



A/E Risk Review brought to you by PLAN and:

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RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

What's Your Professional Liability Loss Prevention I.Q.?

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.

How much do you and your staff know about professional liability risks? Here are 25 true/false questions that will test your liability IQ:

The Questions

1. The best prevention against professional liability claims filed by clients is keeping a low profile and working on low-risk projects.
T F
2. If your firm does not have a written contract with a client, it has no enforceable agreement at all.
T F
3. Third-party claims filed by injured parties looking to “strike it rich” by hiring contingency-fee lawyers are the most common claims against design professionals.
T F
4. The “standard of care” to which you are expected to perform is determined by an expert panel of your peers.
T F
5. Project owners can best reduce their risk by using qualifications-based selection. However, design professionals are best served by selecting their subconsultants by bid.
T F
6. Requesting extensive financial information from a prospective client is unprofessional and almost a guarantee to lose the account.
T F
7. One of the best things about doing projects for public agencies is their creditworthiness. They always pay their bills.
T F
8. When a client directs a design professional to take an action that will violate the standard of care, the design professional should

document all details of the request before following the client's dictates.

T F

9. Virtually all professional liability insurance policies cover the indemnifications clients commonly request.

T F

10. Despite claims to the contrary, computer-aided design and drafting (CADD) does not significantly reduce the errors and omissions associated with design documents.

T F

11. Condominiums are relatively low-risk projects because a simple design can be repeated throughout the project.

T F

12. A design professional's certification of known facts is generally acceptable. Certification of opinions, however, can be dangerous.

T F

13. Most A/E claims are filed within six months of submission of contract documents.

T F

14. Because of personal liability, only death makes a design professional "judgment-proof."

T F

15. With few exceptions (due to state laws), contractors may not sue design professionals for purely monetary damages.

T F

16. Although having a limitation of liability contractual clause is effective, design professionals are better protected with a blanket indemnification.

T F

17. Limitation of liability clauses are upheld only in states without anti-indemnification statutes.

T F

18. When a design professional arrives on site and sees an obvious safety problem or OSHA infrac-

tion, he or she is well advised to remain silent and avoid taking on jobsite safety liabilities.

T F

19. The primary benefit of providing full-time construction observation services is income enhancement, not loss prevention.

T F

20. A certificate of merit clause — a contract requirement that a client must, before filing a claim, obtain a professional's opinion that negligence occurred — may be applied only in states with a merited claims law.

T F

21. In most states, limitation of liability automatically applies to breach of contract.

T F

22. As a general rule, a design professional should keep every scrap of paper associated with a project, just in case a problem occurs in the future.

T F

23. Today, oral contracts are enforceable only in the states of Georgia, Tennessee and Kentucky.

T F

24. When an architect or consulting engineer gives direct instructions to a contractor's employee, a safety responsibility may be inferred despite contract wording to the contrary.

T F

25. Given that one lawsuit could cost a firm the profit made on 50 projects, time spent golfing with clients would be better spent writing iron-clad contract language.

T F

The Answers

1. **False.** Since clients file most claims, the best defense is maintaining good communications and amicable relationships with clients so any problems that do occur can be resolved without lawsuits.

2. **False.** Whenever a firm undertakes work for a client it has a contract. The question is only whether the contract is written or oral. If oral, each party's understanding of the contract will differ.
3. **False.** Third-party claims by injured parties are rare. Clients file most claims.
4. **False.** Standard of care is determined by the trier of fact — a judge or jury — based partly on the testimony of expert witnesses.
5. **False.** Design professionals, just like owners and others, are best served when they use qualifications-based selection. QBS is the only selection method that maximizes the quality of the services performed.
6. **False.** Taking steps to ascertain a client's financial standing is not at all unprofessional. Most clients are familiar with the procedures needed to check financials and are willing to comply.
7. **False.** Public entities have been known to jump the gun and engage design firms before funding is in place. Make certain that a public entity has received funding for the work you are hired to do or you may be left holding the bag.
8. **False.** Design professionals should never knowingly violate the standard of care. Doing so could nullify your professional liability insurance coverage and expose you to severe legal sanctions. If the client states that "So & So Associates down the street will do it," let the client deal with So & So.
9. **False.** Clients frequently ask for indemnifications that are not insurable. Accepting them can increase liability exposures while simultaneously eliminating professional liability insurance coverage.
10. **True.** CADD, in and of itself, does not reduce the chances of errors and omissions. While CADD can help produce more accurate drawings, it also adds its own unique liabilities, such as errors in electronic transmission and an increase in the misuse and reuse of the electronic files.
11. **False.** Condominiums are among the riskiest types of projects imaginable. Highly leveraged developers, skimpy budgets, poor maintenance and litigious homeowner groups all contribute to the condominium's dismal claims record.
12. **True.** A certification of opinion can be interpreted as a guarantee. As with indemnifications, the end result can be a significant increase in liability exposure and elimination of professional liability insurance coverage for it.
13. **False.** Typically, claims are filed within two to three years of the completion of a project.
14. **False.** Even death may not afford protection. As long as the estate exists, it can be sued for damages resulting from the deceased's prior professional acts.
15. **False.** In many states, contractors may sue design professionals for purely monetary damages. Know the law in your state.
16. **False.** A full indemnification is seldom enforceable. As such, it would be the same as no indemnification at all. The courts consider limitation of liability to be a reasonable alternative and, when clauses are properly drafted, they usually will enforce them.
17. **False.** Limitation of liability is legal and enforceable in almost all states; however, some government agencies may consider them to be indemnities. Check your state and local laws.
18. **False.** Not reporting a safety violation would violate licensing requirements. It would do little to prevent liability exposure in most instances and could create serious repercussions.
19. **False.** Full-time construction observation is one of the most important services a design professional can offer, helping to reduce all parties' exposure to loss. Many consider construction observation to be part of a complete design professional service. In fact, *not* providing construction observation on your design work actually *increases* your liability exposure.
20. **False.** Merited claims protection can be obtained by contract in virtually any state or territory of the United States and in Canadian provinces as well.
21. **False.** Limitation of liability applies to breach of contract when the limitation specifically so

states. In some states, limitation of liability may apply to breach of contract without that fact being specified, but only to the extent that negligence also is considered a breach of contract.

- 22. False.** Keeping too much paper on hand can create problems should discovery occur. When opposition attorneys have the ability to examine several drafts of the same document, they can use inconsistencies between drafts to confuse the issue and the trier of fact. As a general rule, only final versions of project and contract documents should be kept.
- 23. False.** Oral contracts are enforceable in every state of the United States.
- 24. True.** Construction workers usually may not sue their employers. Instead, they receive benefits from workers' compensation insurance. Particularly when a death or disability is involved, these benefits can be low and often can trigger a search for deep pockets. If it can be shown that a design professional somehow took on a directional responsibility with respect to a contractor's workers, a safety responsibility may be established.
- 25. False.** Playing golf with clients and undertaking other activities to establish good relationships helps assure effective lines of communication should a problem occur. Given that more than six of every 10 claims filed against design professionals are filed by their clients, having good relationships with clients helps lower exposure to the "riskiest" people with whom design professionals deal.

So, how well did you do? If you missed more than five answers, you might need some refresher work on professional liability issues.

Professional liability education should be an important part of your staff training. Talk to your local PLAN agent about the education opportunities available in the areas of risk and practice management.

For Assistance

If you have questions about any of the issues raised in this quiz, please give us a call. We're members of the Professional Liability Agents Network (PLAN). We're here to help.