SORRY. NOT SORRY.

The Apology Act is intended to make it possible for professionals, including architects, to apologize for errors, without necessarily Incurring liability. The word “necessarily” is important here, since there are critical exceptions. Danielle Muise discusses the Act as it applies to Ontario architects.

EIGHT INSURANCE RISK TRENDS TO WATCH

Bruce Palmer, President and CEO shares eight important trends that will affect insurance risks and claims.

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5 THINGS A PRO-DEMNITY LAWYER DOESN’T WANT TO HEAR FROM AN ARCHITECT

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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

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25 THINGS WITHIN AN ARCHITECT’S CONTROL

Did you know there are at least 25 things that an architect can do to manage or mitigate practice and project risks? We first shared our list of “25 Things” at the 2021 OAA Virtual Conference. Read on and download this useful resource to start implementing or integrating any one (or all!) of these ideas in your practice.

WHAT RECORDS SHOULD I KEEP

There is no simple rule. Which records prove to be most important will depend on the particulars of the claim and will differ in each instance. When litigation occurs, it is the lawyer’s task to find out what went wrong and who is responsible. But it is the Architect’s obligation to provide as much information as possible in support of one’s own defense.

A prudent Architect will maintain project records for at least 15 years after project completion. To minimize the risk of extending the limitation period, it is further recommended that Architects send their clients a letter identifying the date on which they last provided services and keep a copy in their file.

Architects who can produce their own records, rather than relying on those produced by the plaintiff, are generally better able to defend themselves in the event of a claim.

Adequate and well-organized project records may be taken by a court as evidence of sound administrative practice by the Architect.

A written record in an email or letter trumps recollections of conversations. But as the adage states: “A picture is worth a thousand words.” So, photographs or sketches that supplement site review reports may provide the most valuable aids to your defense.

15 most important records to keep

1. Contract between Architect and Client
2. Contracts between Architect and sub-consultants
3. Construction contract between owner and General Contractor, Construction Manager or Builder (where available to the Architect)
4. Insurance policies of sub-consultants
5. Other insurance policies and bonds, where applicable (e.g. Builder’s Risk Policy, Performance Bond, etc.)
6. Communication documents such as emails, letters, faxes, etc.
7. Minutes of meetings
8. Bid and tender documents
9. Drawings and specifications
10. Certificates of Substantial Performance, Letters of Assurance, Statements of Completion
11. Field review reports, site review notes, site observations and photographs
12. Supplemental instructions
13. Change Order logs, RFI logs and shop drawing logs
14. Certificates of Payment and Progress Payment support documentation
15. Budget documentation

DO YOUR FEES ADEQUATELY REFLECT PROJECT SCOPE AND RISK?

You’re bidding on an exciting new project and asked to pull together the fee proposal (dread). Too high a fee and your proposal may be rejected. Too low a fee and the proposal might not reflect certain realities (and so, might be rejected anyway – even in a competitive environment). If only pricing out a project were as simple as applying a universally accepted formula.

Although an Einstein-worthy architectural equation for fees continues to elude the best of us, perhaps we can share some ideas on how to integrate more risk-thinking into your fees structure.

SCIENCE + ART + RISK = FEES

Pricing a project is part science, part art, and part risk assessment. These three factors are ever-present and in constant flux. They are also hard to price independent of one another, and often, risk is completely overlooked.

THE SCIENCE PART IS MATH UNTO ITSELF.

These are the basic calculations that reflect the practicalities of running the project: the internal or external resources and consultants to support the project to a successful conclusion, the related labour or material costs, the profit margin as well as the share of the general business / administration overhead that the project represents. In the business world, these are often represented as “hard costs,” but there is fluctuation inherent in these as well, and in accordance with supply and demand.

THE ART PART REFLECTS YOUR CREATIVITY AND THE FIRM’S EXPERTISE.

It’s the intrinsic value of your firm’s *collective* knowledge, design skill and professional acumen. For example, your ability to manage all the relationships and personalities that come with the project. Your problem-solving skills. Your learned experience of similar, previous projects.

Thinking honestly about what you and your firm bring to the table – the potential project benefits and outcomes (for you as well as your client) – is a valuable exercise to engage in at the start of each project. It provides an opportunity to assess new learning and experience that has been absorbed since the last project, providing a potential new starting point from which to inform the fees. Just as important, is the go/no-go decision: do your qualifications and interests mesh at all with the client and the project?

THE RISK PART CONSIDERS THE POTENTIAL RISKS TO THE PROJECT.

Every project is different so the degree of risk (known and unknown) will be different as well. The possibilities of delays, substitutions, scope change, labour or skills shortage, design flaws, use of client-authored contracts, project financing falling through, municipal or community stakeholder challenges, working with a new sub-consultant, etc., are just a few risks that are ever-present, but these and others will ebb and flow based on market, regulatory and business-environment conditions as well.

