5 things a Pro-Demnity lawyer doesn't want to hear from an architect

JOHN LITTLE, PARTNER, KEEL COTRELLE LLP

Over the years, I have had a great many initial meetings with architects and Pro-Demnity Claims Managers as we start to learn more about the Claim being made against the architect. During those years, I have developed a list of the things I realize I don't want to hear. These are five of the most important:

1. "WE JUST HAD A VERBAL AGREEMENT"

It is surprising how many times even sophisticated architectural firms carrying out substantial projects have not entered into written agreements for their services, or are relying on a brief exchange of correspondence for their contract. Frequently, they will say, " Well I had worked with that client for years," or "We were in a rush," or "I didn't notice that our proposal wasn't signed back."

A written and signed contract (preferably OAA Document 600-2013) saves a lot of trouble down the road. It avoids any arguments as to what the architect's scope was to be, who was responsible for hiring other consultants and what the nature of the architect's contract administration obligations were. It is so much easier once a dispute arises and the client says, "I thought the architect was going to ensure my building was put up properly," to point to the provisions in the written agreement setting out clearly that the architect was not required to make continuous onsite reviews and was not to be responsible for errors or omissions of the contractor in failing to carry out the work in accordance with the contract documents.

Equally important, OAA Document 600-2013 limits any Claim to the insurance available to the architect at the time the Claim is made. That is important protection for the architect. Often at the end of the project, the dispute is about money. A clearly written agreement will set out how the

architect's fee is to be calculated. Resolving that dispute by reference to the agreement will frequently avoid massive counterclaims when a small Claim for fees outstanding is owing.

Remember, just sending the agreement signed by you to the client is not enough. Make sure the client signs the contract and returns it to you.

2. "I SIGNED THE AGREEMENT THE OWNER SENT ME"

The only thing worse than having no written agreement is signing somebody else's form of agreement without proper review.

The owner is your friend until there is a problem. The owner's form of contract was not prepared to assist the architect
and it needs to be reviewed carefully, preferably with your lawyer.

A clause in an owner prepared agreement provided:
The architect agrees to indemnify and save harmless the client with respect to any damages suffered as a result of any failure to construct the building in accordance with the provisions of the plans and specifications and any applicable building codes.

This of course imposes onerous obligations on you, as the architect, which you cannot fulfill. You are not the contractor, you are not on site 24/7, and you cannot see everything in your periodic reviews. In addition, your liability policy with Pro-Demnity excludes damages for any undertaking to indemnify where such provision creates a liability in excess of that which might otherwise arise under law – as this wording certainly does.

A contract provision from a government institution provided:
In addition to the services set out above, the architect will supervise the execution and construction of the Work to the extent necessary and ensure that the construction is completed in

accordance with the final designs, final architectural and engineering plans and specifications.

This is problematic in so many ways as it requires the architect to supervise construction, and in essence provide a guarantee of construction. Again you are not the contractor and there is no coverage for such a guarantee. These are examples of owner's contracts.

The same problem can arise with respect to your subconsultants' agreements. Frequently, they may contain unreasonable limits on liability or indemnities on the part of the architect in favour of the subconsultants, leaving the architect to fill a financial gap between its liability to the owner and its right to collect from the subconsultants. They must be avoided. Use of document OAA 900 is encouraged when retaining subconsultants. Remember, if your arrangement with your subconsultant prejudices Pro-Demnity's ability to defend you, it could lead to a denial of insurance coverage.

3. "I TOLD MY CLIENT I HAD MADE A BIG MISTAKE"

All architects want to help their clients and get the project completed. Mistakes do happen; however, that does not mean that the architect is negligent. That may or may not be true, but you are not the judge. If you feel you have made a significant error, the first thing to do is to advise Pro-Demnity. You do not need to have been sued, or to have received a threatening letter from your client. Rather, this obligation arises as soon as you might reasonably determine that circumstances exist which could subsequently give rise to a Claim against you. Failure to advise Pro-Demnity immediately could result in a denial of coverage.

