Managing your practice to reduce professional liability

Practice Matters

By Jeffrey L. Kinzler, B. Arch., J.D.

Although most architects manage their practices well, two different kinds of lawsuits may befall the practicing architect. The first involves personal injury or property damage resulting from failure to exercise the appropriate standard of care during the design of a structure.

For example, say that a piece of a brick facade falls, causing property damage and/or personal injury, and it is found that the brick anchors were improperly designed or specified by the architect. In this situation, the injured party needs *no direct contractual relationship* with the architect to recover damages, because the architect's legal duty to that person arises from the foreseeable obligation to protect members of the public. In such cases, liability ultimately turns on questions of fact about the cause of the structural failure and how it resulted in the alleged injury. Often, other parties who were involved in the construction process are sued as well, and liability may be apportioned among them.

Malpractice lawsuits, on the other hand, stem from the claim of a client, with whom the architect *has a direct contractual relationship,* that an economic loss was suffered because the architect failed to perform the contract according to the appropriate standard of care. In the previous example, the owner of the building who hired the architect would have a malpractice claim against the architect for all the costs related to repairing the facade that failed as a result of the improperly specified brick anchors.

While malpractice lawsuits sometimes have a legitimate basis, they are, unfortunately, also used by crafty individuals who simply want to avoid paying the architect's fee, or worse, who try to force the architect to pay for the cost of construction. Because malpractice cases are often mired in complex factual issues, the outcome of the case is often determined by whose records are the most complete and credible. This article will focus on avoiding these costly and unpleasant lawsuits by actively managing the architect-client relationship throughout the design and construction process. An added benefit is that good records put the architect in a stronger position to be fully paid for the work and to deflect inappropriate claims by the client or the contractor.

Defining malpractice

It is worthwhile to review some basic legal terminology here. The architect's liability for malpractice claim situations hinges upon performing the services set out in the contract according to the standard of reasonable care. The classic definition of this phrase is that the architect is required to do what a reasonably prudent architect in the same community would do given the same circumstances.

To bring a claim for malpractice the client must allege that (1) the architect had a duty to perform services pursuant to a contract; (2) there was a breach of the contract by failure to perform the services according to the proper standard of care; (3) the client suffered an injury as a result of the breach, and (4) actual damages resulted.

Your scope of work

Where architects often get into trouble with their clients is in failing to make sure that the client understands exactly what services are included in the scope of work and what is not included. The design professional cannot be held liable for failure to perform services that are outside the contractual scope of duties. Therefore, your written proposal should lay out, in an extremely clear fashion, the scope of your work, your fees, and your reimbursable costs. Clients will respect you for taking a forthright approach to describing what you are going to do for them and making realistic allocations of the cost and time required to complete all of the work properly. The proposal must be signed by you and the client, and at that time it becomes a binding contract rather than a proposal. This must be done before you commence work. Some clients, especially institutional and governmental ones, will insist on using their own contract forms, so before you sign make sure they include all information necessary to thoroughly describe your services, fees, and costs; also be sure that the form does not obligate you to perform tasks beyond the proper scope of your services.

Be sure to respond to all of the questions and concerns raised by your client, and address them intelligently in your proposal. Much of what constitutes reasonable care in the exercise of your professional duties should become clear to your clients if you have a frank and thorough discussion about the scope of work and the extent of services provided.

Address the possibility of hidden and unknown conditions in your proposal before the agreement is signed. Help them understand and plan for contingent design and construction costs within their overall budget. The less experienced the client is, the more important such a discussion becomes; never assume, however, that a large client, such as

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a governmental agency or corporation, has any greater understanding of these issues than a small client.

Surprisingly, many architects skip this discussion, possibly because they worry that their clients, when confronted with what the architect can and cannot do for them—and with the serious responsibilities that clients must accept—will get cold feet and not accept the proposal. This is a legitimate fear, especially with clients who have never built before or who may in fact be predisposed to litigation no matter how well you do your job. Still, it is far better to make these points clear to the client at the outset than to risk uncertainty and misunderstandings that might lead to litigation. A meeting should also be held once bidding has occurred and a contractor has been selected, so that the client and contractor also understand their responsibilities with respect to each other and to the architect as well.

YOU HAVE TO FIND OUT WHAT YOUR CLIENTS KNOW AND FILL THE GAPS IN THEIR UNDERSTANDING ACCORDINGLY.

Unfortunately, tales are legion of the design professional who, after going that extra mile to "help the job" or appease an angry client, wound up in a lawsuit. The simple lesson here is that it is very risky to proceed with a client who refuses to recognize and accept the limits of your responsibilities in relation to the overall project. It is far easier to establish and maintain this understanding in the beginning of the relationship than to try to repair it after the fact.

Communications and records

Good communications and good record keeping go hand in hand with reducing your chances of a lawsuit and will place you in a position to vigorously defend yourself and your firm against any claims that do occur. An added benefit is that it strengthens your ability to collect all the fees you are entitled to. Once the job is under way, the best way to protect yourself is to maintain clear and timely communications with everyone involved. The outcome of each meeting or telephone call should be recorded in writing, with copies going to all of the parties involved. Keep written, detailed records of discussions you have with the client, contractor, and any subcontractors. E-mail should be printed and kept in the file. Bear in mind that all electronic records maintained in your office are subject to discovery in a legal proceeding.

However, there are impediments to good job documentation, and if your firm has problems in this area, you should think again about how to organize and empower your staff. The authority for decision making and documentation on each job must be clearly assigned to someone, and everyone in the firm must understand what the scope of work actually entails and how critical their job logs are to protecting the firm from lawsuits. Record keeping must be at its best when your office is busiest and when pressure to get the project done is greatest.

