

Navigating Around and Surviving the Perfect Storm

**Presentation to Van
Oppen & Co. Risk
Management Seminar**

September 23, 2016

8:30am to 12:30pm

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Today's Topics

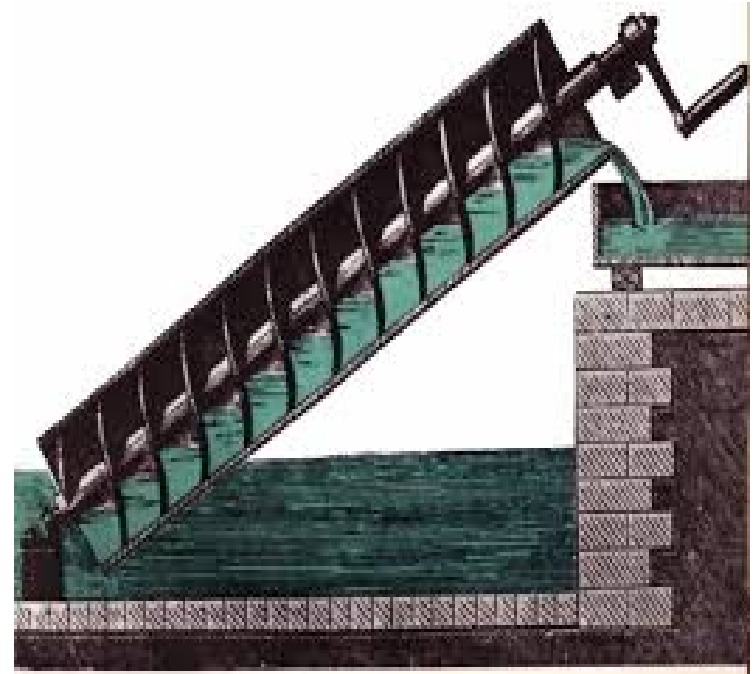
- Risk Navigation and Avoiding the Perfect Storm
- Claims: Some things change but most do not
- Insurance and Contracts
- Some of the Risk Exposures in your Contracts
- Important Contract Clauses ~ Samples
- Contract Management – Consistency is Key



“Perhaps, I’ve said too much.”



Engineering is a very old profession



Risk Navigation is very old too...



Risk Navigation: Beware of Shoals

- Risk issues (aka shoals) have not changed much...
 1. Standard of care
 2. No warranty
 3. Indemnity
 4. Duty to defend
 5. Scope of work
 6. Payment Terms
 7. Document ownership
 8. Limitation of Liability
 9. Attorney/Expert fees
 10. Cert of Merit on steroids



Navigation of risk. Shoals have been wreaking havoc for a very LONG time!



Shoals evolve but they don't change all that much...



OTHER ISSUES OF INTEREST/CONCERN TO ENGINEERS

- Continuity/ consistency amongst offices/ principals
- Doing Condo work – reward v. more exposure – end of program if time allows
- Other risky project types
- With what entity should an Engineer contract if an Engineer has a choice?



The **DANGER!** of Not Having a Signed Contract

- By the time you find out you cannot agree on terms you are too far out on services and now the risk is not getting paid.
- Establish Expectations and manner of Project Communication
- No Contract can lead to Higher Insurance Rates
- First place your insurer and attorney go in the event of a problem
- How to prove your case with no WRITTEN contract?
- Prevent misunderstandings – these are #1 cause of litigation
- Required under certain state regulations like California Business & Professions Code Section 6749 unless you have a written contract, there could be licensure problems.

The Devil's In the Details

- **Professional Liability – Errors & Omissions**
 - No Additional Insured, No Defense to your Client
 - Expenses within Limit
 - NO LD's, YES to Delay “Actual Damages”
 - BI/PD/Economic Loss – Professional Services
- **General Liability – Additional Insured and Defense to your Client**
 - Expense Outside Limits
 - Aggregate by Project
 - Bodily Injury/Property Damage-Other than Services

The Triggers



Professional Liability - Negligence in the rendering of Professional Services as measured by Industry Standard of Care (not client SOC)

The standard of care for all professional services performed or furnished by Consultant under this Agreement **will be the usual and customary care and skill used by members of Consultant's profession practicing under similar Circumstances at the same time and in the same locality.**

SOC is not “best, highest, all, ensure, assure, first class, fit for intended purpose, complete, fully”.

