

Professional Liability Update



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A/E Risk Review

A Failure to Communicate

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.

Professional liability insurers agree: the most effective step design firms can take to lessen the chances of a claim is to improve client communications. In fact, a study of more than 17,000 closed claims published by insurer XL Group showed that communication failures were a contributing factor in nearly a third of all claims.

With today's many and varied electronic communication channels, the need to monitor, control and improve communications with clients is more important than ever. What you and your employees communicate through your Website, email, instant messaging and social networks such as LinkedIn, Twitter and Facebook can be just as important – and binding – as the wording of your client contracts or field observation reports.

Fortunately, with a little planning and employee education you can avoid many of the project upsets created by poor communication among your design professionals, your clients and other members of the design and construction team.

Communicate During Bidding

Never overestimate a client's knowledge of the design services you intend to provide on his or her project. Indeed, don't assume even a sophisticated client understands the full scope of professional services provided by architects, engineers and other design professionals. It is your responsibility during the earliest stages of bidding to explain to your client exactly what services you will perform and – equally important – what project services you will *not* perform for the fee. A complete scope of services needs to be a central part of your initial communications and will need to be shared with the contractor, subcontractors and subconsultants as well.

Likewise, make it clear during the early stages of communication with your client that no design firm has ever executed a perfect set of plans or completed a project without error or omission. Similarly, there are no foolproof materials or systems, despite any guarantees or warranties given by equipment manufacturers. Clear communication regarding the standard of care you can be expected to meet in performing your design services helps ensure your clients don't have overinflated expectations leading to disappointment, disagreement and claims.

Clients, especially those new to the design and construction process, often get upset when you add items to your specifications after the initial design and budget is accepted. They may perceive add-ons as a sign of incompetence or even an unscrupulous attempt to increase your fees and profits. Therefore, it is important to make clear up front that your estimates and specifications are based on your opinion of probable cost and subject to modification once the project commences. Your client needs to be educated to expect reasonable changes and budget revisions as a normal part of the design and construction process.

Communicate During Negotiations

All important design and construction issues need to be communicated clearly during the negotiation process, before you accept and begin a new project. From the earliest conceptual design stage, through the refinement of your work scope, through the negotiation of your contract, through the development of your final design and into construction, make sure you communicate these issues every step of the way

During negotiations, stress the importance of setting up formal communication channels between you and designated client representatives. Propose regularly scheduled client meetings designed specifically to address design and project issues that may impact schedules and budgets. These sessions could include daily phone calls between your primary designer and a designated owner representative, followed by weekly face-to-face sessions with all key players. The goal is to ensure that you fully understand the client's needs and desires and that any misunderstandings, errors, or omissions that could result in project delays, changes and other problems and surprises are conveyed quickly and dealt with swiftly and constructively with the intent to fix the problem rather than fix the blame.

Similarly, make sure communication channels are established between you, your client, and the contractor, subcontractors, subconsultants, suppliers and other pertinent parties. It's a good idea to demand that all key parties be gathered at a pre-construction meeting to review plans and procedures as well as clarify roles, expectations, communication channels and methods of reaching problem resolution. Formal and open communication at the start of construction can do wonders to get a project off to a smooth start and help get it back on track if a problem occurs.

Put It in the Contract

Every important decision made by you and your client during bidding and negotiations needs to be documented in your professional services contract. Verbally agreeing to your areas of responsibility and limits of your liabilities is not enough. Even a hearty handshake won't do. Formalize your entire agreement with the client in a written and signed contract.

Work with your legal counsel to draft a solid contract specifically written to reflect your practice and your role on the particular project. You can start with recommended contract language provided by the AIA or other industry associations. As your professional liability specialist, we can provide additional advice and assistance in helping you draft a fair and equitable contract.

If you are asked to sign a client-written contract, ensure it is thoroughly reviewed by legal counsel. Again, we can provide advice as well, particularly regarding the insurability of the client's contract language. Any liability you agree to take on contractually for which you would not otherwise be responsible can be uninsurable.

