Standard of Care Protection
- Professional Liability Policies Exclude Coverage for Claims Arising Out of Express Warranties or Certifications

Practice Tips

- **Revise Term:**

To the best of my knowledge, information and belief, the building was constructed in (strict) general conformance with the project contract documents and in my professional opinion complies with applicable laws, codes and ordinances.

Practice Tips

- Define Certify:

“As used herein, the word certify shall mean an expression of the Engineer’s opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by Engineer.”

Practice Tips

- Watch Out for Words Such as “Insure”, “Ensure”, “Assure”, “Complete”, “Every” and “All”.
- Discuss with Client that a guarantee of Services Is Neither Realistic nor Effective.
- Legal Standard is One of Good Practice, Not a Warranty (distinguish Contractor providing materials and products)
- No Insurance to Coverage the Warranty

Practice Tips

- Anticipate the last minute demand for a certification, consider a contract clause like:

The Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer having to certify, guarantee or warrant the existence of conditions whose existence the Engineer cannot ascertain.

Dispute Resolution Clauses

- May be one of the most contentious provisions to be negotiated
- Many of the standard form contracts include mediation as a condition precedent to proceeding with litigation or arbitration

Reuse and Ownership of Documents

- In B101™–2007, Standard Form of Agreement Between Owner and Architect, the Architect and the Architect’s consultants are deemed the authors and owners of their respective Instruments of Service, and they retain all common law and statutory rights, including copyright. In B101–2007, however, the license granted to the Owner to use the Instruments of Service has been substantially revised from B141™–1997 and B151™–1997. Under B101–2007, the Owner receives a license to use the Instruments of Service solely and exclusively for constructing, using, maintaining, altering and adding to the Project. This license will only terminate if the Architect rightfully terminates the Agreement for cause due to the Owner’s default. In the absence of such a termination by the Architect, the Owner retains the license to use the Instruments of Service after completion of the Project or the Owner’s termination of the Agreement. If the Owner subsequently uses the Instruments of Services without retaining the author of the Instruments of Service, the Owner agrees to release and indemnify the Architect for such uses. If the Owner rightfully terminates the Agreement for cause, however, the Owner is not required to release and indemnify the Architect for its further use of the Instruments of Service. If the Owner terminates the Agreement for its convenience, or the Architect terminates the Agreement due to the Owner’s suspension of the Project, B101 provides for the Owner to pay a licensing fee to the Architect for the Owner’s continued use of the Architect’s Instruments of Service

Reuse and Ownership of Documents

- Consensus Document Language is more comprehensive and addresses
 1. Copyright Status
 2. Use of Documents in Event of Termination
 3. Owner's Use of Documents after Project Completion
 4. Engineer's use of Documents

Liability Insurance Cases/Coverage

- What types of claims are insurers seeing
- Any change in scope/frequency of claims
- What kind of claims are carriers denying
- What should engineering firms do to protect themselves from these claims and lack of coverage

Alternative Project Delivery Systems

- How do delivery systems other than traditional design/bid impact engineer's risk, liability and professional duties
- Should engineer ever be the lead
- Under what conditions would this be too risky

Design/Build

- Preparation of bid documents for D/B:
 - Drawings may be stamped, but include disclaimer that documents are meant to be a guide for design/build contractor
 - Documents should state requirement for engineered and stamped construction drawings
 - Require coordination of all trades
 - Follow up during construction to ensure suitable engineering was provided by D/B Contractor

Design/Build

- Provide engineering services to a Design/Build contractor:
 - Recommend working with contractors with whom there is mutual respect
 - Do not to stamp other's work unless you have properly reviewed the documents
 - Be careful what you stamp – remember – “You stamp it, you own it!”

Closing and Q&A

- #1 thing that engineering companies should be doing differently to better protect themselves from risk and liability