

# PRACTICAL POINTERS TO ~~AVOID~~-MINIMIZE RISK AS A DESIGN PROFESSIONAL

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## Why Did I Strike “Avoid” and Insert “Minimize”?

- No matter how many precautions you take regarding a project, there is no guarantee that a disgruntled or naïve client won't file a claim against you.
- Does that mean it isn't important to understand and implement some basic ways to minimize your liability?
- Don't be foolish!

# Outline for Today's Discussion

## 1. General Discussion about "Claims"

- What is a claim?
- What are the most frequent types of claims?
- What percentage of Design Professionals get sued every year?
- How long does a typical claim last?
- How many go to trial?



# Outline for Today's Discussion

## **2. How to Minimize Your Risk**

- Select your Clients Carefully
- Communicate with Your Client About Project and Contract Expectations
- Always Try to Retain Contract Administration Responsibility
- Maintain a “Clean” Project File in case a Claim is filed.

# Claims

## **Q: What Is a “Claim”?**

- Any Demand for Money or Services

## **Q: How Are Claims Expressed in a Lawsuit?**

- Breach of Contract
- Negligence

# Claims

Q: What is the Difference?

1.) Breach of Contract

Language of agreement controls

2.) Negligence or Professional Malpractice

Standard of care = key

3.) Both can be alleged in the same Complaint

# Claims

## BREACH OF CONTRACT CLAIM

Key Focus: What did you agree to do in your contract?

- “highest standard”
- “best quality”
- “guaranteed outcome”

Very difficult to defend.

May not be covered by your E&O policy.

Experts typically cannot interpret terms.

# Claims

## PROFESSIONAL MALPRACTICE CLAIM

Key Focus: Did your actions fall below the “Standard of Care”?

Legally speaking:

Did the Design Professional exercise with ordinary diligence, that degree of skill and education ordinarily exhibited by other design professionals in the same community?



## Claims

WHY IS IT IMPORTANT FOR A DESIGN PROFESSIONAL TO AGREE ONLY TO MEET THE STANDARD OF CARE?

- Easier for Defense Counsel to Prepare a Defense
- Facilitates Expert Testimony on A/E's Behalf

## CLAIMS QUIZ

1. What percentage of design professionals are sued each year?

- 20 -30 out of 100

2. How long do claims typically last?

- 2-3 years or longer

3. Are claims typically more technical in nature (code violation) or non-technical?

- Non-technical

## CLAIMS QUIZ

4. What is a “Non-Technical Claim”?

A. Poor Client Selection

B. Poor Contract Terms

C. Inadequate Communication and Documentation

D. Staffing Issues and Project Team Capabilities

## CLAIMS QUIZ

5. What are the most problematic projects?

A. Condominiums

B. Road and Highway/Infrastructure

C. Residential

D. Education/Schools

E. Municipal/Governmental

## CLAIMS QUIZ

### 6. Why Condominiums?

- A. You are exposed to multiple claimants.
- B. None of with whom you contracted.
- C. The developer was a “single purpose LLC” which no longer exists and most likely had no assets.
- D. The HOA is responsible for maintenance and is a voluntary board with little power or incentive to exercise it, i.e., maintenance assessments.

## CLAIMS QUIZ

7. How to lessen the impact of a claim?

A. Loss Prevention Files

B. Include mediation in your dispute resolution section

- 70+% of claims settle at mediation

8. The good news: Less than 5% of all claims ever go to trial.

## MANAGING RISK-OVERVIEW

1. Requires you to review all aspects of a project to ensure you have followed both common sense and good legal practices to manage the inherent risk associated with every project.
2. You have to examine each phase of the project to make sure you have taken the right steps to protect yourself.
3. What are those phases?
  - A. Choosing a client
  - B. Creating a contract
  - C. Construction phase services
  - D. After a claim has been made against you

# MANAGING RISK – CLIENT SELECTION

## I. SELECTING GOOD CLIENTS

A. Can you control the process?

B. Do you have a definition of a “good client”?

- Willing to discuss the project in-depth.
- Flexible and willing to explore options.
- Public clients able to discuss tax aspects of project and how it meets community needs.



## MANAGING RISK - CLIENT SELECTION

### C. You must ask the right questions

- What is client's experience with construction in general and the type of project involved?
- Remember, the less experience, the more time you will spend explaining details to the client.

## MANAGING RISK - CLIENT SELECTION

D. What is the client's reputation and financial condition?

- How will the project be financed?
- Do you check the background and financial capabilities of prospective clients?
- Will the client give you the names of previous design professionals with whom he or she has worked?

