

The Warning Signs of a Claim/ Anatomy of a Claim

Tom Bonggi

Catlin Design Professional

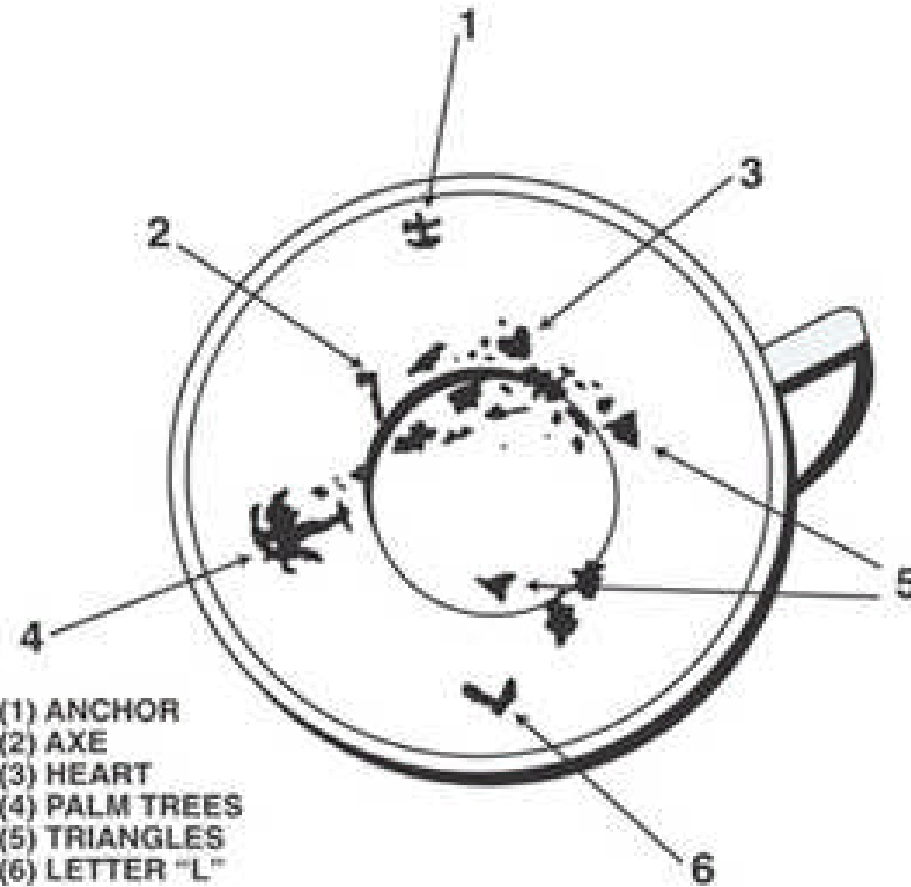


Know the Warning Signs of a Potential Claim

- Tasseography
 - ◆ The art of tea leaf reading
 - ◆ Ancient art probably started by the Chinese
 - ◆ Believed one's future can be seen in the random dispersal of tea leaves



Reading the Tea Leaves



Reading the Tea Leaves

- Unfortunately, a leaf reading can *only* tell the future
- To have true power, one must be able to see the future . . .
- ***and*** the power to change the course of future events

Knowledge is Power. . . And Money

- For design firms, avoiding claims is not just good business sense. . .

. . . It means survival!

The True Cost of a Problem

<u>Cost of Problem</u>	<u>Revenue Needed to Offset</u>
•\$1000	\$20,000 (400 staff hrs.)
•\$10,000	\$200,000 (4000 staff hrs.)
•\$50,000	\$1,000,000 (20,000 staff hrs.)

