

A/E RISK REVIEW

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25 Questions: Measuring Your Risk Management IQ

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.

It's always a good idea to periodically test your staff's knowledge of basic loss prevention and risk management issues. Here are 25 true/false questions you can use to measure your company's Risk Management IQ:

THE QUESTIONS

1. Recent court decisions have made Limitation of Liability clauses virtually unenforceable.

T F

2. Contractor led design-build projects are not necessarily any riskier than a traditional design-bid-build project delivery method.

T F

3. When you take on a project with a financially-questionable client, it is advisable to negotiate a clause that allows you to suspend or terminate the contract for nonpayment.

T F

4. When negotiating a mediation clause in your contract, it is best for you and your client to agree to a specific mediator before the dispute takes place.

T F

5. You should always have your client listed as a named insured on your professional liability policy.

T F

6. A major advantage of having employees work at home is that an employer avoids having to comply with OSHA standards and workers compensation laws with at-home workers.

T F

7. Third-party claims make up only a minority of claims filed against design professionals.

T F

8. The design firm member serving as project representative on a jobsite has the primary responsibility to ensure that the work is being carried out with correct means and methods and in a safe manner.

T F

9. A prevailing party contract clause, which requires the loser of a lawsuit or claim to pay the winning party's legal fees, should generally be avoided.

T F

10. Companies that work for U.S. clients and on U.S. projects only need not be concerned about decennial liability.

T F

11. The quality of communication between you and your client is perhaps the single greatest determinant in whether your project will result in a claim.

T F

12. If your employees drive their own automobiles for business purposes they are automatically covered by your standard business automobile insurance policy.

13. All contractual indemnities requested by your client should be refused outright.

T F

14. To avoid possible insurance premium hikes, design firms should not report project problems to their insurer until a formal demand or claim has been made against the firm.

T F

15. Design firms can be exposed to substantial liability even when they have not been negligent in their acts, errors or omissions.

T F

16. Because of added income possibilities, fast-track projects are as beneficial to the design firm as they are to the client.

T F

17. Clients who are sued for nonpayment of fees are very likely to countersue a design firm for negligence.

T F

18. Condominiums make low-risk projects because a relatively simple design can be repeated over multiple units.

T F

19. Managing client expectations is critically important to avoiding unnecessary confrontations, demands and claims.

T F

20. Today's computerized project delivery methods such as building information modeling (BIM) and integrated project deliver (IPD) have gone a long way to eliminate jobsite safety issues for design firms.

T F

21. Most professional liability claims occur within six months of completion of design documents.

T F

22. Developing detailed scopes of service can have a dramatic positive impact on your firm.

T F

23. Having a verbal agreement with a client is tantamount to not having an agreement at all.

T F

24. When specifying materials you cannot rely solely upon manufacturer claims of quality and effectiveness.

T F

25. A design firm's risk management activities are best left to experts, attorneys and outside consultants.

T F

THE ANSWERS

1. *False.* Limitation of Liability clauses continue to be enforced in state and federal courts as long as the agreements are deemed to be reasonable and fairly negotiated between the two parties.
2. *True.* When the contractor is in the lead role of a design-build project, the design firm does not necessarily take on increased risk. However, when the designer takes the lead role, it can assume responsibilities and risks normally taken on by the contractor.
3. *True.* Failure by a client to adhere to contractual terms, including payment terms, should be considered a cause for termination of your agreement. Both a temporary suspension of services and a permanent termination of the agreement should be options.
4. *False.* It is generally preferable that you agree to use mediation upfront, but choose the specific mediator after a dispute arises. That way, the parties can choose a mediator with knowledge applicable to the specific dispute in question.
5. *False.* Having your client named as an additional insured on your professional liability policy can reduce your client's protection and increase its liability should a claim be filed on your PL policy.
6. *False.* Under OSHA standards, employers are responsible for providing a safe workplace for all employees and that can include those who work at home. Any accidents at the home office workplace are likely covered by workers compensation laws.
7. *True.* Third-party claims against design professionals by injured parties are rare. Clients file the vast majority of claims against design firms.
8. *False.* A project representative's primary role on the jobsite is to ensure that the contractor and subcontractors maintain general conformance with the design documents to achieve the client's objectives. Means and methods and jobsite safety remain the responsibility of the contractor.
9. *True.* A design firm that contractually accepts responsibility to pay the other party's legal fees if the design firm loses a claim may find that this contractual liability is not insured. This potentially large uninsured loss generally outweighs the possible benefit of the clause.
10. *True.* Decennial liability has its roots in French Civil Code. This form of strict liability is imposed only in certain European and Asian countries and in parts of the Middle East including Saudi Arabia, Egypt, Kuwait, Iraq, Jordan, Bahrain, Oman, Qatar and the United Arab Emirates.
11. *True.* A study of more than 17,000 closed claims published by insurer XL Design Professional showed that communication failures were the most prevalent factor in claims, contributing to 27% of all claims.
12. *False.* You will need to purchase "non-owned and hired" auto coverage when employees use their personal vehicles for business. This type of insurance provides liability coverage for your firm above and beyond the employee's primary limits.
13. *False.* While onerous, one-sided indemnities imposed by a client should be rejected, there are acceptable options. For instance, a mutual indemnity, where you agree to indemnify your client for your negligent acts and the client agrees to indemnify your firm for the client's negligent acts, is generally acceptable.
14. *False.* Professional liability insurance uses a "claims-made-and-reported" policy form. To help ensure that coverage will be in place when needed, design firms should promptly report all incidents that could potentially lead to a claim.

15. *True.* Professional liability holds design firms responsible for their negligent acts, errors and omissions. However, design firms have also been held liable for fiduciary liability, a stricter type of liability that can apply even in the absence of negligence.
16. *False.* Fast-track projects typically benefit the client only. They represent substantial added risks for the design firm and require protective contract language to offset these liabilities.
17. *True.* In many cases, unfortunately, the cost of defending a claim for negligence will be greater than the amount of the late fees you are trying to collect. Fortunately, there are contractual measures you can take to increase the chances of being paid on time.
18. *False.* Condominiums are among the riskiest types of projects imaginable. Highly leveraged developers, skimpy budgets, low fees, poor maintenance and litigious homeowner groups all contribute to the condominium's dismal claims record.
19. *True.* When clients are educated as to what to expect during the design and construction of their project and what standards a design firm must meet, then energy can be directed toward resolving routine problems amicably and effectively.
20. *False.* BIM and IPD demand increased collaboration, which can blur lines of responsibility and actually increase a design firm's liability on the jobsite. It becomes more critical than ever that your contract documents and actions squarely place jobsite safety responsibility with the contractor.
21. *False.* Although the root negligence that leads to a claim often occurs during the design process, most claims are filed a year or more after project completion. That's when design errors often come to light.

22. *True.* Developing a clear and comprehensive scope of services not only reduces your professional liability risks, it can increase profitability. By itemizing all or your services you help ensure you get adequate compensation.
23. *False.* Whenever a firm undertakes work for a client it has a contract, whether the agreement is written or verbal. Verbal agreements, however, are much more difficult to substantiate and enforce – detailed written contracts are far superior.
24. *True.* The prevailing standard of care calls for designers to have personal experience or knowledge that a recommended material will perform its intended function successfully under prevailing conditions.
25. *False.* Risk management is everyone's responsibility. Educating your entire staff on the basic principles of how to avoid professional liability claims and prevent losses pays huge dividends.

So, how well did you do? If you missed more than five answers, you might need some refresher work on professional liability issues. Ask us about the education opportunities available in the areas of risk and practice management.

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.