

Risk management helps avoid defect claims

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Responding to litigation arising from alleged defects can be a nightmare for the construction industry.

Attorneys should be taking steps before claims arise to help their clients reduce the likelihood of a lawsuit through effective risk management.

Kay Millonzi, who has experience as in-house and outside counsel for mem-



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**ATTORNEY
KAY MILLONZI**

bers of the construction industry, offered that advice during a discussion about defending against construction defect claims at the Civil Trial Council of

Wisconsin's spring conference Friday.

Prior to obtaining her law degree, Millonzi, of Pfeil & Millonzi LLC in Black Earth, was a risk manager for Pleasant Company Inc. She has applied those risk-management skills as an attorney to help her construction clients reduce the possibility of a claim.

"My goal was always to avoid losses in the first place," Millonzi said.

There are many ways to minimize loss, she noted, but the way a contractor takes

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care of customers can be a significant factor. A key issue with any construction project is ensuring that the buyer's expectations are reasonable.

"It's the contractor's responsibility to manage those expectations," Millonzi explained.

Everyone's concern

Managing expectations begins with the sales team and continues with the project manager and anyone else involved in the project. When the project is complete and throughout the warranty period, the contractor needs to follow up with the buyer to answer any questions that arise or resolve any issues.

She noted that the No. 1 complaint that leads to litigation is a customer's assertion that the contractor did not respond to him or her.

Next, Millonzi warned that contractors need to have established business process in place. Although creating detailed action plans can be a cumbersome task, she said it's essential for ensuring a consistent process that averts problems.

She said developing action plans "forces you to go through the process of writing

down the steps of how you do your job. In some ways, it's a painful process. But the result is having systems in place stating, "This is how the task is performed every time because we wanted to get the best, most consistent result every time."

Contracts serve an important role in laying out the scope of the project, the terms, expectations and specifications. Millonzi noted that contracts between the contractors and owners can vary greatly in complexity and the level of bargaining power the contractor has in the process. Public works contractors are more likely to face more intricate contracts than contractors working with private individuals.

Subcontractors important

Contracts with subcontractors are equally important in laying out the essential elements of the project and resolution of problems. Lawyers were encouraged to work with their construction clients in developing contracts. Millonzi also encourages her clients to work with their trade organizations to find essential elements for different types of contracts.

One key question to consider is whether to include an arbitration clause in contracts. Placing arbitration clauses in

contracts used to be a given; however, that is no longer the case.

"At one point in time, it became common practice to put those in because we all thought that would be a cheaper alternative to litigation. We are starting to find out, especially with complex cases, that it isn't necessarily cheaper."

Also, contractors should not wait until the end of a project to present limited warranties with pages of elements that are not covered. Buyers will be frustrated that those things were not brought up until completion, creating hard feelings about the project.

In-house counsel needs to review all the issues related to insurability for construction defects. That includes understanding the coverage needed, available coverage, cost of coverage and any limitations. In-house counsel also needs to make sure that subcontractors have the appropriate insurance in place.

Finally, Millonzi noted that public relations is a significant issue for many members of the construction industry. When the threat of litigation arises, she observed, they may want to resolve issues as quickly and quietly as possible to avoid damaging their reputation. It's important to communicate with the contractors to ensure that the overall goals match the approach counsel takes to litigation.