## MANAGING RISK-CLIENT SELECTION

E. Make sure you have a clear understanding of the client's budget and schedule expectations

- Is Quality or Cutting Costs the driving factor to the client?
- Does the client have an understanding of what a contingency is?
- Has the client spoken to a contractor about the probable cost of the project and when it could reasonably be completed?

## MANAGING RISK-CLIENT SELECTION

F. Has the client retained other sub consultants to try to “keep the cost down”?

- Is it your responsibility to “coordinate” the various disciplines?
- Did the client get a soils report or is that your responsibility?
- Does the client intend to use a local general contractor to help review cost and constructability issues?

## MANAGING RISK-CLIENT SELECTION

G. Have you checked the client's claims and litigation history?

- The Internet is your friend.
- What is your prospective client's history with other projects?
- Have you discussed certain contract terms with the prospective client to be able to gauge his or her willingness to agree to a mediation or a limitation of liability clause?

## MANAGING RISK-COMMUNICATE WITH CLIENT RE PROJECT AND CONTRACT EXPECTATIONS

1. How many **design professionals** believe that the standard of care for a project is “Perfection”?
2. How many **Clients** believe that, when a change order is necessary because the plans did not contemplate a situation that arose during construction, the design professional should pay for the extra cost?
3. In other words, how many **Clients** think that the design professional is the “Smartest Person in the Room” and the plans and specifications should be perfect?
4. How many of you think it is important to talk to your prospective Client about what their expectations of the project when it is complete?

## MANAGING RISK-COMMUNICATE WITH CLIENT RE PROJECT AND CONTRACT EXPECTATIONS

5. It is just as important to educate the client about issues that might arise regarding the plans during construction and how the Standard of Care does not mean you are responsible for every extra construction cost incurred on the project.
6. How many of you recommend, **before the contract is signed**, that a Client establish a **contingency fund** to deal with such costs?
7. How many of you determine **before the contract is presented**, if the Client thinks you are responsible for cost estimating or ADA compliance?
8. How many of you discuss with the Client that it is beyond the SOC to promise your plans will comply with “all” laws, statutes or ordinances?



## BENEFITS OF GOOD CLIENT COMMUNICATION

- The more your client knows and understands what you are doing for their project, the chances of a “surprise” or claim are greatly diminished.
- Don’t overestimate a client’s knowledge of the design services you intend to provide.
- Make sure your client understands there has never been a “perfect” project.





## BENEFITS OF GOOD CLIENT COMMUNICATION

- Educate your client regarding the standard of care.
- Communicate often.
  - Two-way process – make sure the client fully explains what they want and expect.
- Document and retain your communications and decisions.

## MANAGING RISK-GOOD CONTRACT TERMS

### **1. General Considerations:**

- Always insist on a written contract.
- Avoid client drafted agreements if possible and have them reviewed if client insists.
- Always include clause that any changes to the contract must be in writing and cannot be verbal.
- Using AIA or EJCDC form agreements provides a deep background of legal opinions re how terms have been interpreted in the past.



MANAGING RISK-GOOD  
CONTRACT TERMS

2. **Make sure your Scope of Work (SOW) is clearly defined.**
  - a. Is there more than one phase of the project?
  - b. Who is responsible for geotechnical or other preconstruction investigations?
  - c. Are you responsible for pre-engineered structures?
  - d. Are you responsible for coordinating or vetting the work of Client's consultants?

## MANAGING RISK-GOOD CONTRACT TERMS

### **3. Use Limitation of Liability Clauses (LOL).**

a. Allowed in Idaho if properly drafted, but, have been challenged in last few years by client attorneys.

b. Must Be:

1. Clear and unambiguous.

2. Not in violation of public policy or unconscionable.

3. No “public duty” is involved.

## MANAGING RISK-GOOD CONTRACT TERMS

### 3. Use **Limitation of Liability Clauses (LOL)**.

c. Be very specific and inclusive regarding who is covered by a limitation of liability clause.

d. Clearly set forth which causes of action are covered.

e. Need to explain to client that any contract is a balance between risk and reward and your fee does not allow you to take on unlimited liability.

f. Often times, best solution is to limit recovery to the amount of **available insurance limits**.

## MANAGING RISK-GOOD CONTRACT TERMS

### 3. Use Limitation of Liability Clauses (LOL).-Example

The CLIENT agrees that the **limit of liability** for [Design Professional] (including its employees agents, representative s and consultants who worked on the PROJECT) **for any claim**, including but not limited to negligent acts, errors, omissions or breach of contractual obligations relating to or arising out of the Project **shall not exceed the total aggregate sum of \$50,000 or the A/E's total fee for the services rendered on this PROJECT – whichever is greater.** This limitation will apply to CLIENT and all contractors or subcontractors on the PROJECT. The CLIENT agrees to require all contractors to execute an agreement limiting the [DP's] liability in accord with the provisions of this paragraph.

