

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 01/03: "The High Cost of Defense"

January, 2003

The High Cost of Defense

Courtesy of the Professional Liability Agents Network (PLAN)

It can't happen to me. That's the opinion of most architects and engineers who have never faced the nightmare of a charge of wrongdoing against their design firm. But even assuming vigorous application of risk management and quality control procedures, no design professional can absolutely prevent negligent acts, errors and omissions.

Regardless, many (maybe most) of the professional liability claims design professionals experience are not caused by their own negligence. Rather, they are pulled into a claim as part of a shotgun approach to hit anyone remotely associated with a problem project. Also, a significant portion of the negligence claims clients file against design professionals are counterclaims – clients' response to design professionals that sue for payment.

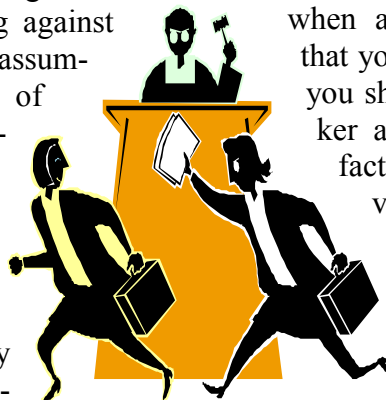
Bottom line, the nightmare of a claim can happen to you. So what can you expect if you are ever faced with this distasteful situation? Let's take a not-so-pleasant trip through the trials and tribulation of the process of having a claim asserted against you.

Pre-Discovery Phase

The claim experience typically begins when a process server notifies you that you are being sued. At that time, you should give your insurance broker a call and notify them of the facts. Generally, you would be advised to put together a crisis team to gather information and get all of your documentation in order.

This crisis team typically consists of the

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INSURANCE BROKERS
License No. OA99520

1230 Columbia Street, Suite 850
San Diego, CA 92101-3547

Phone: 619-234-6848 ♦ Facsimile: 619-234-8601

Web Site: <http://www.cavnac.com>

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CEO or another high-ranking member of management to serve as leader, another senior staffer to serve as the leader's surrogate and communications link, one or two project managers or designers familiar with the case in question, and a member of clerical staff. It's easy to see how the team's billable hourly rate can easily exceed \$500.

Hourly rate becomes an issue right off the bat because research will likely be time consuming. Many designers are not as scrupulous about their documentation and filing as they should be. As a result, a wide array of files, contracts, time sheets, disks, computers and other records must be located and searched. Interviews will also be required because not all pertinent information will have been recorded. In most cases, the work in question occurred as much as 18 to 30 months ago, and few people will have detailed memory of all the actual events.

There may be another problem here. In some cases, the key project manager or designer may no longer be with the firm. If they were terminated for poor work, the situation is even dicier. Regardless, with hat (and often checkbook) in hand, a firm principal will have to locate this individual and ask him or her for assistance in researching the history of the case.

Your insurance company will probably select an attorney to represent you. This person will be an individual with experience and a good track record defending design firms like yours. An associate may be assigned to your case as well. Tasks that the associate can perform instead of and just as well as your lead attorney will cost less to complete. The lead attorney's hourly rate will range from \$145 to \$400. and the associate's from \$90 to \$175.

You may also need a forensic consultant who, in most cases, will serve as your expert witness. (An individual does not become an expert witness until the judge who hears the case so stipulates.) The consultant will at least have to conduct or direct conduct of the research required to establish what the standard of care was at the time the alleged negligence occurred. This may entail site visits, documentation review and interviews, in addition to full participation in "discovery." Experts commonly charge \$150-\$200 (or more) per hour,

half that for "standby" service, and double for court appearance.

An effective forensic consultant is not just an experienced peer. The individual chosen needs to follow your attorney's detailed instruction and deliver effective testimony during depositions and, if necessary, at trial. He or she must convince the judge or jury that he or she is indeed an expert and that his or her testimony is 100% reliable.

During the pre-discovery phase, your attorney will ask you to assemble a chronology of events, accompanied by appropriate documentation. Both your attorneys and forensic consultant will review the report and seek answers to any questions they may have regarding specific facts and incidents.

Based on review of your chronology (or based on prior discussion or subsequent discovery), your legal team may file a number of motions and, if they suspect that fault for damages lies elsewhere, will counterclaim against the plaintiff or cross-claim against your client or others, such as the owner, another design professional, the general contractor or a subcontractor. Such tactics are common and add a great deal of time to discovery. For purposes of this example, however, we'll assume that all suits and claims are between your firm and your client.

Discovery Phase

Discovery is a three-phase process designed to inform both sides of the case about key facts. The discovery phase is performed to reduce the number of speculative issues and thereby permit a closer focus on the facts at hand and expedite the claim

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process. The three phases encompass document review, interrogatories and depositions.

Document Review

You, your lawyers and your forensic consultant will decide which of the plaintiff client's files should be examined. Your attorney will prepare a subpoena and, subsequently, will likely have to defend your requests for evidence from your erstwhile client's charges of immateriality. You, of course, will likely charge that some of the files being requested by the other side are immaterial. You will carefully review the contents of any files you surrender and, just as closely, review the contents of those you receive.

Interrogatories

Your knowledge of events and review of files will lead you to identify a number of issues about which you need or want to know more. Your questions will be put forth in writing, in the form of interrogatories, to which the other side must respond under oath. The other side, of course, will be preparing interrogatories for you.

Issuance of the interrogatories ushers in the next round of legal sparring, with each side typically trying to quash some of the other side's questions. Ultimately, most questions will have to be answered. You, your forensic consultant and other members of your crisis team will prepare suggested responses. You will send these to your attorneys, who will review what you have prepared and then develop a version of their own. During yet another meeting, together you will develop the final responses. Soon thereafter you will repeat these basic steps in reviewing what the other side has to say in response to the questions you posed.

