



10 Actions NOT to take when facing a claim

Design Professional

Experts from AXA XL's Design Professional team have drawn up a list of the 10 most important DON'TS when confronted with a claim.

When an owner or other party files a claim against your practice, alleging errors, omissions, negligence or worse, it can cut right to the core of your professional integrity and self-esteem.

There is a certain protocol you should follow to ensure the right people are notified of the claim – the best defense can be assembled and your professional interests protected. A major part of that protocol is NOT taking certain steps that could undermine your case.

1 DON'T overreact

No matter how you're notified of a claim—whether it's an owner's phone call, an attorney's letter or legal process papers served by a court officer, your job is to remain calm and not overreact. Many A/Es react by trying to resolve the matter right on the spot. They may say something like, "I'm sure my insurance company will settle up with you." Others may have such a negative reaction that they end up blaming everyone else involved in the job, including their subconsultants, for whose actions they could be legally liable. Before you end up painting yourself into a legal corner, say practically nothing other than hello and goodbye.

2 DON'T make any statements until conferring with your insurers and/or attorney

Though it seems obvious, making what seems like an innocuous statement (e.g., "I was wondering when I'd hear about this.") to the other party becomes part of the record and later could be interpreted as an admission of liability. Prior to consulting with those in the business of protecting you, the less you say to anyone about the claim, the better.

3 DON'T wait to contact your agent/broker or insurer

The earlier you notify these parties, the sooner they can help you. Call and let them know, then follow up in writing. Most likely, your insurer will immediately begin investigating the potential liability involved and deciding the best course of action to take (e.g., retaining an expert to evaluate the claim) to defend you. If your insurance agent doesn't handle all of your insurance policies that may be available to respond to the claim, you need to coordinate notice to all brokers and ask them to communicate notice to the insurers. This includes commercial general liability (CGL) and excess insurers, not just your professional liability (PL) insurer.

4 DON'T wait to compile project documents

The claim against you may be related to a project that's years old and the records may have been stored offsite. Getting started right away means you'll be able to quickly pass them on to those defending your interests.

5 DON'T destroy documents related to the project in question

As soon as you have any inkling that there's a dispute on a project, even if you don't appear to be involved, you should preserve all documentation. If your firm has a policy of routinely destroying documents after a certain period of time, then you'll also want to circulate a "litigation hold" memo within the firm. The memo should go out to your staff as soon as you learn about the possibility of litigation—don't wait until you've been served with a summons and complaint.

6 DON'T tell the other side you have no documents

Many design professionals mistakenly believe that if no relevant documents exist, the claim can't proceed. The reality is that not only can the claim proceed, but by telling the claimant's representative you have no documents, you've just given the opposition a leg up in the case. Their attorneys now realize that, absent your project file, their own proofs will form the basis for much of the case, leaving you to defend yourself with nothing but sketchy recollections.

7 DON'T sign or accept releases from anyone

In fact, you shouldn't sign any document related to a claim unless advised to do so by your attorney and your carrier. Otherwise, you could end up releasing the party actually responsible for a problem from any liability, leaving you as the sole defendant. You may also be presented with only an incomplete release, exposing you to liability for additional components of the claim.

8 DON'T agree to make any payments or provide any services

Some A/Es feel they can simply write a check or agree to re-do part of their services and all legal actions will be dropped. The owner may not be able to offer proof of your remedial efforts as evidence of liability, but you may be opening up a new statute of limitations period or giving the owner an argument for continued services. Don't agree to provide a service or make a payment—even if it falls entirely within your deductible—without the advice and consent of your insurer. For example, insurance policies from the Design Professional unit of AXA XL require the insurer's consent on incurring expense or making settlement payments. By acting unilaterally, you could jeopardize your insurance coverage.

9 DON'T offer free advice post-project

We've seen many cases in which an owner asks an A/E to "give us your opinion" or "discuss solutions" in response to a problem that has arisen on a project long after completion. Meeting with the owner under these circumstances is only going to give the owner evidence to use against you later in a claim. Owners also use this tactic when a statute of limitations is winding down, so they can make it appear that you had ongoing communication about the problem. There are two strategies you can use in response. One is to write the owner, stating that, while you haven't been onsite in a number of years, you'd be happy to investigate what has transpired over the years and provide your opinion, as soon as the owner signs a new professional services agreement and a fee is negotiated. The other is to have your insurer's attorney draft a response inquiring as to whether the owner is making a claim against you. Whichever tack you take, you can feel pretty confident the owner won't come looking for free advice or a statement against interest again.

10 DON'T use color commentary

Remember what Joe Friday said, "Just the facts..." Almost every project will have at least one issue, difficult decision, or challenging personality involved. When reviewing, evaluating or communicating about a project internally or externally, don't characterize or portray the project, the participants involved, or the decisions ultimately made. Keep communications and descriptions objective and to the point.

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