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Surveying Architects Engineers and Environmental Consultants

Lessons Learned:

Practical Advice on how to Avoid Professional Liability Insurance Claims and Manage Liability Exposure

Presented By: Mike Hall  1.17.2012

Two Big Contract Issues

- Do not agree to a higher Standard of Care
- Indemnifications:
 - Insist on a Mutual Indemnification
 - Do Not Assume Consequential Damages
 - Avoid the Duty to Defend

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Standard of Care

- The Standard of Care as imposed by law and as contained in the B101
 - The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances.*
- Do not agree that your work meets the "highest standard" or is "free from defects" or that you have "special skills or expertise."
- Do not agree to pay for "damages resulting from errors in your work."
- Do not agree with you will comply with "all laws and codes."
- Do not agree that "time is of the essence."
- A higher standard of care is almost impossible to defend.

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Indemnification

A mutual indemnification:

Architect/Engineer shall indemnify, and hold Client, its officers, agents and employees harmless from and against any and all claims, damages, liabilities, fines, penalties, losses, defense costs, including without limitation, reasonable attorneys' fees, and other liabilities (collectively "Losses") arising out of and to the extent caused by the negligence or intentional misconduct of Architect/Engineer, its officers, agents, subcontractors or employees in connection with the project.

Client shall indemnify, and hold Architect/Engineer, its agents, subcontractors, and employees harmless from and against any and all Losses arising out of and to the extent caused by the negligence or intentional misconduct of Client, its officers, agents, employees, contractors and agents in connection with the project.

Neither Client nor Architect/Engineer shall be liable for any economic losses including without limitation, claims of loss of profits or any other indirect, incidental, or consequential damages.

**Recommended indemnification language
by Dave Eckberg Esq. at Skellenger Bender, P.S. Seattle**

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Indemnification

- The essence of these words:
Architect/Engineer shall indemnify and hold harmless Client from losses caused by the negligence or intentional misconduct of Architect/Engineer in connection with the project.
- **Do not agree to defend!**
Architect/Engineer shall indemnify, defend and hold harmless Client from losses caused by the negligence or intentional misconduct of Architect/Engineer in connection with the project.

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Why not agree to defend?



"It was a big project and like every big project it had client initiated changes, design errors and omissions, construction delays and numerous change orders. The contractor's demand for additional compensation included allegations of the architect's negligence."

"There were errors but not negligent errors. However, if we had agreed to assume the client's defense, the client might have just tendered the entire claim over to us and let us deal with it. As is was, the client worked out a settlement with the contractor."



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Consequential Damages

- The essence of these words:
 - Neither Party shall be liable for economic losses or consequential damages.*
- Consequential damages are often not included as losses in many States unless expressly agreed by contract.
- Consequential damages are the lost profits of the Client for not having use of the facility you are designing.
 - They are:
 - Very difficult to quantify
 - Completely outside your ability to control or mitigate
 - Often potentially more than your limits of insurance
 - Create an further incentive for the Client to bring a claim against you
- I have at least one major client that considers this a deal breaker.

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Limitation of Liability

Client expressly agrees that to the fullest extent permitted by law, Architect/Engineer's maximum liability to Client for claims arising from Architect/Engineer's professional acts, errors, or omissions, shall be the amount of Architect/Engineer's fee for professional services or \$50,000, whichever is greater.

In the event Client desires a higher limitation of liability, Architect/Engineer may increase this limit for a higher fee commensurate with the increased risk to Architect/Engineer, and this paragraph will be amended by separate written agreement.

As used in this paragraph, the term "liability" means liability of any kind, whether in contract (including breach of warranty), in tort (including negligence), in strict liability, or otherwise, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Architect/Engineer's services or the services of Architect/Engineer's subcontractors, consultants, agents, officers, directors, and employees from any cause(s).

Recommended language for a Limitation of Remedies provision by Dave Eckberg Esq. at Skellenger Bender, P.S. Seattle

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Collections

- A large past due receivable is an invitation for a claim.
- Maintain the right to terminate work, if not paid on time.
 - In the event of any failure of payment by the Owner when due, the Architect shall have the right to suspend work on the project and may retain any and all work products whether prepared by the Architect or submitted to the Architect by others, until payment has been brought current. In such event, the Architect shall have no liability for any damages or losses that may result from any delay associated the suspension of work or for the withholding of work products.*

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Case Study

- 17 Story Condo Tower with Mixed Use

"Designing project was a little like planning a city on less than two acres. Mandatory elements included a 30,000-square-foot grocery store (with parking and loading dock), retail shops, offices, a pool and recreation deck, and residential floor plans diverse enough to accommodate price ranges from \$200,000 to \$1 million."



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Case Study



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Insurance Coverage

- Make sure your subconsultants carry the limits they need.
 - MEP, Structural and Geotechs are high liability!
 - Consider \$5 million a minimum limit.



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Major Projects need Major Coverage

- Subconsultants need a limit equal to the prime consultant's limit.
- Large firms have limits of \$10 or \$20 or even \$50 million.
- Don't let a \$1 million sub hand you a \$10 million problem.

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Peer Review

- When the project is bigger than anyone's limits of insurance have a second, independent design firm review the work.
 - Provides assurance that the work was done properly.
 - Provides another set of limits.

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Split limits

- Limits of insurance: \$1 million / \$2 million
- This means \$1 million each and every claim, \$2 million aggregate limit.
- It is useful to have a dedicated limit be able to "settle the claim for limits."
 - Relatively inexpensive.
Est. 20% more than \$1 million vs. 57% for \$2 million each and every
 - Great peace of mind.

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Lightning rod theory

"I don't buy insurance. If I did, my clients would be motivated to sue me."

"I don't buy higher limits of insurance because if I did, my clients would just sue me for more."

- Professional liability is a personal liability as well as corporate liability.
 - As long as you are worth anything, you are worth suing.
- Even a person with no net worth will sued.
 - Some lawsuits make no economic sense

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Claims Made Insurance Policies

- A professional liability insurance policy covers "claims made" during the policy period.
- It also covers "circumstances that may give rise to a claim" that become known during the policy period.
- A professional liability insurance policy does not cover existing claims and known circumstances as of the policy's inception.
- This is true with each new policy whether you renew with the same carrier or change carriers.
- The policy often provides for 30 or 60 days to notify the insurance company of claims and circumstances after expiration.

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Report Circumstances

- Coverage is excluded for a policy if a claim arises as a result of any facts or circumstances known prior to the commencement of the insurance policy, which a reasonably prudent person, if aware of said facts or circumstance, might have expected the circumstance to give rise to a CLAIM.
- It is not sufficient to maintain continuous coverage and report a claim when it becomes "a demand for money or services."
- Awareness of project problems ("circumstances") usually exists well before a formal demand is made.
- Make reasonable inquiry of your staff upon renewal about any circumstances that may give rise to a claim and report them to your insurance carrier.

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QUESTIONS AND ANSWERS

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