Communicate During Construction

Too often, once the design and construction teams are assembled and the professional service contracts are signed, communications diminish. Parties do not take the time to sit down and correspond on a regular and formal basis over the life of the project.

To keep lines of communication open and encourage frequent feedback, schedule regular meetings (preferably face-to-face) with all key parties to the construction project. On larger or complex jobs, consider weekly project review sessions with representatives of the designer, the client, the contractor and any other consultants or suppliers key to the current project phase. Smaller projects may not require such frequent formal meetings involving all parties, but regular communication is crucial nonetheless. These sessions can pinpoint design and construction problems before they become serious. They also foster solutions satisfactory to all involved parties.

Also plan weekly internal conferences among all key members of your staff that is working on the project. Have staff convey their progress since the previous meeting. List problems that need resolution and make requests for whatever information is necessary to solve them. Progress reports with action items serve as effective diaries of the project that can be reviewed after project completion – or when a project dispute arises.

Clients will find progress reports to be valuable as well. Reporting regularly to your clients on the progress of their projects can avoid surprises and form a bond of trust that will keep you working together, even when adversity strikes. Nothing demonstrates a professional approach as effectively as well-planned and timely transmissions of clear and honest information.

Memorialize Your Conversations

Even when verbal communications are frequent, memory failure and misunderstandings can cost huge sums of money and precious time when disputes or litigation result. No one remembers all the details of telephone calls, group teleconferences or face-to-face conversations. It is important to record in writing all important information, decisions and action items that concern or influence a project.

Memorialize your meetings and telephone conversations with clients, subconsultants and contractors. Require your staff to document by brief memoranda all discussions involving design decisions. Have meeting participants formally approve such memoranda as accurate and complete. These memoranda and logs are particularly useful in the event of a dispute or claim. They are invaluable if there is a change in the project team and a new member needs to be brought up to speed with the current state of affairs.

It is always a good idea to have your firm's written correspondence regarding projects or plans reviewed by a senior member of your firm – a project manager, department head or principal – before it is sent out to the client, contractor or other external parties. An internal review provides a crosscheck to discover misstatements and avoid misunderstandings. For sensitive correspondence, a legal review by your attorney should be required as well.

Focus On Electronic Communications

It is amazing how email, text messaging and other electronic communications have taken the place of a phone call, and express-mail package or a face-to-face meeting. While such technology has certainly been a boon for productivity, it can also be a bust when it comes to formalized communication. Emails and text messages are easily forgotten, deleted, misfiled or ignored. We often assume someone has received an electronic message, but it may go unopened or otherwise be lost.

It's very prudent to formalize your company electronic communications policy. It should address not only email and text messages, but also extranets, e-conferences, teleconferencing, Webinars, news groups, bulletin boards, tweets, Facebook, LinkedIn and any other electronic media being used. Make sure all employees are aware of and adhere to the policy.

Keep electronic correspondences regarding each project filed in an orderly manner within your company network. Back up all critical emails and documents in printed hard copy or on separate electronic media such as external drives, CDs, remote servers or clouds. Use the "return receipt" email function to confirm your message has been received and opened. Follow up quickly when your electronic messages appear to be ignored, misdirected or lost.

Establish guidelines for employee use of electronic correspondence on company equipment. Also educate employees regarding their use of electronic communications as a company representative, even if they are using their own phones, tablets or computers. An employee lambasting a client or contractor via a Facebook post or tweet can present serious repercussions on your company, even if the worker did it on their own device during off hours.

Communication the Key

It seems so obvious: clear communication is a vital key to a successful project void of disputes and claims. Yet at the root of litigation between design professionals, their clients and other parties to the design and construction process are misunderstandings based on the failure to communicate.

Effective communications should be a core competency of any design firm that strives to understand and meet the need of its clients. A program of regular communication helps ensure the client understands the true scope and extent of your services. With expectations properly communicated, documented and verified, project upsets can be addressed quickly, calmly and effectively with minimal negative impact on time, costs, reputations and relationships.

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.

STUCKEY INSURANCE is the leading provider of Professional Liability to design professionals in Arizona. Please call us if you like to schedule a consultation for your insurance needs.



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