Including a Claim Validation Clause in your Agreement

By Bruce Burt, P.E., SECB

If you work as a structural engineer long enough, you will probably have the misfortune of defending yourself against a baseless legal claim. We have all heard stories about firms forced to spend thousands of dollars in attorney fees to defend themselves against a nuisance lawsuit, or to make it go away.

There are many ways to protect your firm from legal claims, including claims of questionable merit. Some methods include: following a comprehensive quality assurance program, working under suitably written contracts, managing client expectations, and choosing the right clients in the first place. These measures can help reduce the risk of a lawsuit. However, what if you have developed a quality deliverable and still find yourself the subject of a costly-to-defend lawsuit? Even after you've performed your services in a manner consistent with the care and skill exercised by other design professionals, your client may sue you.

So why would a client choose to litigate? One obvious reason is that your client may have a legitimate claim due to a design error or omission. Professional liability insurance is available specifically for that possibility. However, in most states, your client can sue you whether or not the case has legal merit. There are twelve states (Arizona, California, Colorado, Georgia, Maryland, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, South Carolina, and Texas) that have enacted legislation requiring some form of certification of the existence of a fundamental basis for a negligence claim. Two other states, Hawaii and Kansas, require a claim be submitted to a screening panel to assess its validity.

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While the specifics of state statutes differ in terms of scope and application, all state "certificate of merit" statutes require the opinion of a third-party design professional that a claim is factually supportable. Usually, this opinion is obtained by the plaintiff through his or her attorney and must indicate that you, the design professional, did not meet a "standard of care." State statutes also vary on what is meant by standard of care, but it is generally understood as the care and skill that is ordinarily exercised by other members of the engineering profession in performing professional engineering services under similar circumstances.

You need not reside or do business in one of the fourteen states with a merit threshold to obtain some assurance that a negligence claim brought against you is valid. You can include a "Claim Validation" clause in your professional services agreement. Even if you reside in states with some form of certificate of merit requirement, including a claim validation clause may be advantageous, since you would not have to rely on a favorable application of a state statute for protection against unmeritorious claims.

There are some drawbacks to including a claim validation clause in your contract, including a potential for alienating clients. Selectively including the clause in agreements with new clients is a way to prevent antagonizing longstanding ones. Moreover, it is important to choose the wording of your clause carefully. An unduly strict clause could be struck down in a court ruling if it is interpreted as discouraging legitimate claims. A carefully worded clause emphasizing "Claim Validation" might be looked on more favorably by your client and the courts than a clause that might be construed as a deterrence to pursuing legitimate claims.

Even if you choose not to include a claims validation clause, you should at least ensure that the contract you sign includes wording properly defining your standard of care. Avoid contracts that include words like "best" or "highest," or otherwise attempt to elevate the standard of care. Not only does an elevated standard of care increase your liability exposure, virtually all professional liability insurance companies limit claims coverage to breaches of the commonly defined standard of care.

As with any term written into your client agreement, a claim validation clause should be carefully reviewed by your legal counsel to ensure it is enforceable and does not conflict with state statute.▪

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