



**LEGAL AND LIABILITY ISSUES RELATING
TO BUILDING COMMISSIONING**

Leah A. Rochwarg, Esq. – Seyfarth Shaw LLP
Richard K. Allen, PE, Esq. – Stantec Consulting, Inc.
John F. Penney, PE – John F. Penney Consulting Services, PC
John Andary, PE – Stantec Consulting, Inc.

April 19, 2006

© Leah A. Rochwarg



RISK MANAGEMENT

April 19, 2006

© Leah A. Rochwarg



Manage Risk:

- Contract provisions
- Insurance coverage

April 19, 2006

© Leah A. Rochwarg



Manage Risk:

- Vigilance on Project Site
- Documentation
- Compliance with Industry Standards, References and Guidelines

April 19, 2006

© Leah A. Rochwarg



Manage Risk:

- Compliance with Applicable laws, codes and regulations
- Modified work practices to include back-up or redundant features
- Seek Counsel Where Appropriate

April 19, 2006

© Leah A. Rochwarg



Manage Risk:

- Equipment Selection
- Training
- Disclosure

April 19, 2006

© Leah A. Rochwarg



When things do not go as planned on a Project, problems result...

April 19, 2006

© Leah A. Rochwarg



Each Member of the Project Team May Have a Different Explanation of How, Why and Whether the Project Went Wrong...

April 19, 2006

© Leah A. Rochwarg



If Problems Are Inevitable, How Can I Minimize My Risks On Any Given Project???

April 19, 2006

© Leah A. Rochwarg



For what size and complexity of project is it appropriate for the Mechanical Contractor to assume the CA role, if any?

When the MC takes the CA role, what then are the implications for the PE?

April 19, 2006

© Leah A. Rochwarg



The BCA lists attributes of the CA to uphold the integrity of the profession. One attribute requests that a commissioning agent should advise the owner, in writing, that if the CA works for any party other than the owner a conflict may exist.

April 19, 2006

© Leah A. Rochwarg



BCA Essential Attributes of Building Commissioning:

The CA is an objective, independent advocate of the owner who leads, plans, schedules and coordinates the commissioning team. If the CA's firm has other project responsibilities, or is not under direct contract to the owner, a conflict of interest exists. Wherever this occurs, the CA discloses, in writing, the nature of the conflict and the means by which the conflict shall be managed.

April 19, 2006

© Leah A. Rochwarg



From time to time during the process of commissioning an alternate approach to the mechanical design may become apparent. If the alternate design approach was suggested by the CA and the owner would like to implement it but the engineer of record will not approve it, how does the owner make the change and what is the responsibility of the CA?

April 19, 2006

© Leah A. Rochwarg



As part of the commissioning process the CA performs a review of the engineered documents or shop drawings. Although it is not possible to pick up all the design errors that may exist in the documents, the owner sometimes believes that the CA is responsible to find all errors. What exposure would the CA have in the event of an error not picked up in the design review?

April 19, 2006

© Leah A. Rochwarg



During construction, sometimes the CA may suggest to the engineer a design concern that could, in the opinion of the CA, cause damage or injury if a failure occurs. If the engineer chooses to not accept the CA's suggestion and proceed as designed, what could be the exposure of the CA if a failure occurs a few years down the road?

April 19, 2006

© Leah A. Rochwarg



Does having a professional engineer on the CA's staff affect potential exposure to liability?

April 19, 2006

© Leah A. Rochwarg



During the construction phase the CA provides checklists to the contractor in an effort to confirm construction is complete and functional testing can begin. Often times the contractor runs up against owner occupancy prior to completing the checklists and therefore delays the CA from starting functional testing. The owner is now in the building before the CA has performed the functional test. If a system failure occurs prior to functional testing does the CA have exposure for not performing the functional testing prior to occupancy?

April 19, 2006

© Leah A. Rochwarg



During the functional testing of mechanical and electrical systems equipment is placed in operating and failure modes to see that the equipment performs in accordance with the design intent. If equipment damage occurs as the result of a sequence directed by the CA but in strict accordance with the engineers design, is there exposure for the CA?

April 19, 2006

© Leah A. Rochwarg



Once equipment has been fully tested and a report prepared what responsibility could the CA have for design errors that surface after the equipment has been in operation for a time?

April 19, 2006

© Leah A. Rochwarg



What are the implications of Indoor Air Quality testing as part of the commissioning process?

What happens when IAQ testing performed prior to building occupancy results in one or more failed tests?

April 19, 2006

© Leah A. Rochwarg



Some projects are attempting to perform less than full commissioning?

- Commissioning Light?
- Post-Construction Commissioning?