Assuming 5% After Tax Profit

The True Costs of a Problem (continued)

- Other “costs”
 - ◆ Lost billable hours
 - ◆ Business disruption
 - ◆ Lost opportunities
 - ◆ Lower employee morale
 - ◆ Damaged/destroyed client relationships
 - ◆ Damaged firm reputation

The Warning Signs

- For 19 years, I've been tracking claims against A/E firms
- "I've seen it all"
- Underwriting is about knowing the warning signs and avoiding inappropriate risks
- The trick is for you to know the warning signs and address them before they become a claim



The Warning Signs – Before the Project Begins

- **Unreasonable Now, Unreasonable Later**
 - ◆ **Unreasonable during contract negotiations**
 - ◆ **Inflexible**
 - ◆ **Will only accept one-sided agreement**
 - ◆ **Not arms length deal but the upper hand**

The Warning Signs – Before the Project Begins

- **Litigation As A *First* Resort**
 - ◆ **History of litigation**
 - ◆ **Sued A/E's before**
 - ◆ **Use the designers (and their insurance) as the project contingency fund**



The Warning Signs – Before the Project Begins

- **Stepping In For Another**
 - ◆ **What reason does the client give for the previous designer leaving?**
 - ◆ **What does the designer say?**
 - ◆ **Who has the right to the in-progress design?**
 - ◆ **Get to the bottom of the issue**

The Warning Signs – Before the Project Begins

- **Underfunded And Overleveraged**
 - ◆ **Client have funds to complete project?**
 - ◆ **What type of “value engineering” is going to be demanded?**
 - ◆ **With underfunded client, you have two choices:**
 - (1) not getting paid , or**
 - (2) a claim**
 - ◆ **Pull credit reports and other info**



The Warning Signs – Before the Project Begins

■ Amateur Hour

- ◆ Does the client have experience with this particular type of project?
- ◆ Does the client know how to handle/manage the design period? (Design/build)
- ◆ When the wheels come off, there is only one “professional” involved – you.

The Warning Signs – During Construction

- **Buried In RFI's**
 - ◆ Is it a design problem?
 - ◆ If so, deal with it *quickly*
 - ◆ If not, call it to the attention of the contractor and owner *in writing*
 - ◆ Still must respond to each RFI in timely manner
 - ◆ Don't leave RFI's unanswered



The Warning Signs – During Construction

■ There Goes The Budget

- ◆ Are your billings significantly over your contract amount?
- ◆ Is the project over budget?
- ◆ At best, you'll get stiffed on your last invoice
- ◆ At worst, the owner looks to you to make up the difference

The Warning Signs – During Construction

■ The Cold Shoulder

- ◆ Client/owner not returning your calls
- ◆ Perceive a curt attitude toward you
- ◆ Not invited to attend a meeting you should be at
- ◆ Getting bad vibes
- ◆ Find out why!



The Warning Signs – During Construction

- **Where Did *That* Come From?**
 - ◆ **Receive combative correspondence from client or owner**
 - ◆ **Don't overreact**
 - ◆ **Try to determine the source of the rub**
 - ◆ **Respond in writing (even if it was taken care of orally)**

The Warning Signs – During Construction

- **The Money Spigot Is Turned Off**
 - ◆ **Is the lack of payment the client's standard practice or a sign of dissatisfaction**
 - ◆ **To avoid this, have clear payment terms and hold the client to them from day one**
 - ◆ **Disruption in the routine should be a warning**



The Warning Signs – During Construction

■ Why Aren't You Working?

- ◆ Construction work has stopped
- ◆ Find out why
- ◆ Is the design being blamed?
- ◆ Watch out for the phantom design issue
- ◆ Don't assume the stoppage is not your problem

The Warning Signs – After Project Completion

- **You Sue Me, I'll Sue You**
 - ◆ **Project completed and you're owed money**
 - ◆ **Why not sue to get what is owed to you?**
 - ◆ **80% of suits for fees result in a counter suit against the design professional**
 - ◆ **One suit is now two, insurance company involved, you owe your deductible and, oh by the way, your deposition is next week**
 - ◆ **Best way to avoid this scenario is to have a good contract and stay on top of the fees owed to you**

