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IN THIS ISSUE (click on each subject line to read more)

Be Careful What You Say: It could be used against you

Raise the Stakes to Lower the Risk: Proper documentation essential for surveyors

Legislative Roundup:

- California engineers and surveyors must use written contracts
- Maryland court to design firms: No certificate of merit required to support lawsuit
- Connecticut Certificate of Merit law stalled — Good Samaritan law adopted

Welcome to **Stamped, Sealed and Delivered**, our quarterly newsletter designed to inform architect and engineer professionals like you of the potential risks that impact your business and suggest ways to prevent them. **Stamped, Sealed and Delivered** includes timely, insightful articles collected from our experienced claim specialists — people who work with claims related to your profession every day. We hope this newsletter will help you recognize the exposures that could affect you, both professionally and personally, so you can more confidently provide services to your clients.

BE CAREFUL WHAT YOU SAY

It could be used against you

A client asked an engineer to review the structural integrity of an apartment building that the client intended to convert into condominiums. After the engineer submitted his plans, the client asked him for further assistance. Three contractors had expressed an interest in working on the project and the client asked the engineer for help in selecting the contractor.

The engineer was only familiar with one of the firms and, based on that information, recommended that contractor to the client. When the unsuccessful contractors asked why they were not selected, the client told them that he made his decision based on input from the engineer.

The engineer was promptly served with a lawsuit by one of the contractors who was not selected. In the complaint, the contractor accused him of saying untruthful things about him to the owner. He further alleged that the engineer was guilty of restraint of trade for trying to prevent him from working in the area.

Although the claim may be defensible, the whole situation could have been avoided. The engineer should have refrained from making a contractor recommendation to the client. Instead, he should have limited his advice to criteria for the contractor selection and left the actual decision to the client.

Certain selection criteria can safely be provided to clients to help them choose a contractor. Following are some questions you can suggest to your clients to help them in the selection process:

- What is the contractor's experience working on this specific type of project or repair?
- Has the contractor made a claim for extras or cost overruns against a project?
- Has anyone made a claim against the contractor as a result of his or her work?
- Has the contractor's general license been suspended or revoked?
- What is the contractor's current bonding capacity?
- What are the contractor's current limits of insurance for general liability?
- What kind of contingency does the contractor build into his or her bid?

If you are unsure of how to proceed, please ask your St. Paul Travelers claim professional or your insurance broker for advice.

RAISE THE STAKES TO LOWER THE RISK

Proper documentation essential for surveyors

It was the end of a long day for a land surveying crew performing residential construction stakeouts. When they were finished, they headed home. They did not prepare any field notes or plug any measurements into their GIS system. They also didn't backup the data on their office computers. After all, what could go wrong? It was just another day on the job and the developer would call them back when it was time to locate the foundation.

Jump ahead a few months. The developer never called regarding the foundation, which had now been poured. Construction had officially begun. Then the land surveyor received a phone call. "We have a problem. The neighbors are complaining that the house is on their property. We have to tear down the house." The problem? The surveyor does not know if his crew committed an error because he has no documentation to reference. And guess who the developer is asking to pay for the mistake? The surveyor.

Claims against surveyors continue to be on the rise. Any time there is a boundary dispute or zoning violation, all eyes are on the surveyor to see what he or she will do to fix the problem.

THERE IS NO MAGIC PILL TO AVOID THIS TYPE OF CLAIM, BUT THERE ARE TIPS THAT CAN HELP PREVENT CLAIMS OR MINIMIZE THEIR SEVERITY.

Use written contracts

Define the scope of services you are providing. Include a limitation of liability provision. What type of survey are you performing (ALTA, boundary line, construction stakeout)? What area are you planning to survey? What is your fee? What is the basis and method of compensation for your services? Who is your client? You also may want to include a disclaimer of any inappropriate use of the information and specify that you should be called back to the site for a foundation location prior to construction. (As noted previously, California is now requiring engineers and surveyors to use written contracts.)

Use the same surveying crews

Train your surveying crews and make sure there is a licensed senior surveyor on every crew. What training are the surveying crews receiving? Where are you finding your employees for the surveying crew? If you are unsure of how a new surveying crew is working, send a more senior surveyor to assist the crew on several projects to make sure they are surveying correctly.

Implement quality control measures

In order to prevent human error in the field, take sufficient and redundant measurements to detect errors and oversights. Check and double-check these measurements. To prevent potential instrument errors, repeat measures and make proper corrections to the measurements to minimize any systematic errors.

In the office, use your judgment when determining the need for, and the proper method of, adjusting measurements to handle random errors. Also, make sure that all collected and processed data is in durable form (hard-copy), stored safely and retrievable upon demand.

Prior to a construction stakeout, have someone review the survey to ensure the proper survey is being used. You also may want to use some other method or point of reference as proof of where you performed your stakeout, along with the lines and grades, in the event excavating crews or other contractors accidentally move the stakes and put the foundation in the wrong area.

