

The Ten Commandments
For Managing Your Professional Liability Risk

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Professional Liability Risk, A No Win Situation:

- **The firm loses time**
 - **Productivity lost due to stress**
 - **Billable time lost due to necessity of preparing defense**
- **The firm loses money**
 - **Deductible**
 - **Higher Professional Liability Insurance premiums**

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Professional Liability Risk, A No Win Situation:

- **The firm loses reputation**
 - **Difficult to work with an Owner/Contractor following a claim**
 - **News media attention**
 - **Owners and A/E's are now asking about prior claims as part of the selection process**

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Your Risk Management Strategy:

- **Manage the firm to avoid loss**
- **Manage the firm to minimize the time, effort and money involved in resolving the disputes that could lead to lawsuits**
- **Maximize the defensibility of your position in the event a claim occurs**

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Classification of Causes

- **The XL Insurance Risk Drivers research highlights the interrelationship between technical and non-technical factors that contribute to an A/E firm's risk exposure**

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Classification of Causes

- **Technical**
Error and/or omission of a technical nature which resulted in a loss prevention file or claim
- **Non-technical**
Breakdown in project or practice management processes which contribute to a loss prevention file or claim being made

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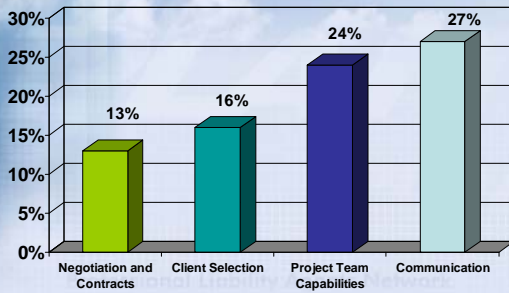
Methodology

- Analysis of over 24,000 closed claim and LP files over a 13-year period.
- These files represent over \$1 billion in claim payments.

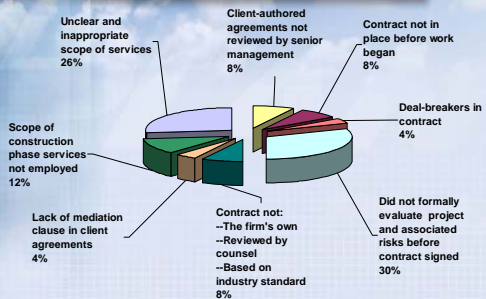
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Top 4 Non-technical Risk Drivers