Embedding risk-thinking within the fees calculation helps gauge if there is sufficient professional liability insurance coverage in place in the event of a claim (or claims) related to that project. Would you need more coverage than your annual limits? Would your firm have sufficient funds to pay out of-pocket if it came to that? What would be the effect of taking on a higher deductible? Above all, it’s important to avoid accepting unfair or uninsurable risk being transferred onto you by your client, while at the same time, making sure that your sub-consultants assume their own fair share of the risk. It’s also an opportunity to re-read the professional liability policy to confirm coverage or limits for a particular risk and to speak with Pro-Demnity directly.

Professional liability insurance coverage is but one facet of a multi-pronged risk solution. Single-project insurance is sometimes a viable consideration for those one-off projects, as is increased limits, particularly if what used to be one-off projects have evolved into business as usual.

It can be empowering to think through risks when structuring fees because you can do something about those risks from the get-go, and price accordingly. You can, for example, actively remove known risks, mitigate existing risks, monitor the presence of risks and manage risks as they come up (and they will). When your scientific and artful pricing formula brings calculated risks into its equation, your fees may prove to be far more inclusive and representative of *your* value and offering.

ON RISK

Life is risky. You don't have to be an architect or a mountain climber to know that. U of T Professor Mark Kingwell puts it this way:

"If life were a game of chance, we would probably choose not to play: the chances are stacked in favour of the house and against the players." – Mark Kingwell, *On Risk*

Right now, in a post-pandemic world, and with natural disasters increasing in frequency and severity, this seems especially relevant. But, in good times and bad, risks are everywhere. Managing them is a feature of life and a factor in all of our planning and decision-making, even when we don't acknowledge it.

LISTEN TO YOUR MOTHER

In everyday life, it makes sense to manage risk by taking certain precautions: If it looks like rain, take an umbrella. If your mother thinks it might get chilly down by the lake, don't be difficult; take a jacket.

Taking risks in our personal lives may be unwise, inconsequential, or in some cases, exciting. Taking uncalculated risks in our work is bad practice, often uninsurable and even prohibited. As OAA members, we are *required* to plan for risk management – not for our own protection, but for the protection of the public we serve, in accordance with our provincial charter.[1]

RISK AND PLANNING

The Dictionary of Insurance defines risk management as "Analyzing a risk to quantify the potential for losses in a specific investment and to decide what is the appropriate action to take (or whether not to take action)." The recognition of potential risks in any venture, and the decision to deal with those risks in deliberate ways form the basis of risk management planning.

What does risk management planning actually entail? In its simplest form, it means thinking about whatever project you're about to undertake and determining how to avoid circumstances that might result in a bad outcome. The logical next step is to record these thoughts and share them with others involved in the project, especially those under your direction. So far, this only seems like good sense.

But given the complexity of many projects, and the tendency of many participants to adhere strictly to instructions, regardless of consequences, something more deliberate would be warranted – a Risk Management Plan. Such a plan should encompass any conceivable situation – insurable and, especially, uninsurable – and might serve as a working template for all future work.[2]

RISK AND REWARD

The idea of risk management planning sounds a little counterintuitive, even counterproductive, since, a) nobody knows what the future holds, and b) architects are meant to be innovators –creators of exciting new solutions to new and old problems. Does risk management imply that architects should avoid taking chances with new ideas?

Yes and no. If *chances* means *uncalculated risks*, then the answer is obviously yes. Never leap without looking. To corrupt an old phrase, "invention is the mother of liability." But if *taking informed chances* means embracing new ideas by exploring the upside and the downside – i.e., managing the risk – the answer may be: go all in; try new ideas; take on new challenges.

But think things through; do your research; make a plan; then proceed with increased confidence.

Notes:

1. “The principal object of the Association is to regulate the practice of architecture … in order that the public interest may be served and protected.” R.S.O. 1990, c. A.26, s. 2 (2). A download of *The Architects Act*, R.S.O., 1990, c. A.26, is available at https://www.ontario.ca/laws/statute/90a26):

2. Confusing online advice abounds, but few helpful texts exist. Amazon offers: *Managing Project Risk: Best Practices for Architects and Related Professionals.* James B. Atkins, Grant A. Simpson. Hoboken, NJ: Wiley, 2008

SIX WAYS TO REDUCE RISK

In architectural practice, risk takes many forms. It’s comforting to know that your Pro-Demnity policy protects you against the risks of error or unintentional neglect. The policy spells out the many things that are covered, as well those that aren’t. Bear in mind that a number of things aren’t specifically mentioned, simply because they aren’t responsibilities imposed by common law.

This is to say that, “A professional liability insurance policy is not an all-risk contract. It is rather a safety net, providing protective cover within specified limits.”

CLIENT-AUTHORED INDEMNIFICATION CLAUSES

The dangers of indemnification clauses have been addressed in numerous Pro-Demnity and OAA publications, and for good reason: Some of these clauses are so dangerous to architects that they have been dubbed “Murder Clauses.”