

Loss Control Bulletin

Architects and Engineers

Professional Liability Insurance

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The 10 Principles of Good Practice – Part I

Introduction

As a design professional, your role can extend to a wide range of areas, including original concept and design, project supervision, expert analysis and certification, and in some instances contract administration. However, at every step along the way you are exposed to a number of liability exposures.

To help you manage these exposures, we've developed "The 10 Principles of Good Practice." These principles are based on lessons we've learned in our more than 40 years of claims analysis and risk assessment. In this first of two bulletins, we've provided our first five principles, which highlight the importance of setting up a clearly defined and realistic relationship with your client right from the start. This can be achieved by selling and portraying yourself fairly; by educating your client on your services and other issues; and by developing a written contract and specific project plan. We've also included real life claims examples to help illustrate the potential pitfalls that may be encountered when these principles are not followed.

1. Sell your firm and your services fairly

Many consulting firms try to increase their business by portraying themselves in the best possible light, whether through advertising or by boasting of their abilities when issuing tenders on new projects. The natural tendency for some consulting firms may be to sell their services in a way that places them above the competition. However, by selling themselves using superlatives such as "the best" or "leader in the industry," expectations can be increased and a court could ultimately determine that the standard of care is higher for such a consulting firm

than it is for others. Consequently, in a claim scenario, the consultants' exposure to liability can be increased as a result of such higher standards. Consulting architects and engineers should know that they only owe a duty to exercise the skill, care and diligence which may reasonably be expected of a **person of ordinary competence** measured by the professional standard at the time. Consultants are not obliged to perform to the standards of the most competent and qualified members of their profession. By claiming to be "the best," they can be held to those elevated standards not only by their clients, but by the courts as well.

Consider the following claim example:

An architect responded to a request for proposal for a project that involved renovations to a municipal community centre. The architect submitted a proposal that touted her firm as being "one of Canada's leading designers of community projects," boasting of "profound knowledge of technical issues" and having a "team of specialists with many similar projects completed." The architect's bid was successful and work commenced. Although the project was under tight budget restrictions, a significant number of change orders were required on this project, leading to extra costs which far exceeded the budget. The municipality claimed negligence against the architect and alleged that she misrepresented her firm as being one of Canada's leading designers and specialists. The municipality contended that with the architect's level of experience and competence, she should have been able to ensure the project was delivered within the budget. The municipality relied on the wording of the architect's proposal and, as a result, the architect had to contend with the possibility that a judge could render an adverse judgment, deeming her standards were higher than those of ordinarily competent architectural firms.

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2. Educate your client

Even the most sophisticated client may require some education regarding the services offered by professional consultants. At the outset of any contractual agreement, the client should have realistic expectations of the consultant's services, and both parties should have the same understanding of the scope of the services to be provided.

For example, some project owners might believe the prime consultant is responsible for the total performance on a project. On the contrary, a project owner should be aware that the consultant's role is to provide professional services and to assist the owner in ensuring that the contractor delivers a project that is in general conformity with the consultant's design and specifications. It is the contractor, not the consultant, who is responsible to carry out construction, and to determine the adequate means and methods required to perform the work.

There can be a number of other issues on which a client needs to be educated. Consider field review services as an example. A client must understand the purpose and importance of field review services, as well as the potential repercussions when field review is not performed or is insufficient.

Consider the following claim example which illustrates a familiar claim scenario:

A consulting engineer was mandated to design and review the construction of a new commercial complex. The owner wished to minimize costs on the project and reduced the consultant's field review responsibilities from a full-time review basis to part-time. The consultant did not challenge the owner's decision. Under the new arrangement, the consultant was to be called in prior to the pouring of the concrete slab in order for him to supervise the pouring and to ensure that the quality and quantity of the concrete were adequate. However, there was some confusion over this detail and the contractor proceeded to pour the concrete without the presence of the consultant. This placed the consultant in a rather difficult position as he was required to certify that the contractor's work was completed in general conformity to the design. If the consultant could not make the necessary verifications, a decision would have to be made as to whether or not the concrete should be removed and poured again. If removal of the concrete was required, then someone would bear responsibility for project delays, extra costs and the possible loss of profit to the owner. Given that it was the consultant's responsibility to supervise and

certify the work, liability was a real concern. Had the owner been made aware of this possible occurrence as a result of reducing the consultant's field review mandate, the consultant might have been permitted to carry out supervision on a full-time basis.

3. Insist on an equitable written contract

The cornerstone of any consultant-client engagement is the written contract. It is the primary reference that defines the relationship between the contracting parties and establishes the requirements expected of the consultant.

