

A/E RISK REVIEW

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25 Questions: What's Your Risk Management IQ?

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

How much do you and your staff know about professional liability risks? Here are 25 true/false questions you can use to test your company's Risk Management IQ:

THE QUESTIONS

1. The best prevention against professional liability claims is keeping a low profile and staying out of the line of fire during both the design and construction phase of your projects.

T F

2. If your firm does not have a written contract with a client, it has no enforceable agreement at all.

T F

3. Third-party claims filed by injured parties looking to "strike it rich" by hiring contingency-fee lawyers are the most common claims against design professionals.

T F

4. Companies that quickly adopt Building Information Modeling (BIM) gain a substantial risk-management edge over their counterparts.

T F

5. You should never have your client listed as a named insured on your professional liability policy.

T F

6. Requesting extensive financial information from a prospective client is unprofessional and almost a guarantee to lose the account.

T F

7. One of the best things about doing projects for public agencies is their creditworthiness. They always pay their bills.

T F

8. When a client directs you to take a money-saving shortcut that may cause you to violate the prevailing standard of care for design professionals, you should document all details of the request before following the client's dictates.

T F

9. Virtually all professional liability insurance policies cover the indemnifications clients commonly request.

T F

10. Despite claims to the contrary, computer-aided design (CAD) does *not* significantly reduce the errors and omissions associated with design documents.

T F

11. Condominiums are relatively low-risk projects because a simple design can be repeated throughout the project.

T F

12. A design professional's certification of known facts is generally acceptable. Certification of opinions, however, can be dangerous.

T F

13. Most A/E claims are filed within six months of submission of contract documents.

T F

14. Because of the extended personal liability for your work, only death makes you "judgment-proof."

T F

15. It is generally preferable that you and your client agree to a mediation service after a dispute arises, rather than having a mediator predetermined in your contract.

T F

16. Although having a limitation of liability contractual clause is effective, design professionals are better protected with a blanket indemnification.

T F

17. As long as a design firm is not negligent in the performance of its services, it cannot be held liable for its actions.

T F

18. When a design professional arrives on the jobsite and sees an obvious safety problem or OSHA infraction, he or she is well advised to remain silent and avoid taking on jobsite safety liabilities.

T F

19. The primary benefit of providing full construction observation services is income enhancement, not loss prevention.

T F

20. A certificate of merit clause -- a contract requirement that a client must, before filing a claim, obtain a professional's opinion that negligence occurred -- may be applied only in states with a merited claims law.

T F

21. Companies working on foreign projects should obtain international insurance coverage because their domestic policies may not provide adequate protection.

T F

22. As a general rule, a design professional should keep every scrap of paper associated with a project, just in case a problem occurs in the future.

T F

23. Threatening to sue a client for overdue fees is a good way of getting paid.

T F

24. When an architect or consulting engineer gives direct instructions to a contractor's employee, a safety responsibility may be inferred despite contract wording to the contrary.

T F

25. Given that one lawsuit could cost a firm the profit made on 50 projects, time spent golfing with clients would be better spent studying up on professional liability issues.

T F

THE ANSWERS

1. *False.* Since clients file most claims, the best defense is actively maintaining good communications and amicable relationships with clients so any problems that do occur can be resolved quickly without lawsuits.

2. *False.* Whenever a firm undertakes work for a client it has a contract, whether the agreement is written or verbal. Verbal agreements, however, are more difficult to substantiate and enforce if the other party disputes your recollection of the deal.

3. *False.* Third-party claims against design professionals by injured parties are rare. Clients file the vast majority of claims against design firms.

4. *False.* Even though BIM holds great long-term promise in reducing project errors, most of the insurance and design industries agree that it may actually increase liabilities in the short term. There are few precedents to help insurers, attorneys, judges and juries sort out responsibilities in the event of a claim.

5. *True.* Having your client named as an additional insured on your professional liability policy can reduce your client's protection and increase its liability should a claim be filed on your PL policy.

