

## Managing Your Practice in a Down Economy

By David J. Hatem Esq. and Brian C. Newberry Esq.

The current economic downturn can tempt design professionals, like other businesses, to abandon good business practices as they scramble to obtain clients, maintain steady work flow and generate revenues. Sacrificing intake controls and other risk management practices, however, often leads to more heartache in the long term than benefits. As all professionals know, the design market, like the economy, has taken a tumble since 2007. However, now is not the time to change risk management practices, no matter how easy it is to put short term gain in the forefront.

Certain risk management precautions should remain central to your firm's operation regardless of, and indeed precisely because of, the current economic climate. For example, client intake screening should stay a priority. Few things can damage a professional practice more in the long haul than poor client selection. When business is scarce, the whole concept of "client selection" may seem a luxury and intake procedures may become lax by default. Many professionals might think that it is better to have a bad client than no client at all, but this is short term thinking.

Staying on top of fee collection is similarly critical to any practice, in good times and in bad. Knowing which clients are "problem payers" and require special attention, as compared to those who pay regularly and on time, allows you to focus your attention on the problem payers at strategic intervals to keep them from getting too far behind in their AR. In general, maintaining control over work intake and payment should always be top priority. Chasing clients for payment is a waste of productive time. The best way to avoid it is by carefully choosing who you do business with. Good business practices dictate that such screening techniques already have been put in place long before the current economic downturn. They exist to protect businesses at all times, and a recession offers no reason to abandon them.

The controls that design professionals ought to have in place should include always sending clients monthly invoices with payment deadlines. Even in situations where alternative payment arrangements have been agreed to in advance, monthly statements of time billed are useful reminders to the client of precisely what work has been done on their behalf. This can forestall later complaints that fair value was

not obtained. Similarly, professionals should ensure that their contract forms contain provisions allowing them to suspend work in the event of nonpayment, and they should take steps to enforce those provisions when necessary.

Having no work is bad; doing work that you will never be paid for is worse. The time spent on that non-paying work (which may just as well never have happened) could be better served in marketing your practice and conducting other non billable essential functions. Not having enough paying work at any given time is psychologically hard, but wasting your

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time is more damaging to your practice in the long haul. Worse, collection activities against former clients often produce counter-claims for malpractice or breach of contract, regardless of the merits, simply as a tactic to avoid or delay payment. These claims can impact your insurance coverage and often wind up costing you more than the money you tried to chase in the first place.

Beyond payment, client intake also has critical implications for potential liability down the road. There has been an increased trend in the industry for parties to search for third party liability exposure when things go wrong on a project. When the economy is booming, developers, contractors and others with whom design professionals regularly do business are often too busy to focus attention on trying to fatten up otherwise questionable potential liability claims. During economic downturns,

however, these parties – lacking other opportunities to divert their time and energy – have a strong economic incentive to try to recover as much money as possible from third parties, particularly when they know liability insurance often can cover the loss. Thus, design professionals are at risk of seeing increases in potential claims during an economic recession and need to take extra precautions to avoid falling prey to such claims.

There are a number of areas where third party liability exposure can lie. During a downturn, areas that ordinarily would not draw attention can become fruitful terrain for creative attorneys. To avoid this pitfall, remember a few basic tips. A well drafted contract can insulate a design professional from many types of claims, particularly breach of contract claims but also far fetched negligence claims. With respect to non-contractual third-parties, however, it is important for engineers to limit their communications with entities with whom they have no contract to those items, issues and tasks for which they have some contractual obligation. For example, gratuitous comments by the lead design engineer to an owner's contractor, on a design-bid-build project regarding the contractor-designed support of excavation, can lead to allegations of approval or ratification that designer never intended. Additionally, designers should carefully scrutinize their cost and schedule estimates and projections, and provide appropriate limitations and qualifications directly on these documents.

Specific and appropriate limitations and qualifications should be included with all the design engineer's reports, affidavits and certifications. While these warnings to the reader may not be dispositive, they do simplify and bolster your defense of certain claims. Consider for



example a claim of negligent misrepresentation which requires that the claimant prove that it reasonably relied on your report, or certificate or other communication, to its detriment and that report was either negligently prepared or negligently communicated. By including appropriate disclaimers as to the scope and purpose of the report, the limitations on data gathering, etc., a burden is created on the claimant to prove that it was reasonable in ignoring the limitations or qualifications. And while the disclaimer may not be perfectly on point, such that it disposes of the claim in its entirety, it will tend to shift the balance in your favor and put the claimant on the defensive. Such limiting statements can help reduce risk exposure.

Finally, designers should take care to enforce their own contractual terms. Doing so on a consistent basis will help forestall future problems. In a professional business where personal relationships are paramount, many people find it difficult to strictly enforce the letter of contractual arrangements. It is easier to do business "on a hand shake" when times are good and the relationship is solid. Only when things go wrong does the wisdom of enforcing the letter of a contract from the beginning become clear. The prudent design

professional does so from the outset, regardless of the prior relationship. Other professionals with whom you do business should recognize this and appreciate it, because clarity benefits everyone.

To sum up, an economic downturn provides temptation to deviate from established practices that exist to protect against long term liability problems. When business is scarce, it is easy to forego protections that have been built into client intake and contractual practices. However, doing so creates liability risks that often outweigh the short term benefits. As difficult as it may be to stick to procedures, doing so will pay dividends in the long run. ■

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