April 19, 2006

© Leah A. Rochwarg



When things go as planned, the commissioning process:

- Verifies the proper operation of building systems
- Reduces incidence of IAQ issues and comfort complaints
- Helps designers and contractors deliver a project which meets owner's needs

April 19, 2006

© Leah A. Rochwarg



When things go as planned, the commissioning process:

- Reduces Change Orders
- Projects delivered on time and within budget
- Reduces contractor call-backs during warranty period

April 19, 2006

© Leah A. Rochwarg



When things go as planned, the commissioning process:

- Reduces cost of operation and maintenance and equipment
- Improves performance of operations and maintenance staff

April 19, 2006

© Leah A. Rochwarg



When things go as planned, the commissioning process:

- Improves building's asset value
- Improved occupant satisfaction initially and long-term (perception is reality)

April 19, 2006

© Leah A. Rochwarg



Contractual Provisions

April 19, 2006

© Leah A. Rochwarg



Understand What Your Contract Says:

- Waiver of Consequential Damages
- Dispute Resolution – Consolidation/Joinder
- Audit Rights
- Attorneys' Fees, Costs and Expenses

April 19, 2006

© Leah A. Rochwarg



What Does the Contract Say???

- Indemnification
- Limitations of Liability
- Notice Requirements
- Duty to Identify Defective Work and Conduct Inspections As Necessary

April 19, 2006

© Leah A. Rochwarg



What Does the Contract Say???

- Disclaimers of Liability
- Hazardous Materials
- Incorporation by Reference
- Choice of law

April 19, 2006

© Leah A. Rochwarg



What Are the Potential Liabilities?

April 19, 2006

© Leah A. Rochwarg



Understand the Potential Bases for Liability:

NEGLIGENCE

- Duty
- Breach
- Proximate Cause
- Injury

April 19, 2006

© Leah A. Rochwarg



What is Duty?

...To exercise the standard of reasonable care required of members of the profession under similar circumstances...

April 19, 2006

© Leah A. Rochwarg



Where hold self out as a “specialist”, Duty may be higher...

i.e. any failure to perform in a manner consistent with a reasonably prudent HVAC contractor will subject contractor to potential liability

April 19, 2006

© Leah A. Rochwarg



Standard of Care May Vary By Project:

- State of the Art (slide rule vs. CAD)
- Severity of Damage (sidewalk vs. cancer facility)
- Was Damage Foreseeable? (slip and fall vs. 100 year storm)

April 19, 2006

© Leah A. Rochwarg



To Whom is the Duty Owed?

- To the Owner by Contract
- To any person it is foreseeable may be injured by a failure to exercise standard of care.

April 19, 2006

© Leah A. Rochwarg



Understand the Potential Bases for Liability:

- Breach of Contract
- Breach of Warranty-Express or Implied

April 19, 2006

© Leah A. Rochwarg



Understand the Potential Bases for Liability:

- Products Liability
- Negligent Misrepresentation
- Unfair and Deceptive Trade Practices

April 19, 2006

© Leah A. Rochwarg



Understand the Potential Bases for Liability:

- Personal Injury
- Indemnification

April 19, 2006

© Leah A. Rochwarg



What Damages Am I potentially Liable For?

April 19, 2006

© Leah A. Rochwarg



Know the Potential Damages for Liability:

- Direct and Indirect
- Cost to correct or repair defective work
- Cost to correct damaged property

April 19, 2006

© Leah A. Rochwarg

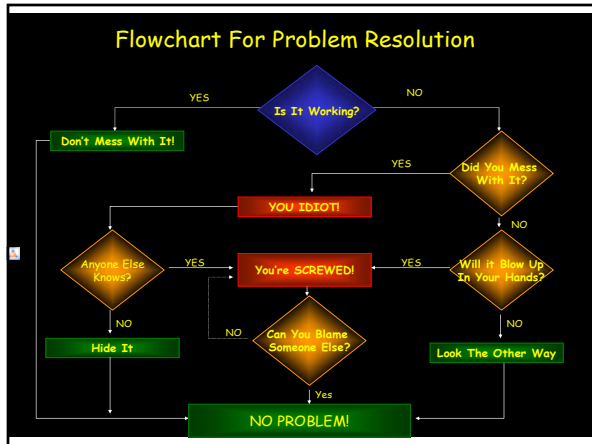


Know the Potential Damages for Liability:

- Consequential Damages
- Double or Treble Damages
- Attorneys' Fees
- Expert Fees/Costs

April 19, 2006

© Leah A. Rochwarg





Leah A. Rochwarg, Esq.
 Seyfarth Shaw LLP
lrochwarg@seyfarth.com
www.seyfarth.com



Richard K. Allen, P.E., Esq.
rallen@stantec.com
 John Andary, P.E., LEED®
jandary@stantec.com
www.stantec.com

John F. Penney, P.E.
john@jfpcs.com
www.jfpcs.com



April 19, 2006

© Leah A. Rochwarg
