

## OCTOBER 2012 MEETING

Wednesday, October 10, 2012 (1.0 PDH)

### TECHNICAL PROGRAM:

#### 2012 Risk Management & Professional Liability Law Seminar

**Speaker:** Marshall Rosenberg, Attorney with Hartline Dacus Barger Dreyer LLP, 1221 McKinney, Ste. 3600, Houston TX 77010

Marshall Rosenberg, FPA Board Member, is an attorney at Hartline Dacus Barger Dreyer LLP where he joined in 2011 after working 20 years at Baker Lyman. His practice areas include construction defect disputes, commercial real estate litigation, and professional liability actions involving architects, engineers, surveyors, and real estate professionals. He maintains an active practice providing consulting services and contract review for a variety of design professionals, contractors, builders, and developers. Mr. Rosenberg holds a degree of Bachelor of Business Administration from the University of Texas at Austin (Finance) and obtained his law degree from Baylor University School of Law in 1991. He is a member of the American Bar Association, State Bar of Texas (Construction Law Section member), and Houston Bar Association.

#### PRESENTATION SUMMARY

To a crowd of about 65 at the HESS club, Mr. Marshall Rosenberg addressed issues related to risk management and professional liability.

Mr. Rosenberg discussed a number of risk and liability issues pertinent to both design professionals and contractors. He discussed real world situations that affect risk and liability, and presented a number of cases as examples.



Some of the key points presented were:

- Make sure the contract is correct and complete
- Make sure commitments are within reason. For example using the phrase “highest standard of care” can be construed to mean perfect work.
- Risk management starts before the firm is retained. Qualify the client and walk away from potential work if too risky.
- Keeping your client informed about risks will reduce cost of liability.
- Many engineers attempt to limit liability to amount of fee paid by client. A better method is to limit amount of liability to amount not to exceed the aggregated the available amount of valid and collectible errors and omissions.
- Observations versus Inspection: Observations should be used when checking on construction progress in general. The word inspection connotes a far more thorough process and therefore carries greater liability. A detailed forensic investigation should entail a more detailed “inspection” versus basic observations.
- Not responsible for errors of contractor for inadequate construction means and methods.
- When in doubt the engineer should call the E&O insurance carrier and ask to contact their retained in-house attorney for advice; this is typically free and does not affect premiums
- Other important terms are:
  - Statute of limitations vs. statute of repose
  - Standard of care vs. certificate of merit
  - Highest standard of care vs. ordinary duty of care
- Clear contract documents are the most important factor in risk management.
- Contract issues, terms and clauses, including insurance, scope, team members, degree of difficulty, experience etc.

- It is not uncommon for the design professional to be the only solvent party at the end of a project, which makes the professional the most viable target in case of litigation.
- Law evolves over time, so effective legal counsel is essential for the design professional and for contract maintenance.
- Contracts must be clear and should place the burden of documentation and responsibility on the owner.
- A key component of an effective contract is a clear concise and well-defined scope of work.

Mr. Rosenberg went on to discuss several cases currently in court. The cases involved the duty of the professional when making onsite observations versus onsite inspections. The discussion emphasized the importance of current legal knowledge since cases may re-interpret contract law over time through court decisions.

Mr. Rosenberg summarized his presentation by advising the audience that litigation should be the last choice in disputes and that both mediation, which is non-binding, and arbitration, which is typically binding, are both preferable to lengthy and expensive trials.

To view Mr. Rosenberg's slide presentation click [here](#).

To view Mr. Rosenberg's previous FPA Presentation, click below:

**April 2011** - Risk Management & Professional Liability Law Seminar