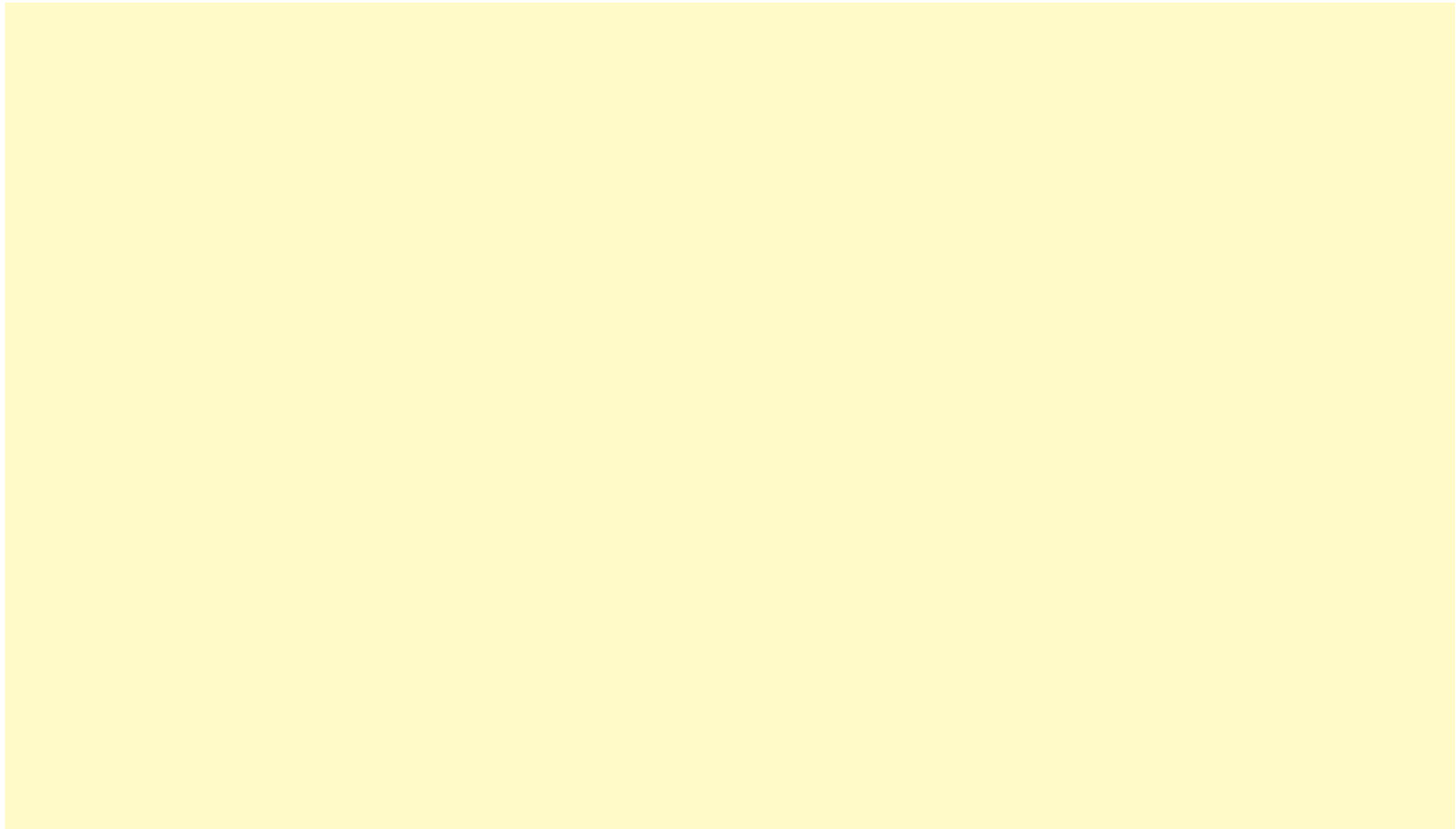


North 1000.com

The Warning Signs – Recognizing Them Is The Most Important Step

- Trick to avoiding a claim is to recognize the potential for a claim as early as possible
- Avoid “whistling past the graveyard”
- Read the tea leaves and take the steps necessary to address the problem

The Anatomy of a Claim



Anatomy of a Claim

- You recognized The Warning Signs *before* the project began and you walked away
- No claim. Everybody's happy.

Anatomy of a Claim

- You recognized The Warning Signs *during* the project and brought your insurance agent and insurance company on board to assist
- Claim averted. Everybody's happy.

Anatomy of a Claim

- You recognize The Warning Signs *after* project completion and chose to collect the fee you are owed in a way other than suing your client.
- No counter-suit against you. Everybody's happy?