6. *False.* Taking steps to ascertain a client's financial standing is not at all unprofessional. Most clients are familiar with the procedures needed to check financials and are willing to comply.

7. *False.* Public entities have been known to jump the gun and engage design firms before funding is in place. Make certain that a public entity has received funding for the work you are hired to do or you may be left holding the bag.

8. *False.* Design professionals should never knowingly violate the standard of care. Doing so could nullify

your professional liability insurance coverage and expose you to severe legal sanctions.

9. *False.* Clients frequently ask for indemnifications that are not insurable. Accepting them can increase liability exposures while simultaneously eliminating professional liability insurance coverage.

10. *True.* CAD, in and of itself, does not reduce the chances of errors and omissions. While CAD can help produce more accurate drawings, it also adds its own unique liabilities, such as errors in electronic transmission and an increase in the misuse and reuse of the electronic files.

11. *False.* Condominiums are among the riskiest types of projects imaginable. Highly leveraged developers, skimpy budgets, poor maintenance and litigious homeowner groups all contribute to the condominium's dismal claims record.

12. *True.* A certification of opinion can be interpreted as a guarantee. As with indemnifications, the end result can be a significant increase in liability exposure and elimination of professional liability insurance coverage for it.

13. *False.* Claims can be filed at any time, but typically occur within two to three years of the completion of a project.

14. *False.* Even death may not afford protection. As long as an estate exists, it can be sued for damages resulting from the deceased's prior professional acts.

15. *True.* While it is true that it is best to agree to mediation as the preferred dispute resolution technique in your client contract, it is best to wait until a dispute arises to select the actual mediator. That way, you can select someone knowledgeable with the issue in dispute.

16. *False.* A full indemnification is seldom enforceable. As such, it would be the same as no indemnification at all. Most courts consider limitation of liability to be a reasonable alternative and, when clauses are properly drafted, they usually will enforce them.

17. *False.* Design firms may be subject to fiduciary liability which doesn't require that negligence be shown. You could perform to the prevailing standard of care and still be found liable for damages – and possibly be uninsured for those damages.

18. *False.* Not reporting a safety violation would violate licensing requirements. It would do little to prevent liability exposure in most instances and could create serious repercussions.

19. *False.* Performing full construction observation services can greatly reduce your exposure to loss. Many firms consider construction observation to be integral part of complete design professional services.

20. *False.* Merited claims protection can be obtained by contract in virtually any state or territory of the United States and in Canadian provinces as well.

21. *True.* While professional liability policies can often be endorsed to provide international coverage, separate international coverage will likely be needed for risks such as workers compensation, general liability and auto liability.

22. *False.* Keeping too much paper on hand can create problems should discovery occur. When opposition attorneys have the ability to examine several drafts of the same document, they can use inconsistencies between drafts to confuse the issue and the trier of fact. As a general rule, only final versions of project and contract documents should be kept.

23. *False.* There are contractual measures, such as a "Suspension of Services" clause, you can use to increase the chances of getting paid by your clients. But threatening to sue for nonpayment will likely result in a counter suit alleging negligence by your firm.

24. *True.* Construction workers usually may not sue their employers. Instead, they receive benefits from workers' compensation insurance. Particularly when a death or disability is involved, these benefits can be low and often can trigger a search for deep pockets. If it can be shown that a design professional somehow took on a directional responsibility with respect to a contractor's workers, a safety responsibility may be established.

25. *False.* Playing golf with clients and undertaking other activities to establish good relationships help assure effective lines of communication should a problem occur. Given that the majority of claims filed against design professionals are filed by their clients, having good relationships with clients helps lower exposure to the "riskiest" people with whom design professionals deal.

So, how well did you do? If you missed more than five answers, you might need some refresher work on professional liability issues.

Professional liability education should be an important part of your staff training. Ask us about the education opportunities available in the areas of risk and practice management.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.