**Usual and Customary = AVERAGE... How do you market your firm?
What are your Client's Expectations?**

Standard of Care

- “A duty to exercise the degree of learning and skill ordinarily possessed by a reputable design professional practicing in the same or similar locality and under similar circumstances.”
- Failure to meet this standard = negligence
- Not the highest or best...



Warranty



- Warranties & guarantees establish liability even in the absence of negligence
- Professional liability policies do not cover claims arising out of express warranties or guarantees.
- There are no warranties (generally) unless you create one

INDEMNITY AND THE **DUTY TO DEFEND**



Reciprocal Indemnity

RECIPROCAL = NEUTRAL

- Engineer indemnifies Owner to extent caused by Engineer's negligence.
- Owner indemnifies Engineer to extent caused by Owner's negligence.
- Neither party obligated to indemnify the other

Indemnity-sample language

- “Consultant agrees to indemnify the Owner, from liability for damages arising out of the performance of Consultant’s services on this project to **the extent that such liability is actually caused by the negligent acts, errors or omissions** of Consultant, its principals, employees or sub consultants. Consultant has no obligation to pay for any of the indemnitee’s defense related costs **prior to a final determination** of liability or to pay any amount that exceeds Consultant’s **finally determined percentage of liability** based upon the comparative fault of Consultant.”

Option 1

Bifurcated Indemnity – Sample language

- With respect to professional services, the Consultant agrees to the fullest extent permitted by law, to indemnify and hold Client harmless from any damages, liability or cost **to the extent caused** by the Consultants established and adjudicated negligence and only in **direct proportion** thereto. The Consultant is not obligated to indemnify the Client in any manner whatsoever for the Clients negligence, whether active, passive or otherwise. The Client is not obligated to indemnify the Consultant in any manner whatsoever for the Consultants own negligence, whether active, passive or otherwise. Consultant shall defend itself from any actual or alleged claims arising from the Consultant's services under this Agreement. Consultant agrees to **reimburse** the Client for **reasonable attorney fees** or expenses incurred to defend the Client from any claims that are ultimately determined by an adjudication (or formal dispute resolution process) to have been **caused by and only in direct proportion** to the Consultant's negligent performance.

Option 2

Scope of Work

- Never oversell what you are going to do in the actual contract.
- Carefully state what you plan to do for a basic fee; what you will do for extra compensation; and what you will not be doing on the project.
- Understand challenges and tell client early.



Scope of Work

- Avoid ambiguity in scope terms...clearly define proposed services.
 - Ambiguity = lawyers' playground!
- Draft Scope of Services with third parties in mind (an entity not a party to the contract); strangers get to interpret YOUR contract if there is a dispute.



Scope of Work

- Examples of ambiguous terms or clauses:
 - “Provide *any and all* services required for project completion.”
 - “Provide *complete* design services.”

Payment Terms

- Make sure your client can pay you!
- It does not matter what the contract says if the client is not properly funded.
- Be sure to establish who the true owner of the project is to establish lien rights
- Secure retainer FIRST and signed agreement
- Ever heard of Google?



Payment Terms

- Clearly define when payment is due. 30-45 days or stop work w/ no repercussions
- Define and discuss penalties for non-payment or late payment, such as
 - Stop work
 - Interest
 - Payment for Collection and Legal fees
- DO NOT work for free
- Avoid continue to work when portion of fees “disputed”

Ownership of Documents

- Copyright not as significant given role of Engineer
- Silence on Copyright can be “golden”
- Ownership provides leverage
- Reuse typically not a problem given standard scope of Engineers

Sample language

- Payment to the Design Professional shall not be withheld, postponed or made contingent on the construction, completion or success of the project or upon receipt by the Client of offsetting reimbursement or credit from other parties causing additional services or expenses. No withholding, deductions or offsets shall be made from Design Professionals compensation for any reason unless the Design Professional has been found to be liable for such amounts. Payment of Design Professionals fees shall be a condition precedent to bringing any action or suit against the Design Professional.

