

# Loss Control Bulletin

## Architects and Engineers

### Professional Liability Insurance

To reference our archive of loss prevention materials, claims examples and detailed product information, please go to our website – [www.encon.ca](http://www.encon.ca).

#### Program endorsed by



## The 10 Principles of Good Practice – Part II

### 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 second of two bulletins, we've outlined the importance of follow-through on a project. This can be achieved by keeping your client informed; dealing with issues promptly; keeping written records; and ensuring the certification process is completed accurately. We've also included some real life claims examples to help illustrate how adherence to these principles can help you to avoid situations where problems spiral out of control and to minimize your exposure to liability.

### 6. Keep your client informed

This may seem similar to principle #2, *Educate your client*, but this mainly deals with managing the client's expectations at the outset of a project. However, keeping the client informed is important throughout the duration of a project—particularly when it comes to identifying problems and risks, and allowing the client to make decisions based on the consultant's advice.

For example, as a contract administrator, the consultant may be dealing with a contractor who is accumulating extras on a project. Given that the client could ultimately bear the cost of these extras, the consultant should identify why the extras are being incurred and raise the issue as soon as possible with the client. It may be that unforeseen site conditions have lead to additional work on a project, or perhaps there is a problem with the co-ordination of the design team and contractors. Whatever the case may be, if the client could be impacted by some turn of events, the consultant should advise the client of the matter and advise on the options available to address it. This way, the client will have an opportunity to make a decision based on the consultant's advice and will also take some ownership of the solution.

#### **Consider the following claim example where a consultant should have identified a risk to his client:**

A consultant provided mechanical and electrical engineering services for the renovation of a hospital. This work was within the scope of a larger project for which the consultant had been providing services. At the request of the client, the consultant agreed to retain a particular subconsultant to work on the electrical design of the hospital's east wing. In the process of retaining this electrical subconsultant, the consultant omitted to draw the client's attention to the relatively low limits of professional liability insurance that the subconsultant carried. This became a contentious issue when it was discovered that the subconsultant's electrical design was fraught with deficiencies and did not meet electrical code. Many changes were required to address the design issues, which lead to significant delays to the project and a claim for damages by the client. Unfortunately, the subconsultant did not have sufficient insurance to cover the

# Architects and Engineers

## The 10 Principles of Good Practice – Part II

damages sought by the client, causing the consultant to be exposed to the uninsured portion of the claimed damages as a result of his contractual liability. Had the consultant informed the client of the subconsultant's low limits, there would have been an opportunity to either convince the client not to retain this subconsultant, or perhaps require the subconsultant to increase the limit of his insurance.

### 7. Deal promptly with problems

ENCON's experience in managing claims has demonstrated that not acting on a problem tends to result in the problem becoming both more complex and costlier with the passage of time. This is a compelling reason why consultants should deal promptly with problems while carrying out their mandates.

To illustrate this point, consider a simple scenario where there are deficiencies in the electrical wiring running through a wall. It is certainly more difficult and costly to fix the wiring after the drywall and other obstructions are installed than to fix it earlier on, while the wall is still open and there are no obstructions. The same logic can apply to more complex matters.

With respect to increased costs, we know that inflation and interest can factor prominently when there is a delay in remedying damages suffered by a claimant. Material and labour costs tend to increase with time, and in civil lawsuits, damages claimed almost always include an interest component to them. These factors serve as additional motivation to address problems as early as possible.

Although a delay in dealing with a problem is inadvisable, completely ignoring a problem, or even worse hiding it, can have an exacerbating effect in the context of a lawsuit. From a liability standpoint, a consultant who chooses to sweep problems under the rug can lose credibility and expect an increase in liability exposure as a result. So, not only is there a potential cost consequence in delaying the solution to a problem, hiding it can actually impair a consultant's defence in a lawsuit. Conversely, when a consultant promptly addresses a problem, good faith is demonstrated, which can strengthen the consultant-client relationship and help prevent lawsuits.

### This is evidenced by the following claim example:

A mechanical engineering consultant provided design services for the renovation of a hospital. The consultant had underestimated the weight of a rooftop air handling unit and relayed the weight data to the structural consultant for load calculations. After the structure was completed and before the air handling unit was installed, the consultant became aware of the miscalculated weight of the air handling unit. Under the circumstances, to reinforce the structure would cause significant delays to the project, not to mention the premium costs related to carrying out the work. Realizing the gravity of the situation, the consultant promptly contacted ENCON for guidance. ENCON and the consultant developed a plan whereby the hospital would be alerted to the issue and a solution negotiated which would allow the work to be completed without any delay. The hospital was appreciative of the consultant's approach and the ongoing dialogue between the hospital and the consultant ultimately prevented a lawsuit for extra costs.

### 8. Use written records

Records are a valuable resource to a professional consultant. The benefits of written contracts were expressed earlier in principle #3. However, throughout a project there are also benefits to keeping physical and/or electronic records. These records can be field notes, conversations, written correspondence, drawings, etc. Written records not only help professional consultants document issues emerging over the course of a project, they may also tell a story that cannot be gleaned from the written contract. These details are helpful if a dispute ensues years later, after completion of a project. Without these records, people will rely on their recollection of the facts, which can fade over time and can differ from person to person.