Beyond the scope of services

You must inform your client that changing the scope of your work will increase your fee if it causes you to perform work beyond your original agreement, and that it may result in additional construction costs as well. This should be done before the initial proposal is signed. After work commences, any verbal communication with the owner that involves an actual or potential change in your scope of work must be confirmed in a clearly written letter and with a memorandum to the file. This is an instance where it is especially important that everyone in the firm understand what your contract covers and who is authorized to make changes to it. For example, a young person just out of school might not appreciate the financial consequences of proceeding with a design change to accommodate an unknown site condition—it could result in extensive redesign of the building and have an impact on the cost of construction as well. If you have educated your client properly, a field condition such as this will be understood as a normal risk assumed by the client in the construction process rather than as your mistake and financial responsibility. You may choose to absorb certain costs as a goodwill gesture, but you are no more responsible for unknown field conditions than the contractor and should not volunteer to do more than a reasonable amount of work to accommodate the situation.

Get it in writing

You should never commence additional work on an owner- or contractor-requested change until the client has signed an addendum to your contract authorizing you to proceed. Before agreeing to changes in the scope of work, you should, once again, make it clear that you are entitled to additional fees because you are spending time on an item that was either completed in your original scope of work or on a new items not in your original agreement. If a dispute arises over such a matter in the future, a document signed by your client authorizing your additional work will carry far more weight than an oblique reference to it in meeting minutes.

Unauthorized design changes

Owners seem to have a habit of asking contractors to change exits, sprinkler systems, paths of egress, building occupancy types, and so on, with the hope that no one will notice. An owner's instructions to the contractor to alter the construction of the building from your design, which turns out to be unsatisfactory, may still be considered your responsibility unless your records show that you were aware of the change and did not recommend it. If your duties include site visits and you notice deviation from your plans, you should send written notice to the owner and contractor that any changes made to construction that do not comply with your plans or applicable codes are not your responsibility. If you don't, the cost of correcting any noncompliant construction, or liability for any personal injury or property damage resulting from it, may later be asserted as a claim against you. If you can show a record of communication that states your plans were not followed, this will go a long way toward protecting you from these claims. At the least, be sure to save a record set of plans and specs in case the question comes up in the future.

The changing of the guard

You can be in good standing with your client one day and out of favor the next if the person in charge of the project for the client, who understands your scope of work, leaves. When this occurs, to protect yourself, you must schedule an immediate meeting with the new individual running the project. Assume that you are starting over and that this person has absolutely no understanding of your duties and responsibilities or the history of the project. At this meeting, you will thoroughly review the scope of your work and the basis for your understanding of each aspect of your contract. Follow this up immediately with a detailed, letter of confirmation. If the new person is inexperienced or anxious, you must do whatever is necessary to develop a relationship of trust so that the project can go forward smoothly. This may be time-consuming, but it is cheaper than facing a malpractice lawsuit based on a gross misunderstanding of the architect's responsibilities. Of course, you should be reimbursed for the additional time spent in this

orientation and assistance process, and if you get off on the right foot, the new client representative will appreciate your help and agree to compensate you for it.

Practice fundamentals

The following tips are so easy to follow, they're often forgotten.

Time sheets. Employees consider keeping time sheets a hassle, but they enable you to keep meticulous records of all time spent on each project in the event that you must file a claim against the client to demonstrate your entitlement to unpaid fees. Distinguish between basic contract work, additional work on contract items, and extra work not included in your original contract. Perform no work beyond the scope of your contract without an authorization in writing, signed by the client. Your authorization should briefly and clearly explain why the work was required and what additional fees are due.

Get paid as you go. You have performed valuable services for your client and are entitled to get paid when the services have been performed. Make sure that you get paid for your work as it progresses, according to your contract. In your billing statements, be sure to distinguish between contract work and additional or extra work authorized by the owner. Your authorization form for extra work should provide for payment of your additional fee as the work progresses. You may also consider a provision in your contract for stopping work if payment is not received within a reasonable time limit and adding an interest penalty for late payments.

Promptly address problems. If trouble appears, stop and address it. If you are required to perform additional or extra work due to reasons beyond your control, whether they be contractor errors, unknown field conditions, or other matters, you must stop work and insist on an immediate meeting with the owner to address the situation. Of course, if you have done a good job explaining the scope of work to your client from the outset, it will come as no surprise that these unexpected circumstances require you to perform more work than you originally agreed to, and that you are entitled to receive additional compensation for handling them.

Know when to walk away. If the contractor messes up critical work, don't be afraid to stop the job and make sure that the responsibility for the problem is placed squarely where it belongs. If this creates extra burdens for you, have the owner sign an agreement that you will be paid additional fees immediately and that this will be taken as a credit on the contractor's progress payment. If the owner refuses to acknowledge and pay for additional design or field services or for your basic contact work, you may decline to continue as architect of record on the project. If you withdraw, you must act responsibly by providing timely and appropriate notice to all concerned parties and to the authorities. Bear in mind that your firm is legally responsible for any work you have done, and the same standard of professional care applies, regardless of whether it is in your contract and whether or not you get paid for it.

All of this correspondence, file keeping, and renegotiating for extra work probably seems more like busywork than design. But keeping your project files well organized and maintaining records of meetings and conversations will go a long way toward protecting your practice from claims, and it will help you to get paid.

If you sense trouble brewing. A brief consultation with a qualified attorney may nip a problem in the bud before it results in a claim against you and the long, costly process of digging your way out of it. ■