Ownership of Documents-

Sample language

- If required by contract and only upon full payment to the Consultant, Client may take ownership of the Consultants work product. Any reuse or modification of the project documents by Client shall be at Client's sole risk and Client agrees to indemnify, defend and hold Consultant harmless from all claims, damages, and expenses, including attorney's fees, arising out of such reuse or modification by Client or by others acting through Client.

Replacement of Consultant - Sample language

- If your work is completed by others, an indemnity is strongly advised.
- If the Consultant for any reason does not complete all the services contemplated by this agreement, the Consultant cannot be responsible for the accuracy, completeness or workability of the contract documents prepared by the Consultant if used, modified or completed by another party or the Client. Accordingly, the Client agrees, to the fullest extent permitted by law, to indemnify, defend and hold the Consultant harmless from any claim, liability or cost (including reasonable attorneys fees and defense costs) for injury or loss arising or allegedly arising from such reuse, modification or completion made by any party to any contract documents prepared by the Consultant.

Limitation of Liability

- Insist on at least:
 - Limits of insurance
- Better to seek:
 1. Limit based on total fee or
 2. A set amount; and
 3. The limit is the higher of 1 or 2 (or lower if you like to gamble)

Limitation of Liability

- Standard Example:
 - Owner agrees to limit Engineer's liability for Owner's damages to the sum of \$50,000.00 or Engineer's fee, whichever is greater
- "Higher of the two" supports enforceability

Limitation of Liability

- Real world example
- Sunnymead Ranch development in Riverside, CA
- Markborough v. Superior Court - 227 CA 3d 705 (Feb. 11, 1991)
- Owner agrees to limit Engineer's liability to \$50K or Engineer's fee, whichever is greater
- "Higher of the two" can support enforceability

Limitation of Liability

- Client was small engineering company
- Plaintiff was Markborough. Division of Hudson Bay
- \$5M+ catastrophic loss in 1986
- Clay lining of man-made lake failed
- 2nd opinion (aka cheaper) from another soils engineer led to failure
- Court held for Glenn under CA Civil Code 2782.5

Limitation of Liability

- Case of first impression and still good law in CA
- “negotiating and expressly agreeing”
- The clause is valid if the parties had the ability to accept, reject or modify the provision
- The cover letter saved the day. Not the contract...

Damage Waivers

- Usually a Mutual waiver
- Waiver of consequential damages
- Waiver of punitive damages
- Start broad and add some detail
- Waiver of claims against principals, engineer of record and employees
- See Corporate Limitation

Corporate Limitation – Sample language

- It is intended by the parties to this agreement that the Consultants services in connection with the project shall not subject the Consultants individual employees, officers or directors to any personal financial exposure to the risks associated with the project. Therefore, and notwithstanding anything to the contrary contained herein, the Client agrees that its sole and exclusive remedy arising out of any claim, demand or suit shall be directed and/or asserted only against the Consultant, a California Corporation _____, and not against any of the Consultants officers, directors or employees including the engineer of record.

Attorney Fees

- Prevailing party clause – some risk
- Actual v. Reasonable
- Insurance Coverage issues
- What about expert fees?
- Pro v. Con
- Discussion

Certificate of Merit on Steroids

- Does not matter if your state requires it
- Create it contractually
- Set forth key terms
- Cert from professional in same discipline
- At least 30 days before action filed
- Provide detail as to the breach of contract and/or standard of care

CONDOS

- Super dangerous building type
- Conversions are a problem – recent situation
- Assist in writing the by-laws
- Insurance Coverage issues
- Expert fees can be very costly
- Attorney fees can be very costly
- Pay the deduct/pay a penalty/strict language
- No “silver bullet” but there are things that can be done to navigate this risk

What is not covered?

