



AIA Best Practices:

You're not invincible: How to prepare for claims

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Summary

Professional liability insurers tabulate lists of the most common problems that plague the practice of architecture and lead to claims. Learning from the mistakes of others is a great way to give your practice an edge over the competition and, at a minimum, save money and preserve a good reputation.

The most common claims

In the past two decades, surveys conducted by the top professional liability insurers reveal a consistent pattern in the causes of claims against design professionals. More than 90 % of all claims involve the following four areas:

1. negotiation and contracts
2. client selection
3. project team capabilities
4. communication

Firms that don't seek and embrace strategies to combat these potential problems may do so from a naive sense of invincibility, thinking "we've never been sued before." But they are just one claim away from being snapped back to reality. Everyone makes mistakes. It is better to prepare for these common claims before they happen and to learn from the mistakes of others. Avoiding common mistakes will help protect your reputation and your business.

Negotiation and contracts

Claims almost always appear in a legal form, alleging some failure to comply with the terms of the design services agreement. Below is a list of do's and don'ts that will help mitigate such claims:

- Don't work without a written agreement.
- Don't take on risk that rightfully belongs to the client or the contractor.
- Don't take on risk that will not be covered by insurance — don't accept a higher standard of care.
- Don't oversell your capabilities; carefully review your marketing materials.
- Do thoughtfully define the services you will and will not provide. Set clear expectations for your client.
- Do seek to obtain limitations of liability.

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- Don't limit the liability of consultants on your own.
- Don't make guarantees or certifications beyond the scope of your services.
- Don't accept design commissions for construction projects that exclude construction phase services.
- Do use industry standard agreement forms.
- Do seek qualified outside legal and insurance counsel to review agreements before you sign them.
- Do establish internal protocols for preparation, review, and authority to sign all contracts.

Client selection

Your client is most often the party that sues you. Just as prudent clients carefully choose their designers, smart design firms carefully select their clients. Below is a list of client selection do's and don'ts:

- Do work for experienced clients — clients that have a history of developing projects with reasonable expectations of what it is like to employ a design professional.
- Do work for clients with the financial resources to do the project and pay you.
- Don't work for clients with a history of litigation — check with your professional liability insurance provider.
- Don't accept commissions that are outside your area of expertise unless you intend to hire or team with the right expert.
- Do understand the impact of the proposed delivery method (hard bid, negotiated contract, fast track, public versus private) on the services that will be expected by the client and necessary for a successful outcome.
- Do establish a reasonable fee to cover the necessary service level (and degree of service accuracy) that will be expected by the client.
- Don't unwittingly take on high risk, highly litigious project types, such as condominiums.

Project team capabilities

The capability of you and your team—or, better stated, the lack thereof—is the second most common cause of claims. Below is a list of do's and don'ts that can mitigate team capability claims:

- Don't send inexperienced staff unaccompanied to the project site.
- Don't assign projects to an inexperienced project manager.
- Do maintain senior firm leadership (project principals or directors) involvement in the project.
- Do buttress or balance junior staff assignments by including the right mix of senior, experienced staff.
- Do maintain continuity of staff throughout the life of the project. When someone unavoidably leaves, get a qualified replacement.
- Do develop, implement, and enforce the use of office standards for design and documentation activities.
- Do learn from past mistakes; issue lessons learned and update standards.

- Do educate young staff.
- Do embrace emerging technologies for design and production and hire and train accordingly.

Communication

Failure to meet expectations is the most common cause of claims, and a breakdown in communication often lies at the heart of this failure. These failures inevitably lead to complaints and accusations:

- Why didn't you do such and such?
- I never approved that.
- I'm not going to pay that bill.
- You never told me this could happen.
- When did I say that?

Below is a list of do's and don'ts to mitigate communication problems:

- Do review your contract with your client to eliminate false expectations.
- Do review your contract with your project staff and consultants to clarify expectations and deliverables.
- Do conduct proper team meetings; take notes and issue minutes containing approvals and action items. Issue minutes promptly and correct mistakes.
- Don't issue drawings, specifications, reports, and the like without document control; include proper dates, descriptions, drawing numbers, and records of who received the documents.
- Do maintain proper project records. Use electronic filing systems to their best advantage.
- Do develop, maintain, and use to-do lists.
- Don't issue documents for use by others without implementing proper quality assurance and quality control measures. This includes internal third-party reviews and possibly electronic clash detection and external peer reviews.

Warning signs of a claim

You or someone in your firm is almost always the first to know a claim is coming. How you act in that circumstance will have a substantial impact on the severity and ultimate disposition of the claim. It does no good to hide, as doing so only makes it worse. The following list of do's and don'ts will help you prepare for an impending claim:

- Do see the claim first. Better you tell the client than your client tells you.
- Don't just hope the problem will go away on its own. It won't.
- Don't be in a rush to admit guilt. Admitting fault may negate insurance coverage. Check the facts first.
- Do report the issue, or potential issue, promptly to your insurer and seek legal counsel if appropriate.

- Work out a solution. This gives you a chance to preserve your valued client relationship and goes a long way to affect what they will say about you behind your back.

Conclusion

The practice of architecture involves risk. Much risk can be avoided or transferred by being savvy, by getting good advice, and by following through on that advice. The rest of the risk must be embraced and handled with skill, and at a level equal to the standard of care — you must, at a minimum, do that. Guard your reputation. A good reputation is a valuable and beautiful thing, and it will last only as long as your next claim.

About the contributor

Peter Gifford Longley, AIA, CSI CCS, LEED AP, is an architect with more than 39 years of experience. As director of operations for Tsoi/Kobus & Associates, he has developed and written firm standards for documentation and quality control and is responsible for the firm's risk management and quality assurance/quality control practices.

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This article corresponds to:

Architect's Handbook of Professional Practice, 15th edition Unit 1 – The Profession
Chapter 16 – Risk Management
Section 02 – Insurance Coverage for Business and Professional Liability