PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

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Frivolous Lawsuits

The defense process can cost a blameless defendant years of frustration and stress

Have you heard the one about the drunk driver? He careened down a road past several well-marked detour signs and crashed. When he finally sobered up, the fellow sued the engineering firm that designed the road, along with the road's general contractor, subcontractors and several others.

Five years later, all of the defendants settled for $35,000, but just getting to that settlement cost a 15-person engineering firm more than $200,000 in legal fees.[1]

Is this kind of suit unusual? Just how serious the frivolous (or *non-meritorious* as trial lawyers prefer to have them called) lawsuit problem is depends upon whom you ask.

A 1996 survey of California lawyers found that while only 5% of them would admit to filing a frivolous lawsuit, 64.9% said they had defended one. Over half of the lawyers felt that frivolous and unfounded suits were ruining the economy.[2]

The Problem

The truth is that there are frivolous claims against architects, engineers and environmental consultants all the time. These are usually "shotgun" lawsuits, cases in which a plaintiff's attorney names everyone who had anything to do with a project in hopes that some have either assets or insurance. Often these people are named without proof of how or even *if* they contributed to the problem.

Although this is sometimes done unwittingly by an attorney who is unfamiliar with the facts, very often shotgun suits are filed intentionally, with the purpose of finding someone who can be intimidated into paying something just to get out of the lawsuit. It is a subtle form of legalized blackmail.

Who is to blame? The "system?" Judges? Insurance companies? Certainly, both plaintiffs and their lawyers play a major role.

Thankfully, they don't always get away with it. In really egregious cases, attorneys can be sued for malicious prosecution. But, while there may be a certain satisfaction in seeing the plain-

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tiff's attorney suffer in kind, these actions are difficult to prove, and the entire process can cost the original (blameless) defendant years of frustration and stress.

The Solution

Unfortunately, there is no complete protection against frivolous lawsuits. There are, however, some measures you can take.

One answer is an "attorneys' fees" clause, which entitles the prevailing party in a lawsuit to recoup his or her legal expenses from the loser. This clause might read as follows:

Attorneys' Fees

In the event of any litigation arising from or related to this Agreement or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred, including staff time, court costs, attorneys' fees and all other related expenses in such litigation.

But an attorneys' fees provision is not enough, because this provision is triggered only if one party actually *prevails*.

In other words, if your client sues you, the suit would have to go through the entire legal process and then a court of competent jurisdiction would have to decide the case in your favor before you could recoup your legal fees. Until then, you would have to pay your own bills, a very expensive and lengthy process.

Many people decide at some point that it is not worth the time and trouble, and may opt to settle, even though they are blameless.

Because many settlements are the result of mediation (or other non-adjudicative processes) or arbitration, you could add a provision to the above clause that lets the process determine who the "prevailing party" is, such as:

In the event of a non-adjudicative settlement of litigation between the parties or a resolution of dispute by arbitration, tthe term "prevailing party" shall be determined by that same process.

There is another solution. A growing number of jurisdictions, California included, have enacted – or are currently considering – legislation called *"Certificate of Merit"* laws.[3] These laws oblige a potential plaintiff to demonstrate that a case against a design or environmental professional has legal merit.

Some jurisdictions require that another consultant licensed in the same discipline declare whether or not a case should proceed through the civil system. In other jurisdictions, a screening panel of knowledgeable persons gives its opinion.

In most Certificate of Merit jurisdictions, if the required Certificate of Merit has not been filed by the plaintiff, the law will allow the defendant to file a motion for summary judgment, a relatively quick and inexpensive means of getting out of a lawsuit.

A Certificate of Merit requirement accomplishes two things: first, it might discourage a client from suing you without justification. Second, if the client does obtain such a Certificate, that tells you that at least one member of your profession believes the case against you is worthwhile and may be prepared to testify to that in court.

If you live or work in a jurisdiction that does not have such a law, or if the existing Certificate of Merit law in your state is not working well **[see insert, page 3]**, it is certainly possible for you and your client to write your own Certificate of Merit contract provision.