Anatomy of a Claim

- You are served with legal papers
 - ◆ Subpoena – documents or deposition testimony
 - ◆ Summons & complaint – lawsuit
- Don't panic
- Don't dawdle

Anatomy of a Calim

- Can I be sued for . . .
 - ◆ Being in the wrong place at the wrong time?
 - ◆ Being in the right place at the right time?
 - ◆ Making a mistake (even an “honest” one)?
 - ◆ Making no mistakes?
 - ◆ Sending out bad vibes?

Anatomy of a Claim

- Lawsuit
 - ◆ Contact your insurance agent
 - ◆ Insurance agent will contact your insurance company
 - ◆ Insurance company *should* contact you within 24 hours of receipt of the information

- “Make it go away.”
 - ◆ The legal process has very few shortcuts
 - ◆ Usually in it for “the long haul”

Anatomy of a Claim

- Assignment of counsel
- Discovery
 - ◆ Document production
 - ◆ Interrogatories
 - ◆ Depositions
- Motions
 - ◆ Demurrer
 - ◆ Strike
 - ◆ Compel
 - ◆ Summary Judgment

Anatomy of a Claim

- Court appearances
 - ◆ Status conference
 - ◆ Settlement conference
- Expert witnesses
 - ◆ Disclosure
 - ◆ Reports
 - ◆ Depositions
- Alternative dispute resolution
 - ◆ Mediation
 - ◆ Neutral evaluation
 - ◆ Arbitration

Anatomy of a Claim

- The Trial
 - ◆ Jury
 - ◆ Witnesses
 - ◆ Documents

Anatomy of a Claim

■ Jury Instruction

A design professional is negligent if [he/she] fails to use the skill and care that a reasonably careful design professional would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

You must determine the level of skill and care that other reasonably careful design professionals would use in similar circumstances based only on the testimony of the expert witnesses [including [name of defendant]] who have testified in this case.

Judicial Council of California Civil Jury Instructions, Instruction 600

Anatomy of a Claim

- The verdict
- The judgment
- The appeal

Anatomy of a Claim

- And guess what . . .
 - ◆ Throughout the entire process
 - ◆ Everybody is getting paid
 - ◆ Except you.

Anatomy of a Claim

■ Costs

◆ “Victory”

- Don't owe damages being sought by plaintiff
- You are awarded your court costs
- But not entitled to recover attorneys fees (usually)

◆ “Defeat”

- Covered damages are paid by your insurance company to the extent of your remaining policy limits

Anatomy of a Claim

- The moral of the story:
 - ◆ Work with who you know
 - ◆ Do what you do well
 - ◆ Don't sell a commodity
 - ◆ Watch out for The Warning Signs
 - ◆ Avoid litigation if at all possible

	COLUMN A	COLUMN B	COLUMN C	COLUMN D
1	One might say	the massing of major elements	must utilize and be functionally interwoven with	the sophisticated design solution
2	Aesthetically speaking	the introduction of brutalism	maximizes the real probability of cost overruns for	the anticipated degree of human ambiance
3	On the other hand	the treatment of the main façade	adds specific critical path events to	the acuteness of the conflict gradient
4	Based upon inter-disciplinary considerations	the initial stage of conceptual development	necessitates that urgent considerations be made of	the pragmatics of value engineering
5	With sensitive respect for human scale	the by-product of repetitive space articulation	requires exhaustive trade-off study to arrive at	the final quantitative analysis
6	Indubitably	the life-cycle cost control	is further compounded by taking into account	the evolution of performance specifications
7	Above and beyond plebian comfort objectives	the environmental impact analysis	presents extremely synergistic challenges to	the philosophy of commonality and standardization
8	Beyond the horizon of the human intellect	energy conservation regulations	recognizes the critical necessity to subtract from	the study of true fecundity in the state of the art
9	Architecturally thinking	the structural dynamic analysis	imposes smothering constraints upon	the creation of an immortal monument to posterity
10	In the final rationalization	the internal use adjacencies and circulation	adds overriding three dimensional constraints to	the final abortion

Questions?

Thomas M. Bonggi, Esq.

President

Catlin Design Professional

1990 N. California Blvd., Suite 230

Walnut Creek, CA 94596

(925) 927-2239

tom.bonggi@catlin.com



Catlin Group Limited



















CATLIN