
PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 11/98: "True or False: To Reduce Risk, Avoid Risky A/E Projects"

November, 1998



How "Loss Prevention Literate" Is Your Firm?

Times are good for the design profession. The building industry in San Diego is booming, and if we hear one complaint from our clients more often than not, it is the fact that they can't find quality people.

Unfortunately architects and engineers still face the very real threat of claims on every project they undertake. The sad truth is that any claim can prove disastrous for a design practice. Given the relatively small margins for a typical design firm, a single claim can mean the difference between a profit and loss, and a large claim could very well spell disaster.

This is why it is critical for design professionals to understand how to avoid litigation. Loss prevention must become a necessary part of your design practice.

So how loss prevention literate is your firm? To see where you stand, take a look at the following 25 true/false questions. Think about your answers, and then compare them to the corresponding responses.

As always, these questions are just starting points for improving your risk management skills. Discuss them with fellow employees as well as other architects and engineers. Before taking any action, don't forget to consult your insurance broker (assuming you are dealing with a specialist broker) as well as legal counsel, if appropriate.

We are very interested in discussing your conclusions, and look forward to helping you solidify your loss prevention program. We would also welcome the opportunity to discuss any questions you might have regarding either your insurance or your risk management programs.

Questions

1. The best defense against claims is to provide high quality deliverables.
2. If you don't have a written agreement with the client, you have no enforceable agreement at all.
3. The most common claims against design professionals are by people who are looking to "strike it rich" and who hire contingency-fee lawyers.
4. The "standard of care" is determined by expert witnesses who tes-

(Continued on page 2)

Published by

Cavnac & Associates

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(Continued from page 1)

- tify in court.
5. Owners reduce their risk by using QBS (qualifications-based selection) to select their prime design professionals. Design professionals, however, should select their sub-consultants on the basis of a cost bid.
 6. If you request financial information from clients, you'll look unprofessional and turn them off.
 7. Public agencies are credit-worthy and always pay their bills.
 8. If a client asks for something that will violate the standard of care, you should document all details before following the client's mandate.
 9. Your professional liability policy covers almost all of the indemnification agreements that your clients ask you to sign.
 10. Your exposures to employment-related claims exceed those related to your professional services.
 11. A breach of contract rider may be costly, but the protection is worth the price.
 12. Your certification of facts is generally acceptable; a certification of opinion is dangerous.
 13. Most law suits against design professionals are filed within 6 months of completion of the contract documents.
 14. Because of personal liability, design professionals can only be truly "judgment proof" when they're dead.
 15. In most states, contractors may not sue design professionals for purely monetary damages.
 16. Limitation of liability is effective, but full indemnification clauses are better.
 17. Limitation of liability works only in states without anti-indemnification statutes.
 18. If you arrive onsite and see an obvious OSHA or safety violation, it's okay to look the other way.
 19. Full-time construction observation is primarily a fee-enhancing (not loss prevention) service.
 20. A merited-claims clause (one which requires the client to obtain an opinion verifying negligence) is valid only in states with a merited-claims law.
 21. In most states, limitation of liability automatically applies to breach of contract.
 22. As a general rule, you should keep every scrap of paper associated with a project.
 23. With the exception of Kentucky and Minnesota, oral contracts are unenforceable.
 24. If design professionals give direct instructions to a contractor, courts will infer a safety duty, despite the contract.
 25. It's better to spend time (and money) golfing with clients than developing loss prevention strategies.

Answers

1. False. Clients file most claims, so the best defense is maintaining good client relationships.
2. False. You may have an oral contract about which your understanding differs from your client's.
3. False. Third-party claims are rare; most are filed by clients.
4. False. The trier-of-fact (a judge or jury) determines the standard of care based on expert testimony.
5. False. Prime design professionals should use QBS just as owners do.
6. False. It's unprofessional *not* to obtain credit references, and most clients are familiar with the procedure.
7. False. Too often public entities start planning before they receive funding for a project.
8. False. You should never intentionally violate the standard of care. Doing so could nullify your insurance coverage and expose you to severe penalties.
9. False. Clients often ask you to sign uninsurable indemnification agreements. Although you are always covered for your negligent acts, errors or omissions, to the extent that you contractually agree to be responsible for

(Continued on page 3)

(Continued from page 2)

- more than that (i.e., the client's comparative negligence), you are uninsured.
10. False. While your exposures arising out of professional services are probably greater than employment-related claims, the gap is narrowing. In order to insure this exposure, you need to buy a separate Employment Practices Liability insurance policy.
 11. False. Breach of contract riders do not exist.
 12. True. A certification is often interpreted as a "guarantee." As such, you should only certify facts. To the extent you certify (or guarantee) performance, you may have contractually increased your standard of care beyond that which is covered by your insurance policy.
 13. False. Typically, claims are filed within two to three years of a project's completion.
 14. False. A client can sue a design professional's estate for damages relating to the deceased's prior professional acts.
 15. False. In many states (including California) contractors can sue for monetary damages alone.
 16. False. Courts rarely uphold full indemnification clauses, but usually consider clear limitation of liability clauses reasonable.
 17. False. Most states enforce limitation of liability.
 18. False. Looking the other way violates licensing requirements and does not decrease risk. As a matter of fact, it may increase your risk.
 19. False. Site observation is one of the best all-around services an architectural or engineering firm can offer. Professional liability underwriters generally provide a discount to those firms that provide construction observation, and a debit to those firms that don't.
 20. False. Merited-claims protection is available in every U. S. state and Canada.
 21. False. Limitation of liability applies to breach of contract only if the limitation specifically includes it.
 22. False. Keep only the final version of documents, so that the opponent's attorneys can't use drafts to confuse issues at trial.
 23. False. Every U. S. state enforces oral contracts.
 24. True. In general, construction workers cannot sue their employers for work-related injuries. They must rely on workers compensation insurance. They may, however sue a design professional if they can find any evidence that the design professional had or took on a responsibility regarding site safety.
 25. Well, it depends on how well you like to play golf. Because clients file 60% of all claims, good relations will help you lower exposure and reduce your risk. Regardless, there is no substitute for sound loss prevention strategies.

How do you score on professional liability loss prevention?

Read the responses to each 25 questions in the

Points	Grade
92 – 100	Give yourself an "A" for aptitude
80 – 88	"B" for pretty bright
68 – 76	"C" for catch-up work required
56 – 64	"D" for definitely at risk
Below 56	"F" for get help fast! ✦

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.
