

Hall & Company A/E Resource Webinar



LIABILITY PROTECTION AND BUSINESS TRANSITION ADVICE FOR ENGINEERS AND SURVEYORS

DAVID ECKBERG



OVERVIEW



- I. Liability of Engineers and Land Surveyors; How to Manage your Risk**

- II. Ownership and Transition and Exiting your Practice**



I. Theories of Liability

- **Most Common: Negligence**
- **Breach of Contract**
- **Negligent Misrepresentation**
- **Fraud**
- **Willful Misconduct**
- **Breach of Warranty**

NEGLIGENCE



Defined: Breach of the Standard of Care that Proximately Causes Negligence

Standard of Care

**Similarly situated Professionals
Practicing in the Same Region**

At the time the Services are Performed

Proximately Causes

Reasonably Foreseeable

Client and potential Third Parties

Damages

Actual Damages

Per se Negligence

BREACH OF CONTRACT



- **A Promise in Writing (or can be oral)**
- **Failure to Meet the Promise**
- **Causes Damages**

NEGLIGENT MISREPRESENTATION



- **False Statement of Fact**
- **Made Negligently (not intentionally)**
- **Example: Representation of Successful Development**
 - Permitting
 - Third Parties

OTHER CAUSES OF ACTION



- **Fraud**
- **Willful Misconduct**
- **Breach of Warranty**

HOW LONG DOES THE LIABILITY EXTEND



Statutes of Limitations (Depends on Each State)

Accrues from time plaintiff knew or should have known

- A. Negligence: 3 years**
- B. Breach of Contract (written): 6 years
(oral) : 3 years**
- C. Fraud: 3 years**
- D. Breach of Warranty (written): 6 years**
- E. Negligent Misrepresentation: 3 years**

Statute of Repose

CASE HISTORIES



RISK MANAGEMENT PRACTICES



A. Understand What You Are Getting Into

- 1. Know the Project**
- 2. Know the Client**
- 3. Know the Other Parties**



B. The Contract!!

- 1. In writing and executed by both parties
BEFORE beginning**
- 2. Issues with “offer” and “acceptance”**
- 3. Well Defined Scope of Work**
- 4. Limitations/Exclusions**



C. Key Terms

1. Indemnifications

a. From Client

b. To Client

2. Standard of Care

3. Limitation of Liability

4. Time Bar to Claims

5. Alternative Dispute Resolution

Sample Provision:

Client expressly agrees that to the fullest extent permitted by law, Professional's maximum liability to Client for claims arising from Professional's professional acts, errors, or omissions, shall be the amount of Professional's fee for professional services or \$50,000, whichever is greater. In the event Client desires a higher limitation of liability, Professional may increase this limit for a higher fee commensurate with the increased risk to Professional, and this paragraph will be amended by separate written agreement. As used in this paragraph, the term "liability" means liability of any kind, whether in contract (including breach of warranty), in tort (including negligence), in strict liability, or otherwise, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Professional's services or the services of Professional's subcontractors, consultants, agents, officers, directors, and employees from any cause(s). Professional shall not be liable for any claims of loss of profits or any other indirect, incidental, or consequential damages of any nature whatsoever.

Sample Provision:

Interpretations and enforcement of this AGREEMENT shall be governed by the laws of the State of _____. All legal actions by either party against the other related to this AGREEMENT, shall be barred after one year has passed from the time the claimant knew or should have known of its claim, and under no circumstances shall be initiated after two years have passed from the date by which Professional completes its services.



D. Building and Maintaining Good Client Relations

E. Project Documentation

F. Reliance on Third Party Materials

1. Copyright

2. Authorizations

3. Consider Separate Agreement

4. Limitation in Contract



G. Insurance

- 1. Professional Liability**
- 2. General Liability**
- 3. Auto Liability**
- 4. Workers Compensation**

BUSINESS TIPS





I. Business Forms

A. Corporation

B. Limited Liability Company

C. Professional Corporation

D. Professional Limited Liability Company



II. Company Ownership

A. PLLC v. LLC; PC v. Corp

B. Shareholders' Agreements; Member Agreements

1. Restrictions On Ownership

2. Pricing Formula

3. Transfers/Company Redemptions



III. Ownership Transfers

A. Internal Transfer Plan

- 1. Planning**
- 2. Financing**
- 3. Use of ESOPs**



B. Third Party Equity Infusions

- 1. Control Issues**
- 2. Culture Disruption**
- 3. Strong Growth Focus**



C. Mergers and Acquisitions

1. Finding the Right Marriage

2. Process

i. NDA Agreement

ii. Exchange preliminary information

iii. Letter of Intent

iv. Due Diligence

v. Definitive Documents

vi. Closing

vii. Integration



- 3. Stock (Equity) Transactions**
Pros/Cons for Buyers and Sellers
- 4. Asset Transactions**
Pros/Cons for Buyers and Sellers
- 5. “Tax Free” Transactions**



6. Key Issues

- i. Continuing Involvement of Seller Owners**
- ii. Employment Agreements**
- iii. Payment Terms**
- iv. Earn-Outs**
- v. Liability tails**
- vi. Post Closing Integration**



D. Securities Concerns in Ownership Transitions

- 1. Federal Securities Laws**
- 2. State “blue sky” Laws**
- 3. Exemptions**



IV. Exiting Your Practice

A. Records Retention

B. Dissolution of Company

C. Winding up Business Affairs

D. Complying with Statute to Minimize Liabilities

E. Tail Insurance



QUESTIONS