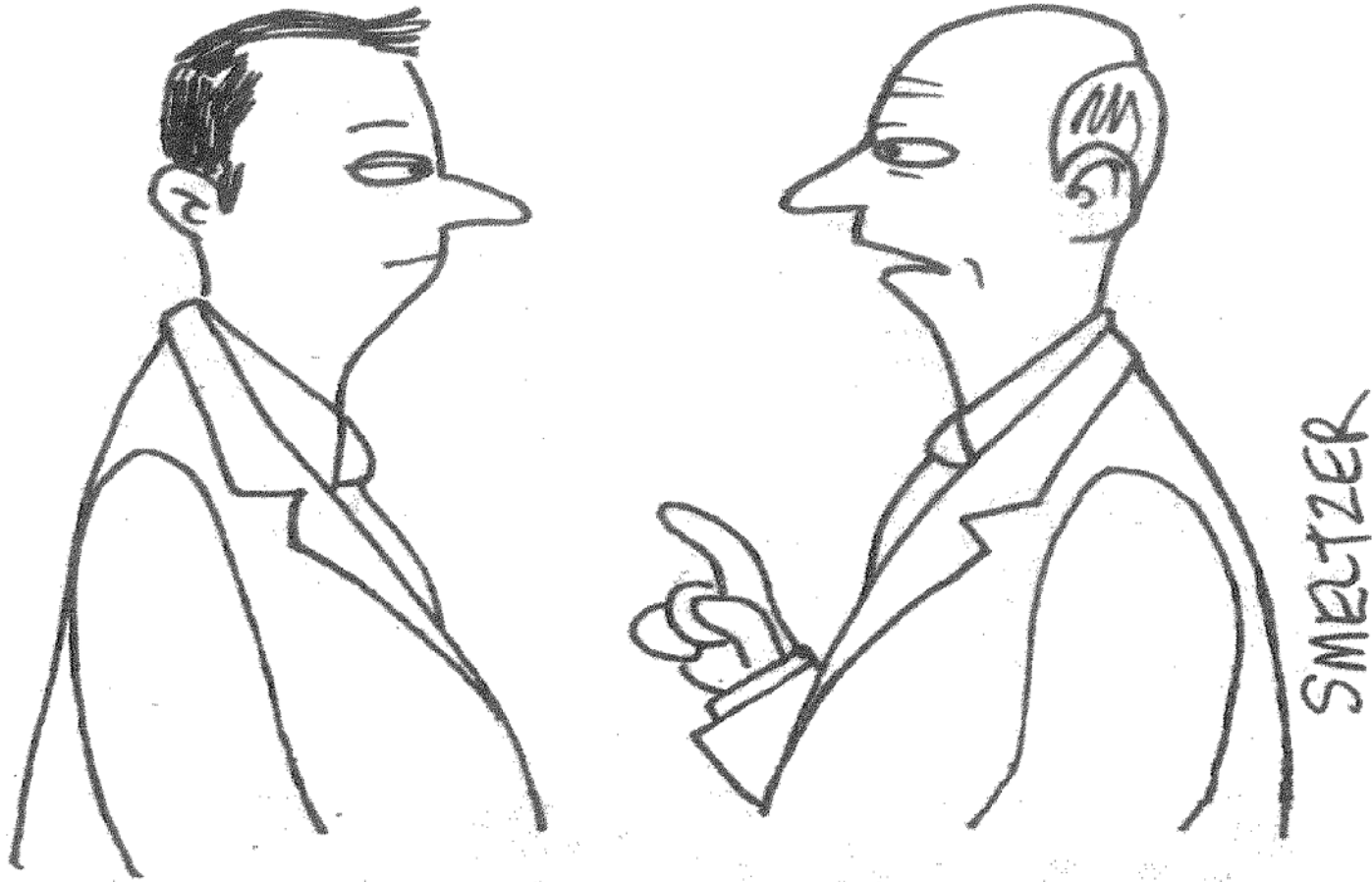
- Your deductible
- Your time
- Your sleepless nights
- Your reputation
- Your Client relationship
- Reduction of or lost fees, profits
- Liquidated damages
- Contractual assumptions made that you would not otherwise legally have in absence of contract – DUTY TO DEFEND!
- Construction Related Risk –
- SECURE CERTS FROM ALL SUBS WITH A/I, PRIMARY AND WAIVER
- What about 2-10 years down the road and subs going bare or business gone?

Conclusion

Beware the fine print...



Questions?



*"Give a man a fish and you feed him for a day.
Teach a man to fish and you can charge a consulting fee."*



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