A written contract, as opposed to an oral contract, is preferable as it is easier to enforce. In an oral contract, the parties must rely on their recollection of the agreement which can change over time. Also, oral agreements tend to be simplified and may not address a number of important contractual elements.

A clearly defined contract ought to include five important elements:

- i) **Mandate:** The contract must define the complete scope of the consultant's services, which include but are not limited to: design services, inspection, field services, expert analysis and reporting, and certification. A consultant should also consider specifying which services will not be provided in order to avoid misunderstandings with the client. For example, if a consultant is not providing field review services, these should be documented as excluded in the contract wording. In the absence of this exclusion and in the absence of other key evidence supporting the consultant in a claim situation, a court could potentially determine that it was reasonable to expect the consultant to provide field services.
- ii) **Design Inputs:** These are the parameters imposed by the client that will guide the consultant in the design process. For example, a client may wish for a project to withstand a 100-year flooding event, a 300-year earthquake, or maybe to achieve LEED Gold status. Design inputs may present risks and challenges that have cost implications for the client with respect to design, construction and life-cycle costs. If this is the case, a consultant may wish to heed the advice in the previous principle: *Educate your client!*

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- iii) Deliverables:** Sufficient details are required in the contract in order to define what the consultant will deliver to the client over the course of the mandate. For example, these might include electronic design drawings, shop drawings or schedules. A consultant may also wish to include wording to the effect that deliverables, such as drawings, are not to be reused or modified by the client or others, and that in doing so, there is a disclaimer of responsibility on the consultant's behalf. This will help protect the consultant in the event of a claim relating to tampered drawings.
- iv) Compensation Terms:** In the interest of both the client and the consultant, a contract should be specific about the terms of compensation. Important details to consider include payment schedules and amounts, terms relating to suspension of the consultant's services and terms relating to termination of services in the event of non-payment. In the case where a consultant wishes to terminate services because of non-payment, it is advisable to consult a legal advisor as taking this step could be viewed as a breach of the contract.
- v) Allocation of Risk:** A consultant should be wary of risks that are assumed in a contract and should seek to manage these risks so that they may be allocated fairly. For example, if a contract states that the consultant shall assume liabilities of others who are not part of the consulting firm or are not insured under the consulting firm's insurance policy, the consulting firm may find itself without insurance in the event of a claim. Assuming such risks would not serve the consultant, nor would it serve the client if damages were suffered. It would be best if the risk was allocated in a more manageable fashion, with each party involved in a project carrying adequate insurance to cover their own liabilities. Another way a consultant can manage risk is by including a limitation of liability clause in the contract. For example, a consultant may wish to include a clause that limits liability to the total amount of insurance available under his or her professional liability policy.

Generally speaking, where contract wording is concerned, it is advisable that a consultant seek the advice of legal counsel. However, there are standard agreement forms available to consultants such as ACEC Document 31 (available at www.acec.ca) and RAIC Document Six (available at www.raic.org), which are generally accepted in the industry. It is advisable that a consultant seek the advice of legal counsel when modifying the language in these standard forms.

Based on our claims statistics, many consultants choose to enter into agreements with clients where no written contract is in place. The absence of a written contract can be challenging to the consultant, especially in the context of defending a lawsuit.

Consider the following claim example as an illustration of this point:

An ENCON insured consultant produced structural design drawings for multi-unit residential homes to be constructed in various northern communities. Notwithstanding the significance of the project, the consultant carried out the design mandate with no written contract in place. Further, the consultant was not requested to investigate the site in person prior to issuing designs, nor was he required to inspect the work during or after construction. A number of years after project completion, a windstorm partially took the roof off of a building in one of the locations and caused lateral deflections of the structure. Significant repairs were required and a claim ensued against the consultant. During the investigation, some design issues came to light and a number of construction deficiencies were noted. These construction deficiencies proved to be a liability concern because it was alleged the consultant ought to have taken steps to ensure the construction was properly reviewed in order to ensure it was in conformity with the design. Had there been a written contract in place, the consultant could have ensured it included wording stating that the consultant would not be providing field review services and that it was incumbent upon the client to ensure that field review would be carried out by a professional consultant. Such wording could have helped shift some of the liability exposure to the client.

