LESSONS FROM CASE HISTORIES

by

Hugh W. Nasmith, P.Eng
Past President, Thurber Consultants Ltd.

LESSON ONE

FOR SOME COMBINATIONS OF CLIENTS AND PROJECTS THE RISK TO REWARD RATIO IS SO POOR THAT THE ASSIGNMENT SHOULD NOT BE ACCEPTED

High risk clients have one or more of the following characteristics:-

lack of finances
unethical practises
frequent changes in staff
poor management and administration
propensity for litigation

When you work in a community for any length of time you will build up a list of these people and organizations. Each of the characteristics brings to mind one or two names. If you are dealing with a new client you may not recognize them until you are well into an assignment.

With the exception of the litigious client it is possible to work with these hazardous clients, although it is seldon a profitable undertaking. In order to avoid a claim you have to spend an inordinate amount of time managing and reviewing the work and usually you are unable to bill for the extra time spent.

High risk projects include, but are not limited to the following:-

-- projects in which the solution of technical difficulties absorb a disproportionate amount of the client's resources

-- projects which are underfinanced so that they will probably go through a complete re-organization and end up with a new owner before completion

-- projects which when completed will be sold to an unidentified owner or owners. A subdivision or condominium is a typical example.

-- a project which is fundamentally uneconomic and

is being promoted in what might subsequently be regarded as a fraudulent manner. Some politically sponsored projects fall into this category

-- projects which have a potential for adversely affecting either a powerful third party or a large number of third parties. Disposal of hazardous wastes would be an example

It is possible to successfully carry out assignments on high risk projects if you are dealing with a responsible competent client with whom you have a good working relationship. They may in fact be quite profitable if you have an open ended budget. They are nevertheless risky and if they come from a high risk client they present a substantial risk for loss.

Consulting in the geotechnical engineering is a risky business, not for the faint-hearted. Each combination of client and project results in a risk/reward ratio which although it cannot be precisely quantified should aid your judgement as to how to proceed with an assignment.

LESSON TWO

A REPORT WHICH HAS AS ITS PRIMARY PURPOSE OBTAINING THE APPROVAL OF SOME GOVERNMENT AGENCY OR SELLING A PROJECT TO AN UNSOPHISTICATED PURCHASER IS HAZARDOUS AND REQUIRES SPECIAL CARE IN WRITING, EDITING AND FOLLOW UP.

This is a very common type of assignment. Reports in this category deal with such topics as potential slope stability problems, suitability of land for ground disposal of wastes (septic tank fields), general suitability for foundations, and preliminary design for cost estimating to name a few.

Often the client who is buying this kind of report is doing so under pressure from a government agency and sees the value of the report only in obtaining approval and not in solving any real technical problem.The client resists a cautious or conservative report and is reluctant to pay a fair price for the work you do and the responsibility you take. Once the approval has been obtained the project is often passed on to others to carry out the work and your recommendations may or may not be followed.

This kind of report requires extremely careful writing and editing.You must keep in mind that it is not just going to the government agency which requires it, but may be passed on to an unsophisticated owner of builder for his use or direction.

LESSON THREE

MURPHY'S LAW APPLIES. THERE IS NO SITE SO GOOD THAT AN INCOMPETENT OWNER OR CONTRACTOR CANNOT SCREW IT UP.

This lesson relates to the type of report referred to in the previous section. The client is anxious to receive a favourable and optomistic report. If the site is reasonable or apparently free of problems there is a temptation to give unqualified approval. Some phrase such as "the site is entirely suitable for the proposed development" or "settlement of the building will be negligible" may come back to haunt you.

In effect you are giving approval to activities over which you have no control. The ultimate owner may suffer a loss related to some defect by the contractor or to some design feature that was never envisaged when you wrote your report. If a claim is advanced against you on the basis of your approval of the site you may have to spend considerable effort and money to prove that the defect arose from some activity unrelated to the concern addressed in your report. Even then an unsympathetic judge my assign the blame to you for failing to anticipate the deficency of the owner or builder.