There are many reasons for this. The first is that we all lose perspective and our judgment suffers when we think we have made a mistake. It is far better to have a dispassionate professional review the situation. You will know the old adage about the lawyer acting for themself having a fool for a client. This holds true for architects as well. In addition, while admitting to your client that you made an error may be good for your conscience, it may potentially void your insurance coverage, which specifically prohibits your admitting to an error.

4. “I LOST/DESTROYED/NEVER HAD RECORDS FOR THE PROJECT”

Most disputes arise sometime after the completion of the project, even years later. In litigation, lawyers like to ask, “Do you remember what happened in the July 15, 2016 meeting?” or “Why do you say the plaintiff authorized that change?” That is where records (now mainly electronic) come into play.

As the project progresses, a mass of drawings and sketches will be prepared. The architect’s usual temptation may be to simply keep updating drawings and on occasion deleting the early drawings. The early drawings should be saved – particularly those that have been forwarded to the client for review. This is particularly important in fee disputes, for example, where there may be an issue as to whether the architect actually reviewed the drawings with the client, or whether they were even created.

The more work which is producible, the more likely it is the fee will be recovered. It is very important to confirm significant instructions in writing. A short email is fine. When a dispute arises, a written confirmation will be the best evidence that instructions were actually given. For example, “Dear Client, this will confirm your decision to use XYZ cladding notwithstanding its higher long term maintenance cost.” It is important to prepare complete site visit reports. Architectural firms’ site visit reports vary dramatically. Some contain no information other than “The project appears to be proceeding satisfactorily.”

The Pro-Demnity Claims Manager in one meeting queried an architect as to why his site visit report contained so little information. The response was, “I thought it was better not to list anything so I could deny knowledge of any problems.” That of course is not particularly helpful when you are faced with multi-million dollar litigation. Reasonably detailed site visit reports show that you were conducting a proper review even if the particular item, which is ultimately at issue, is not referred to. The test is not whether you actually saw and identified the problem. The test is: Did you act in the manner that a reasonably competent architect would?

5. “YES, THAT IS MY SIGNATURE ON THE CERTIFICATE”

The owner needs financing. The owner’s lawyer sends you a certificate and says I need it signed today before the project shuts down. I’ll be paying your outstanding fees out of the draw. The form says: *Construction and development of the Project up to and including the Inspection Date has been performed in a good workmanlike manner and in accordance with the plans and specifications and all applicable building codes. This Certificate is given in connection with the above referenced advance under your construction letter agreement with the lender, and you may rely upon it in making such advance.* You sign the form and email it back.

Three years later the project is in shambles. The lender cannot collect from the owner and pursues you on the basis of the Certificate. On discovery, the lawyer for the lender asks you, “Is that your signature? Was what you certified true?”

In another scenario, the project is complete and the local municipality will not give your client an occupancy permit without a final sign-off letter from you. The owner says every day is costing money. The form that you are being asked to sign says that you have inspected the construction and that it complies with your drawings and the Ontario Building Code. It omits the words “based on periodic site reviews” and omits the phrase “the construction is in general conformance with your drawings and the Ontario Building Code.”

Once again you are in a ZOOM discovery with the document being shared with you on the screen by plaintiff ’s counsel, and the question is asked, “is that your signature?” Although they often consist of only one page, certificates of final inspection are very important. Consider them carefully and if the wording is unusual, review it with your lawyer or Pro-Demnity before signing.

These are my top five. I hope not to hear them from you if/when we meet.

Our Contributor

John Little is a partner with Keel Cottrelle LLP, where he specializes in Civil Litigation and Insurance Law. Called to the Ontario Bar in 1976, he is a member of the Canadian and Ontario Bar Associations and the Advocates Society. John has been acting for Pro-Demnity Insurance Company since 1991, defending and providing advice to architects, while dealing primarily with professional negligence and professional discipline matters. When not spending quality time with architects or his golden retriever, John enjoys fishing and travel. John can be reached at: jlittle@keelcottrelle.ca