

LEGAL PANEL

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SUMMARY: PLANNING TO PREVENT LEGAL LIABILITY

Please note: Giving legal advice requires complete knowledge of all of the facts in a particular situation and all of the interest of the client. Obviously, this brief review of the factors involved in preventing legal liability in the professional measurement of radon in buildings can not substitute for the advice of your own lawyer. Please use this as a way to think about your potential liabilities and as a list of concerns which you and your own lawyer can discuss.

Thinking about legal liabilities associated with measuring radon in buildings can be outlined in eight words. The first four deal with the types of liability faced:

- * Criminal
- * Governmental
- * Tort
- * Contractual

The next four words deal with the radon measurement professional's risk management program:

- * Knowledge
- * Planning
- * Care
- * Documentation

TYPES OF LIABILITY

Criminal liability is a result of enforcement by government of the criminal laws. Most federal and some state environmental laws have criminal enforcement provisions. However, the most likely form of crime that a radon professional is likely to be accused of is "criminal fraud." This is a result of intentionally lying to a building owner regarding some aspect of your business. The most likely criminal penalties are incarceration or fines or both.

Governmental liability results from the enforcement by the government of civil penalties as sanctions against some types of behavior. For instance, state laws which require licensure or specific training before measuring for radon are enforced by the imposition of a civil penalty or fine levied by the appropriate state agency. Federal law does not require that someone take the RMP exam prior to measuring for radon, but if one wants to participate in the RMP program, the rules require that certain actions be taken. Failure to follow these rules could result in fines or "delisting" or both.

Tort liability is the result of one person suing another for an injury. A "tort" is a legal wrong committed against another. There are two types of torts for radon professionals to focus on: intentional torts and negligence. An intentional tort involves intentionally hurting someone, either through your actions or your words. Fraud, while a crime, can also be an intentional tort. The tort of fraud means the "intentional misrepresentation of a material fact with reasonable reliance upon that fact." So lying to a building owner can be prosecuted criminally and can also be the basis of a suit by the building owner against the radon professional. And in states which have a

"consumer protection law," the fraudulent radon professional might be sued under this statute, sometimes having to pay the building owner's attorney fees!

Negligence is the "breach of a duty that causes harm." To be negligent, a radon measurer must have a duty, a standard of reasonable behavior, which he or she breached, and this unreasonable mistake must have caused harm to another. For instance, measurement courses establish appropriate protocols for radon professionals. Failure to adopt the appropriate protocol is a breach of duty: If the measurer gave an inaccurate reading in the house, this would be harm that was caused by the breach of duty, i.e., negligence. (Whether or not the measurer would be sued, given the questionable damages which arise from such a mistake is a practical matter which radon professionals should discuss with their attorneys.)

Contractual liability arises out of a breach of an agreement between two or more parties. Some disagreements arise when the parties know what it was that they agreed upon, but one of the parties can no longer perform as per the agreement. Something has come up to change the circumstances. In this case, *renegotiating* or getting a "change order" is the logical approach. The more difficult contractual dispute comes from the two parties having a difference of opinion on what was the nature of the agreement in the first place. Since most radon measurements are done without a formal, written contract, this type of liability is problematic. The verbal agreement between a radon measurement professional and a homeowner can be a binding oral contract (depending upon circumstances and state laws), but the scope of work is never clearly spelled out.

THE "BASIC FORMULA"

In order to put together a risk management plan for your work, you and your attorney should start with the basic formula:

Knowledge + Planning + Care + Documentation = Health + \$\$ + Peace of Mind

Radon professionals and their lawyers must have a complete knowledge of the criminal statutes of the state and how they have been applied. They must understand current federal and state regulations, rules and guidelines to avoid civil fines, and they must keep up to date with changes in these rules. They must know the state-of-the-art of the radon measurement business, since that will be the basic duty to which the radon professional will be held, thereby lessening liability for negligence. And, they must know the scope of work routinely offered by the professional and any changes to this basic program for a particular job. Given how expensive good legal advice can be, this is a set of issues that the professional and his or her attorney should address comprehensively once, and revisited periodically, rather than on a case-by-case basis.

The radon measurer should **plan** all of his or her work. This is not only good business practice, it also allows the professional to plan the work in such a way to control the potential for liability. The radon professional should plan the entire scope of his or her business; how quickly are they going to grow, what kinds of jobs will they take, what will they turn down because they can not handle the job safely? The professional should also have standard operating procedures, such as a "practices and procedures manual," which they update regularly and which all of their employees are trained to observe. Each job should be planned to make sure that the work will be consistent with governmental requirements, the reasonable duties of a radon measurer and the contents of the scope of work.

Once on the job, the professional should adopt a **standard of care** so high as to live up to the liability prevention measures contained in his or her plans. A job done with the utmost of care can make up for a lot of sloppy planning, but the best plan in the world will not compensate for inadequate attention to state-of-the-art principles on the job. The standard to which a jury will hold the radon professional is likely to be something like, "Would I, the juror, have done something differently if I had been in his or her place?" If you have a sufficiently high standard of care to be able to tell a jury that they would have done exactly what you did in the same

circumstances, you should have little legal difficulty. Even if "active ethics" were not its own reward, this liability prevention impact makes honest, thorough, high quality professional work worth the effort.

If the knowledge, planning and care have all been observed, a program to thoroughly document all aspects of each and every job will be an enormous assistance to the professional's lawyer, should a lawsuit occur anyway. And sometimes even the best, most careful person in the world can get sued. Knowledge, planning and care prevent lawsuits; documentation wins lawsuits. I tell my clients to document everything. (How much to document is a matter of opinion which you should discuss with you own lawyer.) A full documentation program will "collect it, protect it and be able to select it." In other words, the documentation program must systematically (not haphazardly) collect the information. It must be protected over time, probably for decades, given the latency period of lung cancer. And you must be able to select the information relevant to a particular controversy from twenty or thirty years worth of jobs, making some type of management information system for your documentation program a "must."

Following the Basic Formula is not a "sure thing." (Nothing in the law is!) But increasing your and your lawyer's knowledge to the maximum, planning all aspects of your work, establishing and maintaining a high standard of care, and documenting your work completely and systematically will result in better radon monitoring, thereby increasing protection of health, will save you money in the long-run by preventing most lawsuits and making any that do arise much easier to win, and will give you the peace of mind of knowing that you did your work safely, with high professional standards, and little risk of legal liability.

BIOGRAPHY

Daniel Swartzman has practiced environmental law in Chicago since 1975. He received his law degree cum laude from Northwestern University and a Masters in Public Health from UIC, concentrating in Environmental Policy. He has practiced in state and federal courts, before Illinois and federal regulatory agencies and before the Illinois General Assembly and the U.S. Congress. Mr. Swartzman is also Associate Professor at the UIC School of Public Health, where he teaches and does research in the areas of environmental law, public policy and government regulation. He is a recognized expert on legal liability questions associated with asbestos abatement and management.