Other potential claims

Claims also may arise when a homeowner or developer obtains a variance from the local zoning board, and the survey and plans are re-drafted based on the local requirements but the stakeout crew still uses the old plans. After the foundation is poured, or the building is already constructed, the neighbors may complain and eventually file a lawsuit.

Will the local board allow construction to move forward or a new house to remain? It depends. One thing is certain – you are dependent on the municipal boards to grant a variance. If a developer has a good relationship with the municipality, a variance might be granted and the construction can continue. If it has been a contentious project, however, the local board may require a foundation to be removed and a building demolished, only to be re-built in the proper place.

Mistakes happen. In the long run, employing methods up front to help minimize the impact of those mistakes can save you time, money and aggravation.

LEGISLATIVE ROUNDUP

California engineers and surveyors must use written contracts

If you're an engineer or surveyor in California who does not use written contracts with clients, you might want to think twice. The California legislature recently enacted a new statute (AB2629) that requires all engineers and surveyors to use a written contract when providing professional services.

According to the statute, the following information must be contained in written contracts:

- A description of provided services
- The basis for service compensation
- The method of payment for services
- Name, address and license number of the engineer/surveyor
- Name and address of the client
- The process for handling additional services
- The process for terminating the contract

If you are not sure which contract form to use visit the Consulting Engineers and Land Surveyors of California Web site at www.CELSOC.org. For a fee, you can download their forms and adapt them for your own particular use.

Maryland court to design firms: No certificate of merit required to support lawsuit

In a potential blow to design professionals, the Maryland courts have changed the Certificate of Merit statutes. In recent months, the courts ruled that a Certificate of Merit only has to be filed in lawsuits against individual architects and engineers — not the firms that employ them.

The court's ruling reverses the predominant interpretation of the Maryland Certificate of Merit law since it was enacted in 1998. The Maryland Court of Appeals ruled on April 9, 2004 that the Certificate of Merit requirement of Maryland Code Section 3-2C-02 of the Courts and Judicial Procedure article is limited to lawsuits against licensed individuals and not to lawsuits filed against their firms.

The ruling stems from a dispute between the Baltimore County municipal government and a Baltimore City architectural/engineering firm. The county hired the firm to perform design and construction-phase services for a project involving construction of a new environmental park. Upon completion of the design professional's contract, a county survey crew found that the firm's sub-consultants committed an error in setting the benchmarks.

The county sued the design professionals, alleging malpractice. The design professionals moved to dismiss, arguing that the county failed to file a Certificate of Merit within 90 days of initiating the lawsuit, in violation of Maryland law. Pursuant to Maryland's statute on when a claimant alleges professional malpractice against an architect or engineer, they were required to file a Certificate of Merit from a qualified expert attesting that the licensed professional failed to meet the applicable standard of care.

On appeal, the county argued that Maryland law required a "license" for individuals and a "permit" for design firms. Thus, the county argued, because the law only expressly governed claims against a "licensed professional," the Certificate of Merit law clearly was not intended to cover design firms and a certificate of merit was not needed.

The Maryland Court of Appeals agreed. The court noted that the Certificate of Merit law's definition of "licensed professionals" includes architects, interior designers, landscape architects, professional engineers and land surveyors/property-line surveyors – not the business entities formed to work in the design professions. The end result? The county's lawsuit was allowed to go forward against the defendant design firms.

Connecticut Certificate of Merit law stalled — Good Samaritan law adopted

In Connecticut, the Certificate of Merit statute has been stalled in committee, but design professionals anticipate its adoption in 2005. Although trial attorneys opposed the bill, it did hold the interest of the legislative committee in 2004. When the vote was scheduled before the session closed, however, several key committee members who purportedly supported the legislation were not present for a vote. Lobbyists for design professionals asked that the bill not be brought up for a vote because they did not want to risk a negative result. The lobbyists are optimistic that the law will be approved in 2005.

Good Samaritan law – disaster response

In the aftermath of 9/11, Connecticut structural engineers who rushed to New York City to assist in the triage process realized that by providing assistance in a time of need, they were exposing themselves to claims. At the time, the Good Samaritan laws only applied to medical personnel. Legislation has been in effect since Oct. 1, 2003, which now gives certain protection to engineers who respond on a volunteer basis to a crisis situation.

In a related development, Connecticut's engineers were able to establish additional immunity under the Disaster Preparedness Statutes in certain circumstances. Some structural engineers in Connecticut formed a committee, the Structural Engineering Coalition Emergency Response Group (SEC/ERG), to prepare for emergency responses — either manmade or natural — in the future. The group has already undergone extensive related training.

To provide additional protection to those afforded under the Good Samaritan laws, members of the SEC/ERG group expect to be sworn in as “volunteers” under the statutes for volunteers assisting the government. The swearing-in should occur in the spring of 2005.

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We hope you found this issue of **Stamped, Sealed and Delivered** to be informative and worthwhile. If you have any questions or comments regarding the articles in this newsletter, or you would like to submit topics for future issues, please contact Dana Coleman Caparoso at 732.205.9297 or at caparos@stpaultravelers.com.



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