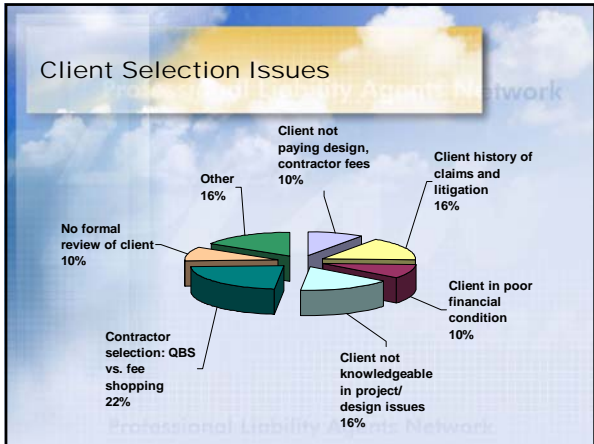
Percentage of Claims Affected

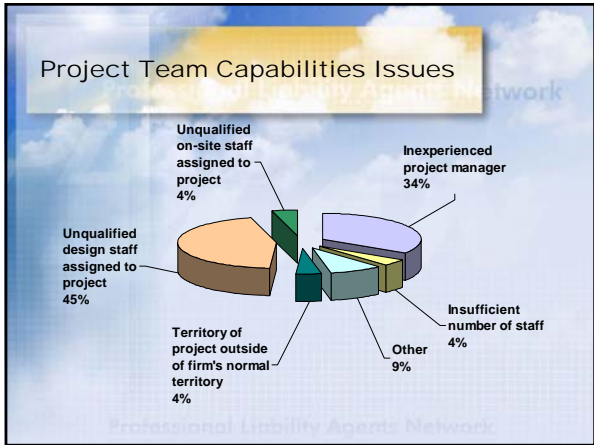


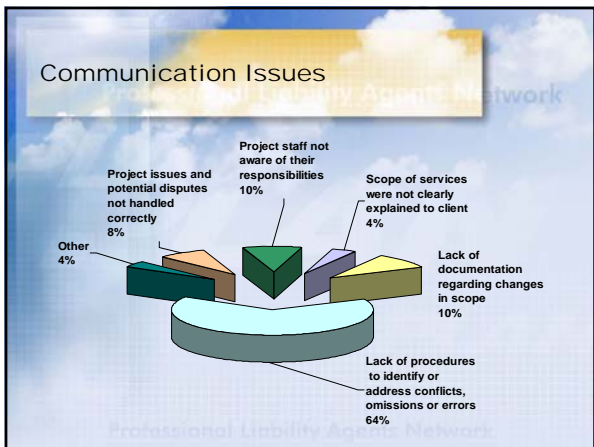
Negotiation and Contract Issues



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10. Thou Shalt Develop a Dispute Resolution Strategy

- **Negotiation**
- **Mediation**
- **Arbitration**
- **Litigation as last resort**

9. Thou Shalt Get Help with Potential Claims

- **Get help from your insurer, agent and attorney at the first hint of trouble**
- **Comply with your Insurer's "Claims Made" reporting provisions**
- **Leverage your personal relationship with the owner and contractor to minimize the escalation of misunderstandings to disputes**

8. Thou Shalt Manage Your Accounts Receivable

- **General rule:** If you sue for fees, you will be counter sued for professional negligence
- **Secondary rule:** If the project is over budget, the cost of change orders will be deducted from your final fee

Manage Your Accounts Receivable

- **Establish your fee and payment schedule in your contract**
- **Insert suspension of services clause in your contract**
- **Invoice your services on a timely basis**
- **Insist upon timely payment**
- **Add interest and costs of collection provisions to your contracts**

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Manage Your Accounts Receivable

- **Reality check**
 - Are Project Managers aware of and involved in collection procedures?
 - Are fees invoiced on a timely basis?
 - Do you know what your economic leverage points are on a project?

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7. Thou Shalt Develop a Formal QA/QC Program

- **Quality Control:** The process of checking work for errors before it leaves the firm
- **Quality Assurance:** Creating work-flow procedures and processes that support the creation of the work

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Develop a Formal QA/QC Program

- **Back to basics: Do quality work on quality projects for quality clients**
- **Develop a “culture of discipline” within your firm**
 - **Work is executed following your established procedures**
 - **Exceptions to established work flow standards are minimized**

Follow your Written QA/QC Program

- **Danger!!!! Don't allow routine deviations from your program**
- **Continuously improve your program**

QA/QC Reality Check

- **Do you have a written program?**
- **Is the program up to date?**
- **Does the firm follow it's written program?**
- **Does the firm allow for exceptions to established standards?**
 - **If yes, who in the firm approves exceptions?**

5. Thou Shalt Know the Project Team Capabilities

- What is experience of firm?
 - in project type, size & budget
 - with client
- What is experience of individuals within firm?
- What is experience of team outside firm?
- How do you train/mentor?

6. Thou Shalt Document and Confirm

- **General rule:** He who has the most paper wins.
- **Secondary rule:** Never assume communication, always confirm.

Document and Confirm

- Establish standards for what is documented (What, When & Why)
 - Meetings, job site visits, telephone conversations, e-mail, voice-mail messages, fax transmittals
- Establish standards for how documentation is organized and stored
 - Paper files, electronic files or both?