## MANAGING RISK-GOOD CONTRACT TERMS

### 4. Only agree to meet the Standard of Care-Nothing More

- Remember, your contract is a classic means of controlling and assigning risks on a construction project.
- It would be **foolish** to agree to any measure of conduct or performance that exceeds the applicable standard of care, as **that is all the law requires**.
- Never agree to “highest efforts” or “extreme diligence”.
- May be viewed as a contractual assumption of liability which may not be insurable under your E&O policy. (**Only negligence [not meeting SOC] is covered**)

## MANAGING RISK-GOOD CONTRACT TERMS

### 4. Only agree to meet the Standard of Care-Nothing More

#### Bad Example:

#### ARTICLE I.

#### REPRESENTATIONS AND WARRANTIES

By executing this Contract, the Consultant makes the following **express representations and warranties to the Owner:**

\*\*

D. The Consultant shall prepare all documents and items required by this Contract including, but not limited to, designs, advice, reports, needs assessments, and all contract plans and specifications. **Such documents and items shall be accurate, coordinated, adequate for construction, sufficient to accomplish the purposes of the Project, and shall be in conformity and comply with all applicable laws, codes, and regulations.**



## MANAGING RISK-GOOD CONTRACT TERMS

### **4. Only agree to meet the Standard of Care- Good Examples:**

**Engineers:** The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services. EJCDC® E-500, Agreement between Owner and Engineer for Professional Services (2014)

### **ARTICLE 2 ARCHITECT'S RESPONSIBILITIES**

The Architect shall provide the professional services set forth in this Agreement consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

## MANAGING RISK-GOOD CONTRACT TERMS

### **5. Avoid Uninsurable Indemnity Clauses**

- If you can't eliminate the indemnity clause, at least make sure it only requires you to be responsible **ONLY** for your own negligence.
- Also make sure it does not require you to **DEFEND** your client before there has been some determination of whether you are at fault.
- Typically not insured by your E&O policy.

## MANAGING RISK-GOOD CONTRACT TERMS

### 5. Avoid Uninsurable Indemnity Clauses-

#### UNFAVORABLE INDEMNIFICATION CLAUSE:

Consultant shall **defend**, indemnify, and hold the [Client], its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits, including attorney fees **arising out of or resulting from the acts, errors or omissions of the Consultant** in performance of this Agreement, except for injuries and damages caused by the sole negligence of the [Client].

## MANAGING RISK-GOOD CONTRACT TERMS

### **5. Avoid Uninsurable Indemnity Clauses-**

#### **BETTER LANGUAGE:**

Notwithstanding any clause or provision in this Agreement or any other applicable Agreement to the contrary, Consultant agrees to indemnify and hold harmless (**but not defend**) the Client, its officers, directors and employees from and against damages and costs (including reasonable attorney fees and cost of defense) that Client is legally obligated to pay, to the extent caused directly by any negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement.

## MANAGING RISK DURING CONSTRUCTION PHASE

### Always Try to Retain Contract Administration (CA) Responsibility

- Some Clients will try to save money by not hiring the Design Professional to perform CA tasks as construction is underway.
- This leaves the contractor without a resource to use when questions about the plans arise during construction.
- That is a classic way for an “issue” to be created.
- Some firms are passing on projects where they do not have both design and CA responsibilities.

## MANAGING RISK-KEEPING A “CLEAN” PROJECT FILE

- THIS GOES BEYOND HAVING YOUR JOB FILE ORGANIZED ON THE COMPUTER.
- ALWAYS PREPARE AND RETAIN CONFIRMATIONS OF ORAL CONVERSATIONS.
- RESPOND TO ALL INCOMING MEMORANDA AND DETAIL ANY AREAS WITH WHICH YOU DISAGREE.
- NEVER KEEP NOTES IN YOUR FILE QUESTIONING YOURSELF OR THE OTHER MEMBERS OF THE DESIGN TEAM.

## MANAGING RISK-KEEPING A “CLEAN” PROJECT FILE

- NEVER ADMIT A MISTAKE IN WRITING.
- DISCARD ALL PREVIOUS DRAFTS OF CORRESPONDENCE.
- KEEP A SEPARATE FILE OF ALL EMAILS/DOCS RELATED TO A PARTICULAR ISSUE TO ASSIST COUNSEL.
- AVOID USING CERTAIN WORDS AND PHRASES AS YOU DEAL WITH THE PROBLEM WHICH HAS ARISEN:
  - “Mistake”
  - “Design Defect”