Adopting a standardized procedure for keeping records is advisable for professional consultants. It can certainly be helpful to a consultant involved in a lawsuit as project records may be produced as documentary evidence, and the ability to locate and identify these documents is key to preparing a defence to the lawsuit.

# Architects and Engineers

## The 10 Principles of Good Practice – Part II

Records should be kept for as long as a consultant may be found legally responsible for his or her work. A minimal measure for record keeping should account for the applicable Statute of Limitations in the jurisdiction where services were provided. The Statute sets a limitation period during which a claim may be brought against a consultant. In this regard, professional consultants should seek advice from legal counsel with respect to the applicability of the Statute of Limitations.

### **The following tells a story of a professional consultant who did not keep project records:**

In 1979, a structural consultant was retained by a prime consultant to provide engineering services for the construction of a commercial condominium building. There was no written contract in place and the structural consultant did not keep any records from the project. In 2003, a section of the roof collapsed, causing damages throughout the premises. The unit owners filed a lawsuit against a number of parties, including the structural consultant, to recover damages suffered as a result of the collapse. Evidence with respect to this project was scarce given the considerable lapse of time since construction had been completed. Allegations against the structural consultant were that he was negligent in his inspection of the building after construction. However, the structural consultant insisted that he did not have any field review mandate and maintained that position during his examination for discovery.

At first, it seemed that the structural consultant did not face any liability in this matter until another defendant in the action produced a copy of inspection certificates that appeared to be issued by the structural consultant. This evidence not only increased the structural consultant's exposure to liability, it also affected his credibility in the eyes of the court seeing that he rejected any such evidence in his testimony. The matter settled out of court with a contribution made on behalf of the structural consultant.

## 9. Do not certify what you have not seen

If a consultant is required to certify work, it is imperative that the work be adequately reviewed in person prior to issuing certification. Before agreeing to issue certification, it is important to establish the nature of the certification required in a written contract, so that it is clear and specific. For example, if the intent of certification is to ensure only that

construction has been carried out in general conformance with the design, this ought to be expressly set out in the contract. A consultant should also outline the necessary degree and frequency of field review to be carried out. To that end, a professional consultant may consider specifying field review on a part-time basis, on a full-time basis, over a fixed number of hours or on demand.

The circumstances behind claims which relate to certification can vary considerably. In some cases, the details of certification were not set out in a written contract, leading to confusion. In other cases, engineering firms have sent inexperienced staff to review work, and as a result, the validity of the certification was questionable.

### **Consider this claim example:**

For one particular engineer, ENCON managed two separate claims where field review was a contentious issue. This engineer worked for a firm specializing in the design of manure pits and storage tanks. In both claims against the engineer, damages were claimed in relation to cracking concrete slabs in storage tanks. Our investigation revealed that the problems could have been averted if the engineer had been on site to witness the work carried out by the contractor. However, in the first instance, the engineer elected to trust the advice of a contractor over the telephone in order to issue certification. This advice was eventually determined to be erroneous. In the second instance, the engineer relied on insufficient information gleaned from photographs of the tank that were taken by another party. Both matters show the importance of a consultant personally witnessing a project before issuing certification.

## 10. Think before suing for fees

The final principle of good practice offers valuable advice to professional consultants: think before suing for your fees! In our experience, when a client fails to pay a consultant for professional services, it is usually because the client has run out of money, or there are unresolved issues with the consultant's services. Further, when a consultant claims for unpaid fees, we have found that the client will often file a countersuit for damages as a result of the consultant's alleged negligence. And, in many cases, the countersuit will contain allegations of damages totaling more than the fees sought by the professional consultant.

# Architects and Engineers

## The 10 Principles of Good Practice – Part II

### Consider the following claim example:

A structural engineer was retained for a home renovation project. Part of the renovation required the removal of a number of internal walls. The consultant's mandate included ensuring that these walls were not load-bearing. The work progressed on the project and the client produced most of the payments to the consultant in accordance with a payment schedule. However, an amount of \$1,200 remained outstanding and, despite the consultant sending numerous notices, payment was not forthcoming. The consultant filed a claim in small claims court, seeking payment of the fees. A month later, the consultant was served with a claim by the client for \$50,000 in damages as a result of the consultant's alleged failure to notice that one of the walls being removed was load-bearing. The damages claimed by the client included sums for remedial work, additional materials, labour, the return of fees paid to the consultant, interest and legal costs.

In this case, even if the consultant had not sued for the outstanding fees, it is possible that the client may have sued the consultant for negligence anyway. However, rather than suing for fees, the consultant could have attempted to communicate with the client, which would have revealed the contentious issue. The consultant may have lost the opportunity to help the client mitigate damages and maintain a good client-consultant relationship. Furthermore, it may have been possible to avert a costly and time-consuming lawsuit.

### 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 1 through 5, read our Loss Control Bulletin No. 112 entitled "*The 10 Principles of Good Practice – Part I*," available for download at [www.encon.ca](http://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](http://www.encon.ca/elearningcentre).