Just as you can set your own statute of limitation by contract, you can agree on a provision to set up a procedure to pre-screen disputes for probable cause before litigation can be filed. Consider the following sample provision:

Certificate of Merit

The Client shall make no claim for professional negligence, either directly or by way of a cross complaint against the Consultant unless the Client has first provided the Consultant with a written certification executed by an independent consultant currently practicing in the same discipline as the Consultant and licensed in the State of California. This Certification shall:

(a) Contain the name and license number of the certifier;

California's Certificate of Merit Provision

California law (Section 411.34 Code of Civil Procedure) contains a "Certificate of Merit" provision which was enacted to protect design professionals against frivolous lawsuits.

Essentially, the law requires that prior to initiating litigation a plaintiff's attorney (1) must consult with a design professional to confirm that the suit to be brought has merit, and (2) file a Certificate of Merit.

Unfortunately, the protection provided is about as meaningful as having a watchdog with no teeth. The lack of strength in the law is due to the following deficiencies:

- **If there are multiple defendants representing several disciplines, the plaintiff's lawyer is only required to obtain an opinion from a single design professional representing only one discipline.**
- **There is no requirement for the reviewing design professional to specifically identify particulars; he or she is not obligated to specify in detail the alleged errors or omissions which are the subject of the litigation. Further, the law does not require the plaintiff's attorney to identify the hired design professional.**
- **The law does not provide a thirty day "cushion" in which to review allegations and then work for a settlement of some type.**

Compounding the problem of the statute's weaknesses is the human nature factor. The perfect set of drawings has yet to be drafted.

One does not have to be a cynic to conclude that a design professional hired to assess the merit of a potential lawsuit can find a flaw worth fighting about.

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(b) Specify the acts or omissions that the certifier contends are not in conformance with the standard of care for a consultant performing professional services under similar circumstances, and

(c) State in detail the basis for the certifier's opinion that such acts or omissions do not conform to the standard of care.

This Certificate shall be provided to the Consultant not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any arbitration or judicial proceeding. This Certificate of Merit clause will take precedence over any existing State law in force at the time of the claim or demand for arbitration.

The last sentence of the above clause is appropriate so long as the requirements of this paragraph are at least as broad or demanding as the existing laws, if any, of your jurisdiction.

You should consult with your legal counsel to determine whether the Certificate of Merit discussed above is legally appropriate in your specific circumstance. California's Certificate of Merit law applies to ***all*** parties who might sue you: a client, a contractor, or an injured passerby. The Certificate of Merit provision outlined above would only apply to claims by your client, because a contract is binding only upon the parties who sign it.

This is why, even if you are able to negotiate a Certificate of Merit clause into every one of your contracts, if your state does not have such a law, you and your colleagues should be trying to change that. A number of state professional associations are working to enact or improve existing Certificate of Merit laws. The American Consulting Engineers Council (ACEC) has developed model law language and will help local professional organizations get this legislation on the books.

In the meantime, add Certificate of Merit clauses to your contracts. Your clients may be hard-

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pressed to refuse. It is difficult, especially in the formative stages of a contract, for clients to argue against putting a provision in a contract that would require them to do something that they ought to do in the first place!

Footnotes

[1]American Civil Engineers Council and the American Tort Reform Association

[2]***California Lawyer***, October 1996

[3]As of December 1997, California, Colorado, Georgia,Hawaii, Kansas, Minnesota and New Jersey all had some form of Certificate of Merit law

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.*

DPIC Management Services Announces Fall Seminar Schedule

DPIC Management Services Corporation (DPIC MSC) is a management consulting firm catering to the design profession. DPIC MSC has turned its attention to its business management seminar dates scheduled for this fall. Here's the line-up:

Form Follows Function	Chicago	October 5
	New York City	October 12
Mergers & Acquisitions	Washington, D.C.	October 13
Internal Ownership Transition	Atlanta	October 21
	Los Angeles	November 4
Business Valuation	Chicago	September 14
	Boston	October 14

If you would like more detailed information about the seminars, please call DPIC MSC's North Carolina office toll-free at 888-919-2121.