

A/E RISK REVIEW

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Are You A Risk Terminator? 20 Questions to Test Your Liability 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.

So, how good of a risk manager are you? Are you a risk terminator or a risk inciter? Here are 20 true/false questions you can use to measure your Risk Management IQ:

The Questions

1. When including a mediation clause in your client contract, it is nearly always best for you and your client to mutually agree upon a specific mediator before the contract is signed.

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2. A specific-job-excess professional liability policy can be a good choice when entering into a joint venture with another design firm where the client demands high limits.

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3. Adding your client as a named insured on your professional liability policy is an inexpensive way to increase protection for your client.

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4. In light of the passage of the Frank-Dodd Act and the potential liability of being sued for providing services as a municipal advisor, it's a good idea to increase your limits on your professional liability policy.

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5. Most PL insurance companies have changed their tune and now advise against including "prevailing party" clauses (losing party pays both sides' legal fees) in client contracts.

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6. At the first sign that a contractor is not complying with your design intent, you should immediately ask him or her to stop work on the project and bring the issue to the client's attention.

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7. A split-limits PL policy is an affordable way for two design firms to share the same insurance policy limits.

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8. Broad-form indemnities in a client's contract should be avoided at all costs.

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9. It is currently illegal for architects and engineers to use drones (unmanned aircraft) for commercial purposes.

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10. Cyber liability insurance not only covers damages to third parties due to compromised identity or financial information, privacy leaks, and transmission of computer viruses, it can help cover the costs for public relations work incurred to help restore your reputation.

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11. When working overseas in countries like France and Egypt that impose decennial liability, it is crucial to have a clause in your client contract that clearly states you are not liable for this exposure.

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12. Poor communications is the #1 nontechnical cause of claims.

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13. Multiple prime projects create a hornet's nest of liabilities and should be avoided at all costs.

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14. If your professional liability insurance policy lapsed in 2013, but you purchased a new policy in 2015, a new claim against design services you provided in 2012 may not be covered by your new policy.

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15. Always wait until a formal claim is filed against your firm before reporting a problem to your insurance company. Otherwise, your premiums may go up.

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16. Employee Practice Liability Insurance only covers claims against your firm by current and former employees.

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17. It is advisable to have a contract clause stating you do not owe a fiduciary duty to your client.

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18. One of the best ways to reduce the risk of a fast-track project is to get your client to lower its expectations.

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19. Threatening to sue a client for late payment of services is one of the most effective ways to ensure you get paid on time in the future.

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20. When drafting your scope of services, you should only list those specific services you have agreed to perform for a fee.

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The Answers

1. **False.** It is generally recommended that the mediator be selected only after a dispute arises. This allows you to select a mediator that has expertise in the subject of the specific dispute at hand.

2. **True.** With specific-job excess coverage, each party to the joint venture could maintain its current limits on their practice PL policy while purchasing an endorsement that provides a separate higher limit to cover the joint venture project.

3. **False.** If your client were added as an additional insured on your PL policy it could jeopardize their coverage since, in the event it filed a claim, it would be suing itself.

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4. **False.** The 2013 ACEC Survey of Carriers indicated nearly all PL carriers have no intention of covering municipal advisory services as defined by Dodd-Frank under their policies.
 5. **True.** Since you would not normally be liable for another party's legal expenses in absence of a prevailing party contract clause, those costs might not be covered unless specifically stipulated in your policy.
 6. **False.** In no instance should a project representative demand a contractor to stop work unless it is an issue of imminent danger to the safety or lives of people on the site. A stop work order can be interpreted as taking control of construction means and methods and greatly expand the design firm's liabilities.
 7. **False.** With a split-limits policy, a design firm has an annual policy limit for a single claim and a higher aggregate limit that covers all claims in the policy year. For instance you may have a \$2 million annual limit per claim, but an annual aggregate limit of \$5 million.
 8. **True.** Broad-form indemnities can make a design firm responsible for almost any problem that befalls its client during the project, whether or not the designer was negligent.
 9. **False.** As of the writing of this test, businesses are generally prohibited from using drones for commercial purposes. However, under Section 333 of the FAA Modernization and Reform Act of 2012, architects, engineers, and others can file for an exemption from current federal regulations on a case-by-case basis and, if granted the exemption, use drones for commercial purposes.
 10. **True.** While cyber liability policies differ from insurer to insurer, many do cover public relations expenses incurred to mitigate negative publicity.
 11. **False.** You can't eliminate decennial liability through contracts with either the owner or your subconsultants. If you perform work in a country where decennial liability is in effect, you are exposed to this form of strict, joint-and-several liability.
 12. **True.** A study of more than 17,000 closed claims published by insurer XL Catlin showed that communication failures were a contributing factor in nearly a third of all claims, making it #1 on the list.
 13. **False.** While it is true that multi-prime projects can cause overlapping responsibilities and liabilities if poorly managed, they can be a viable delivery method for complex or multi-stage projects. This is especially true when the client has extensive experience managing multiple primes and/or contractors or hires a professional project coordinator.
 14. **True.** To keep your retroactive date in force and have prior acts coverage, you normally must maintain continuous coverage. If you go uninsured for a period of time and then get a new PL policy, you could lose coverage for your acts prior to the new policy's inception date. Be aware, however, that you may be able to purchase prior acts or "tail" coverage.
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15. **False.** Most insurance companies do not consider an incident report as a claim unless a formal demand for money or services is made. Smart insurance carriers understand it is in their best interest to encourage early reporting and don't "ding" you for reporting an incident that never becomes a claim.

16. **False.** EPLI provides protection against claims made by current employees, former employees, *and* potential employees. It covers claims based on discrimination, wrongful termination, sexual harassment, and other employment-related allegations.

17. **True.** Have your attorney draft language in your contract that confirms neither you nor any of your subconsultants have offered any fiduciary service to the client and no fiduciary responsibility shall be owed to the client as a consequence of entering into an agreement to provide design services.

18. **True.** Educate your clients on the risks of fast-tracking a project and bring expectations in line with reality. There should be an understanding that some changes, delays, modifications, reconstructions and extra costs are the norm, not the exception, with fast-track.

19. **False.** Sue a client for fees and you'll likely face a countersuit from your client for errors or omissions in your services, whether warranted or not. A better way to ensure timely payment for your services is contract language that allows you to suspend your services after a specified period of nonpayment for undisputed fees.

20. **False.** In addition to listing the services you will perform for an agreed to fee, it is generally recommended that you list additional services that you can perform for an additional fee, recommended services you will not perform per the client's refusal and required design services that will be performed by a third party, such as a subconsultant.

So, how did you do? If you missed three or fewer questions, consider yourself a risk terminator. If you missed more than five, you might need some refresher work on professional liability issues. Ask us about the in-person and online 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.