Depositions

The final element of discovery is the taking of depositions. Your attorney will likely examine various client representatives, the client's forensic consultant and such other individuals (e.g., other design professionals, contractors, suppliers, etc.) who would likely be called as witnesses at trial. All testimony at depositions is given under oath. It is taken down word-for-word by a court reporter. You, your forensic consultant and others associated

with the project will be deposed by the other side, of course, and overall two weeks or more may be required.

Depositions are extremely important because anything an individual says will be compared to what that person says later at trial. Even minor variances in responses will be pounced upon in an effort to convince a jury that witnesses have changed their stories. With so much at stake, careful preparation is essential. Preparation may involve:

- Drafting and finalizing questions to ask witnesses for the opposition
- Drafting and finalizing questions that your attorney will ask you and other witnesses for the defense
- Drafting questions that your witnesses will probably be asked by the other side
- Drafting responses to questions you probably will be asked by your opponent's and your own legal team.

Seemingly endless hours of work will be required for these tasks. Even more time will be spent rehearsing what you should say and how you should say it. You will need to be on guard against slip-ups that can be encouraged by the comparatively casual atmosphere that usually prevails at depositions.

To Trial or Not to Trial

Most negligence cases are resolved before trial. Sometimes, the complaint is dropped when the discovery phase shows that the plaintiff does not have a strong case. Other times, the parties may simply reach agreement on a settlement following the discovery phase. Still others agree to take the case before a mediator or arbitrator. If the design firm had foresight, it would have stipulated non-binding mediation as the mandatory first step in any claim process.

If you will be forced to go to trial, however, months may pass because so many schedules must be accommodated. The plaintiff will probably request a jury to serve as the trier of fact, because the jury will find it difficult to grasp the technical issues upon which you will base much of your defense. Trial preparation will probably entail many of the tasks you performed in preparation for depo-

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sitions. Chances are you will have to live with whatever outcome the trial brings, and your client will do likewise. An appeal would not be out of the question, however, nor a second trial.

The Cost

How much will all of this defense work cost? So much that you will quickly understand why, for many people, loss prevention is a central part of practice management. The cost of defending a claim, even without litigation, could look something like this:

Description	Crisis Team	Legal Team	Forensic Consultant
Pre-Discovery	\$15,000	\$15,000	\$4,000
Discovery			
➤ Subpoenas	4,000	20,000	8,000
➤ Interrogatories	10,000	20,000	8,000
➤ Depositions	20,000	40,000	15,000
Total	\$49,000	\$85,000	\$35,000
GRAND TOTAL	\$169,000		

If the case goes to trial, add on another \$100,000 to the process – and this total does not include any award granted by the jury.

Of the total, your insurance would apply to the total for the legal team, forensic consultant and settlement. Your cost would be the \$49,000 in lost billable hours for your crisis team plus the value of your deductible. Assuming the later is \$50,000.

your total climbs to \$99,000 – an amount about equivalent to the profit you would derive from approximately \$2 million of work, assuming a 5% net profit.

There's More at Stake

More than short-term losses are at stake. Litigation is an adversarial process that generally destroys client-consultant relationships. Given that almost any relationship with a client could become one that spans a career, that loss alone could be worth millions of dollars in terms of lost fees and lost referrals.

Consider, too, that all claims can hurt morale and lower productivity by virtue of the distractions they create, and also impair reputations given what the former client tells friends, colleagues and not just a few of your peers.

Super Bowl XXXV demonstrated the high value – and the high cost – of a good defense. When it comes to professional liability claims, however, the best defense is avoiding the situation in the first place. The value of an expert insurance agent and consultant who can serve as your risk management and loss prevention partner can be enormous if you can prevent one project mishap from becoming a claim. And should a claim occur, the right insurance program can minimize your out-of-pocket expense by providing comprehensive coverage, prompt action at the first sign of trouble, and expert claims handling throughout the entire ordeal. ✨

***Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

The Eighth Commandment of Loss Prevention: Treat Certifications Like a Bad Neighbor

Excerpted from "Ten Commandments of Loss Prevention" by Gunther O. Carrle, Esq.
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Are you required by your Agreement to give the certification requested? If not, try to avoid it.

Does the certification attempt to expand your services beyond those contained in your agreement for services?

Certifications should always be based on "*your knowledge, information and belief,*" particularly if they involve matters outside of your total control – compliance of construction with plans and specifications; contractor's entitlement to payment; absence of hazardous materials.

Certifications should always be based on your professional judgment – they should not be language of warranty or guaranty. Even where you have control over the subject matter, i.e. compliance of plans with codes, your statement of compliance should be in terms of a "*reasonable and prudent (architect or engineer) rendering services of the type set forth in the agreement exercising usual and customary professional skill and care.*" Guarantees and warranties are generally not insurable.

Certifications should be accurate and reasonable. Limiting the certification to "*your knowledge, information and belief*" and to your "*professional*

judgment exercised as a reasonable and prudent (architect or engineer) using usual and customary professional skill and care" is not always enough if the subject matter of the certification is outside of your expertise or is overly broad.

For example, compliance with "*all*" codes, statutes and regulations, etc. is not reasonable. You are not likely to be fully aware of all of them; they may not all apply to your services; they may be contradictory. Another example is the absence of hazardous substances in the building materials incorporated.

Are you improperly assuming a governmental function? Building code officials may require certification that the structure complies with the building code. It is their duty to make this determination and an effort should be made to avoid this type of certification.

Is your compensation adequate for the risk and for the level of services required?

If possible, the form of certification should be developed during the negotiations for the contract and attached as an exhibit. This is particularly useful with lender certifications.✿

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