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Claims, Claims Go Away!

By Joshua Lluch

Unfortunately just saying it does not make it so. In today's litigious society design professionals are often sued for things that they have no control over. The economy being what it is doesn't help either. Claim frequency trends north when the economy goes south. When people need money where do they go? Why, to the deepest pockets of course! (Much to the chagrin of the insurance companies.) While there is little or nothing that you can do to prevent frivolous lawsuits, there is something you can do to prevent real lawsuits. Educate yourselves. Here are some of the most common problem areas that you and your firm can avoid.

Client selection. Those of you that only work with government agencies can sit this one out. For the rest of you, do you know who it is that you are dealing with? Doing quasi-background checks is key to eliminating some of the risks involved in your projects. It is amazing what you can find on the internet. All you have to do is enter your prospective client's name in a search engine and hit the enter button and see what comes up. Have they recently gone to court to sue another design professional? Did they just lay-off 50% of their work force? Has there been a restructuring of the organization recently? These are things that you can probably find within 10 minutes on the internet. Ask some of your peers if they have ever worked with your prospective client. You may find out that they are prone to filing lawsuits, or to not paying on time (or at all). Run a Dun & Bradstreet report. Make sure they are as financially sound as they say they are.

New projects/questionable projects. Now is not the time to start taking on work in fields that you have no experience in. Again, because of the economy, any little thing that goes wrong can potentially snowball into a lawsuit looking for that deep pocket. There are a large number of claims that involve schools, universities, churches, medical facilities, and condos/co-ops/apartment buildings. If you do not specialize in those areas now, do not take on jobs in these areas. If you already have a specialty in these areas be aware of what it is you are getting into. What is the reward relative to the risk you will be taking on? Proper contracts can go a long way to helping you stay out of trouble. Your employees also go a long way to helping you stay out of trouble. Unfortunately some of you

have had to let some employees go. While it is never easy to let go of employees, it is even less easy knowing that there is a shortage of talent in the design professional industry. Know the capabilities of your current team (pared down or not). It is ok to pass on work that you know you cannot complete without breaking the figurative and physical bank. It is much more expensive, both in the short and long term, to get involved in a big claim than it would have been to just take a pass.

Contracts. Any advice given here does not pertain to public sector contracts. Public sector contracts are take them or leave them, and most firms take them. And while that is not ideal, it is the nature of that particular beast. There are many pitfalls involving poorly worded contracts. Is the scope of services clearly stated? Are there unrealistic expectations regarding schedules and fees? Are the indemnification clauses mutual? Do warranties and guarantees exist which would not be covered under a professional liability policy? Is the standard of care attainable? Is there a mediation provision? Is there a limitation of liability provision? A contract should be in place prior to initial work. Client-authored forms, especially, should be reviewed by your counsel and insurance agent in order to detect any onerous language like assumption of liability as well as any insurability issues. Contracts with subcontractors should also be maintained and reviewed in the same fashion.

Communication/Documentation. The title just about speaks for itself. Clear, concise and frequent communication between all parties involved is imperative to the success of any project. Client expectations have to be managed and that simply cannot be done without proper communication. Poorly defined staff responsibilities and scope of services are some of the biggest causes for the elevation of issues. Avoid the types of claims alleging misrepresentation, negligence, or misconduct by simply communicating more clearly and more frequently. Most importantly, document any and all forms of communication so as to avoid mysterious "lapses in memory." There is an old joke about lawsuits: the person with the most paper usually wins. Live by those words. Also, don't write anything in internal memos or e-mails about anyone else that you wouldn't say to their face. You would be very surprised what comes up during discovery. There is a whole industry that is devoted to the field of electronic discovery. It is their job to find all electronic files that pertain to a specific case during the period of discovery. Think about that the next time you

want to send an e-mail to a coworker telling him/her what a pain in the neck your client is. Just because you delete an e-mail doesn't mean that it disappears into an electronic black hole.

Trust Your Instincts. The first time you even suspect a problem might become a claim get the insurance company involved. Insurance company studies have shown that the earlier the insurance company gets involved the less likely the problem is to become a claim. Don't worry about loss preventions (pre-claims assistance) increasing the price of your liability insurance. In general, pre-claims assistance does not affect the price you pay for your liability insurance and the assistance is generally free. Most, if not all, insurance companies want to get involved from the beginning. Just remember, however much you pay for your professional liability insurance, the insurance company has more skin in the game than you do. They will fight hard to keep their money in their pocket.

While there is no magic bullet that will make all claims disappear, following the simple steps that have been outlined here will get you well on your way to a more claims free life. After all, the cost of insurance is much more than what you pay for your actual policy. Frequent and/or severe claims will cost you in ways that you may never have thought about. Such as: money in the form of lost opportunity costs and deductibles as well as future increases in both the price of your liability policy and future deductibles as well as an overall loss of morale, and of course time away from doing what you love most. If you arm yourself with proper education and safeguards you will ultimately reduce the total cost of your insurance. And who couldn't use a little extra money these days?

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