Document and Confirm

- **Reality Check:**
 - What do you document? (Meetings, job visits, phone calls, voice-mail, e-mail)
 - How do you document? (Paper, electronic or both?)
 - Is all documentation organized and in one place?
 - How do you confirm important communications?

4. Thou Shalt Provide Full Services

- **Avoid partial services!**
 - Design without construction observation
 - Construction Review without design
 - Inspections
 - Free services
- **General rule: The greater your scope, the lower your risk**

Provide Full Services

- **The scope should be congruent with the needs of the project**
- **Link the scope to the critical success factors of the project and the client**
- **Don't expand services beyond your capability (ie., You have the time, expertise, people, skills and money)**

Provide Full Services

- **Reality check:**
 - Is your firm providing partial services?
 - Is your scope appropriate to the project and your capability?
 - Do you use disclaimers when appropriate?

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3. Thou Shalt Carefully Choose Your Clients and Projects

- **Certain types of projects are inherently risky:** (condominiums, residential, PUD)
- **Certain types of clients are inherently risky:** (Developers)

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Carefully Choose Your Clients and Projects

- **Reality Check:**
 - What specific characteristics make an excellent client?
 - Can your new and existing clients be measured against this standard?
 - What is the difference between a “good” client and an “excellent” client?

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The Three "C"s of Client Selection

- **Character:** What is your prospective client's track record for honesty, integrity and fair dealing?
- **Capacity:** What is your prospective client's track record successfully completing projects of this size and complexity?
- **Capital:** What is your client's source of funding for both your fee and the project? Is the project budget realistic?

2. Thou Shalt Measure Risk Against Reward

- Does your fee (and the profit within your fee) justify risking your firm and personal assets?
 - **Basic rule:** Don't take a large risk for a small reward
 - **Secondary rule:** Don't take a risk for a reward you may not get
- Hindsight is always 20/20!
- The challenge is to develop "foresight"

1. Thou Shalt Always Use A Written Contract

- **Never do business on a verbal agreement!**
- **Contracts need to establish at a minimum:**
 - Scope of services
 - Services not included or provided by others
 - Timeframes and deadlines
 - Conditions of service
 - Liability allocations and risk transfers
 - Fees and expenses

Always Use A Written Contract

- A contract is a two party agreement
- The owner has a major role in the success or failure of his/her project
 - What role is the owner going to play?
 - What information is the owner going to provide?
 - What services will the owner provide?

Always Use A Written Contract

- If you're the prime
 - Be sure all subs have Professional Liability Insurance
 - Be sure to pass their contract provision from prime-owner agreement
 - Be sure to have clear scope of service

Always Use A Written Contract

- Reality Check:
 - Do you start projects without signed agreement or authorization to proceed?
 - Does your firm always use written contracts on every project?
 - Are verbal contracts confirmed with signed letter agreements?
 - Do your letter agreements include all essential contract elements?

Red Flags in Client Prepared Contracts

- **Non-negotiable agreements**
- **Elevated standard of care provisions**
- **Uninsurable indemnification provisions**
- **Warranty, certification and guarantee provisions**
- **Construction phase responsibilities for means, methods or safety**
- **No dispute resolution provision**

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Use Caution with Client Prepared Contracts

- **Learn the skills to read, review and understand your agreements**
- **Get help from a competent lawyer**
- **Review with your insurance agent**
- **Always balance risk against reward!**

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Use Caution with Client Prepared Contracts

- **Reality Check:**
 - **Who reviews client prepared contracts for the firm?**
 - **Are they properly trained to recognize potential problems?**
 - **Does the firm utilize legal and insurance resources?**

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Ten Commandments.

- 10. Always document and confirm
- 9. Get help with potential claims
- 8. Manage your accounts receivable
- 7. Develop & follow formal QA/QC program
- 6. Always document and confirm

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Ten Commandments.

- 5. Project Team Capabilities
- 4. Provide full services
- 3. Carefully choose both clients and projects
- 2. Measure risk against economic reward
- 1. Always use a written contract

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Questions?

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