One way to protect yourself is to make a condition of your approval that any work be done by a qualified contractor and that you be called in to inspect the development at all stages. This has the advantage of increasing your fees to compensate for the responsibility and risks that you are assuming. If these inspections are carried out they must be done thoroughly by qualified personel and reported properly.

LESSON FOUR

ADVICE MUST BE CONFIRMED IN WRITING AND TRANSMITTED TO EVERYONE WHO COULD POSSIBLY HAVE ANY INTEREST IN THE PROJECT.

This is a two part lesson. The first is to put your advice in writing. If you give bad advice you will be blamed for it no matter how it is transmitted, but if you give good advice and it is not followed you will have to be able to prove that it was given and not only that it was given but that it was received.

A person or organization who receives advice and doesn't

follow it can never remember receiving it, especially when they are involved in litigation. An engineer gave advice on the site to the superintendent and confirmed it in a letter to his client the project manager, but was still obliged to contribute to the settlement because the information had not reached the owner/contractor who was being sued by a third party.

A partial solution at least is to define in your contract who is to receive your advice and make that person or organization responsible for distributing information and advice from you to all who need to receive it.

LESSON FIVE

DON'T DEPEND ON LEGAL TECHNICALITIES TO PROTECT YOU FROM CLAIMS

The statute of limitations theoretically protects you from claims seven years after the actions occured on which the claim is based. From a practical point of view the statute of limitations doesn't offer much protection. A claim will seldom be disallowed on this basis before it goes to trial and by the time the claim reaches trial you have spent substantial amounts of time and money in the pre-trial processes. You can't skimp on the pre-trial processes in the expectation that the claim will be disallowed on the basis of the statute of limitations because if that defense is rejected, as it may well be, you have to be prepared to proceed to a second line of defense in the trial.

A skilfull lawyer may get you out of trouble on a legal technicality once you are involved in the litigation process, and certainly an incompetent lawyer can get you into deep trouble, but in general legal knowledge and legal advice are not what keep you out of claim situations. The principal exception to this is in reviewing a complex contract with a client to ensure that it does not inadvertently impose unreasonable duties on you

If you have to call on a lawyer to check the wording of your contract to ensure that a client that you don't really trust is not trying to put something over on you, you are already in a hazardous situation.

LESSON SIX

IF YOU HAVE A CLAIM AGAINST YOU AND CAN GET IT CLEARED UP FOR LESS THAN HALF OF YOUR DEDUCTIBLE, SERIOUSLY CONSIDER THIS OPTION.

This is a particularly difficult lesson to apply. In most instances you feel that the client's claim is not justified and that he should not be entitled to any of your money. It is difficult to justify this kind of expenditure of money to the directors and shareholders of your consulting company. You are probably feeling hostile to the client and anticipate the satisfaction of seeing him eat humble pie in court.

Nevertheless -- if you can get an absolute release for an expenditure of less than half your deductible, you should look at this option rationally. The risks and costs of proceeding to litigation are substantial and the intangible cost of senior managmement time spent on litigation instead of on business development may have a serious impact on the future viability of your consulting practice.

LESSON SEVEN

DON'T WAIT TILL THE LAST MINUTE TO DEVELOP YOUR DEFENCE TO LITIGATION.

Unfortunately there is a tendency for both the consultant the insurer to defer spending funds on such things as surveys, subsurface investigation and research until it is clear that the dispute is not going to be settled out of court.

There is a real risk that a courtroom defence will be weakened by inadequate use of facts which are uncovered in a last minute investigation.

Obviously the most effective loss control procedure is to avoid a claim situation. However when a claim is made you should, at a fairly early stage, proceed to gather information on the assumption that the claim will ultimately end up in court. The information properly compiled may enable you to avoid litigation, will certainly allow you to assess the risks of proceeding to litigation and will provide valuable information for avoiding similar claims in the future.