



Top Risk Management Questions Facing Design Firms Today

By G. Daniel Bradshaw, CPCU

As an insurance agent working with design firms every day, I get lots of questions regarding professional liability risks. Here is a listing in no particular order of the top professional liability questions I have been hearing from my clients and prospects, including my structural clients. It's not a scientific poll, mind you, but a fair reflection of what's on the minds of design firms when considering their professional risks.

Should I sign my client's take-it-or-leave-it contract?

This is a very difficult question to answer. First, the fact that a client would take such a stance should send up a red flag. Is this the type of entity or individual you want to do business with? But if it's a project or client that is attractive to you from a business standpoint, a client-drafted contract is not necessarily a bad thing. The key is to ensure the contract does not contain onerous language you simply can't accept.

First of all, READ the contract – or have legal counsel do so. Highlight any language that you feel presents risks to your firm. Look for language that asks you to indemnify the client from risks that might otherwise logically belong with the client. For example, does it ask you to take responsibility for the client's negligence or actions? Please be aware, if you agree to accept liabilities that would not be yours absent the contractual obligation, those liabilities will most likely NOT be insured!

In the end, it comes down to a risk-versus-reward business decision. You may be able to get a contract review from your insurance agent, but only you know whether you can live with the contract conditions.

Whatever happened to project insurance?

Long ago and far, far away, most professional liability insurers offered a product called project-specific insurance. Generally, this type of insurance covered all of the design firms

working on a single project up to the policy's dedicated limits. It was typically paid for by the project owner and the fees earned by the design firms did not count in the calculation of their own practice policies.

Sounds great, right? Who could lose when project owners had guaranteed coverage up to their desired limits and the design firms avoided most if not all the cost? The insurance company, that's who! These policies, for a variety of reasons, resulted in monumental losses for insurers. As claims and loss ratios hit the stratosphere, insurance companies pulled their products off the market and project policies went the way of the dinosaur.

Actually, there are still a few insurers who may offer project policies under the right conditions, but prices are extremely high and policy conditions are not as attractive as before.

Will my clients really accept a limitation of liability (L of L) contract provision?

You'll never know until you try! The fact is many clients accept L of L contract provisions once the reasoning behind them is explained.

The primary line of reasoning goes something like this: The client has the most to gain from a successfully completed project. The designer's gain is limited to project fees minus expenses. So if the owner has the bulk of the reward, shouldn't they also be willing to accept its fair share of risk? As a structural engineer, your client is often another designer who didn't negotiate a limitation of liability clause with its client, the project owner. Regardless, you should discuss the importance of this clause and the benefits for you and them.

The best L of L negotiation stance is to avoid a yes/no decision. Provide your client an option – you can either perform your services with unlimited liability for one fee, or you can lower that fee if the client is willing to accept the L of L. If clients balk at the amount, raise the limit. A cap at your available insurance limits rather than your fee, for example, is much better than no clause at all.

How much will my professional liability insurance cost next year?

That's going to depend on a whole slew of factors. Your premiums will be based on your annual fees, your claims history, the types of projects you've worked on and whether you take advantage of cost-saving opportunities offered by your insurance company – such as completing loss prevention education programs or including prescribed risk management practices.

All things being even, insurance premiums are currently pretty stable, but that may change. Be sure you consider the entire cost of professional liability protection, not just your annual policy premium. You might find an insurance agent or broker offering significantly reduced premiums. But if you end up with inferior policy coverage and inadequate claim service, support and advice, buying that cheap policy may turn out to be the most expensive decision you've ever made.

What is the best thing I can do to reduce my professional liability risks?

That one is pretty easy – manage your client relations. Claims studies show that non-technical factors are the leading cause of claims, and topping the list are communication problems between designers and their clients.

Stress within your firm the need to have open, honest and clear communications with your clients. Good communications go a long way to uncovering misunderstandings, omissions and errors at the earliest stage possible, before they require an expensive fix.

Equally important, if you have a solid, open and trusting relationship with your clients, they are more willing to seek amicable solutions to any project upsets that arise, rather than immediately calling in their lawyers and threatening you with claims. When your client's attitude is one of "how can *we* fix it?" rather than "how are *you* going to fix it?" you've won half the battle. ■

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