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4. Do not play lawyer

As a professional architect or engineer, when you are brought into a lawsuit, retaining defence counsel is an imperative step in ensuring your interests are protected. However, outside a lawsuit there can be instances when a consultant should seek legal advice rather than “playing lawyer.” Here are some examples:

Contract Preparation: When a consultant’s client hires a lawyer for the purpose of preparing or negotiating a contract, the consultant should also consider hiring his or her own lawyer for assistance and to obtain advice on key legal issues relating to the contract. In the contract offered by the client, there may be wording that deals with issues such as indemnity specification, insurance specification or waivers of liability, all of which could potentially hinder the consultant if the contract is not properly crafted and prudently reviewed. Retaining a lawyer who will review contract wording with the interest of the consultant in mind can provide a higher degree of comfort and potentially prevent contractual disputes down the road.

Bylaws and Regulations: Consultants may wish to seek legal advice when there is confusion over the interpretation of applicable bylaws and regulations in relation to the consultant’s project design. This is especially important if, further to the consultant’s queries, the governing municipality does not provide adequate clarifications.

Contract Administration: There are instances when consultants may wish to seek legal advice if they are retained as contract administrators on a project. In this context, a consultant may be required to approve or decline contractor bids on a project, approve payments to a contractor or even take steps to terminate a contract. In either of these cases, the consultant’s decision may have an impact on other parties’ ability to draw revenue from a project. This raises the potential for a claim in negligence against the consultant and, as a result, warrants seeking legal advice.

ENCON has managed a number of claim files that illustrate situations where a professional consultant should have sought the assistance of a lawyer.

Consider the following claim example:

A consultant was retained to provide design services and contract administration for the redevelopment of a city’s “works operation yard.” These responsibilities entailed reviewing the construction schedule and evaluating extensive or unreasonable claims by contractors. The general contractor issued a claim against the city for extras due to delays which were allegedly caused, in part, by the consultant’s design. In this situation, the consultant was in a conflict of interest if she was to evaluate the contractor’s delay claim for the city. Further, if the consultant was to review the delay claim and accept it, she would essentially be acknowledging her own negligence. In a situation such as this, it is advisable for the consultant to seek advice from a lawyer before reviewing the contractor’s claim.

5. Develop a specific project plan

Countless considerations go into developing a project plan, including the complexity and magnitude of the project, existing site conditions and available resources. For this reason, a project plan needs to be comprehensive, specific and clear on all aspects of the work involved in the project.

Some important elements of a project plan include:

- The identification of human resources and experienced personnel responsible for inter- and intra-disciplinary co-ordination
- The production of schedules specific to field services, deliverables, milestones, etc.
- A project team briefing of the firm’s mandate as well as every team member’s responsibilities

Our experience has shown us that disastrous results can ensue when project team members do not fully understand the project plan, their roles and responsibilities.

Consider this claim example:

A joint venture, comprised of two engineering firms, was retained by a city as the prime consultant for the construction of a bridge over a river. While the falsework was being removed to install the bridge deck, it was alleged that the bridge deck settled more than what the design had anticipated. Remedial work was immediately required. The city paid for the remedial work and approached both joint venture partners for reimbursement. It was the position of

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one joint venture partner that the design and field review relating to the project had been subcontracted to another firm, such that the joint venture could not be held responsible for any damages. However, unbeknownst to this partner, there was evidence that the other joint venture partner had performed a peer review of the design. This evidence resulted in the joint venture bearing some liability exposure in the claim by the city. Had both joint venture partners been clear on their mandate, they may have been able to avoid exposure to liability in this matter altogether.

Summary

In summary, the processes that you follow as a design professional can have a direct impact on both your exposure to claims of negligence or wrongdoing, and the ultimate success of the project. The following principles of good practice can go a long way to managing your exposure to liability and should be considered as minimum standard procedures when providing services to your clients.

1. Sell your firm and your services fairly.
2. Educate your client.
3. Insist on an equitable written contract.
4. Do not play lawyer.
5. Develop a specific project plan.
6. Keep your client informed.
7. Deal promptly with problems.
8. Use written records.
9. Do not certify what you have not seen.
10. Think before suing for fees.

To learn more about principles 6 through 10, read our Loss Control Bulletin No. 113 entitled “*The 10 Principles of Good Practice – Part II*,” available for download at www.encon.ca in the Resource Centre.

ENCON’s loss control program includes annual seminars across Canada, Loss Control Bulletins and eLearning modules on relevant industry topics. For more details on oral and written contracts, please refer to our Loss Control Bulletin No. 111 entitled “*When Is a Contract a Contract?*” and our first eLearning course, which is available to policyholders and the network of brokers who work with us at www.encon.ca/elearningcentre.

