



**Risk Tip 11 – Dealing with a Claim or Dispute**  
*Provided as a courtesy by the ACEC/MA Risk Management Forum*  
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Few other industries in the United States are as subject to litigation as is the Construction Industry. Hardly an architect, engineer or contractor can go through his or her career without at some point facing a claim, lawsuit or demand for arbitration from a client unhappy with the outcome of their construction project. Frequent problems include lack of funds due to tight budgets, poor scheduling/planning, unforeseen conditions or just unrealistic client expectations. Add to this the occasional error or omission in drawings and specifications, thus it is easy to see why the average construction professional faces a virtual minefield while performing project services. Against this backdrop, it is important for design professionals to understand what to do and what not to do when faced with a dispute or actual claim.

First be aware of the signs that something is wrong. It may be a complaint that something just does not seem quite right. A contractor may be demanding more money from the owner alleging delays or extras have driven up their cost. Or it could be a significant issue with the project that will result in a change order that not only will require additional materials and services but also additional time which will extend the project completion date. These are all the early warning signals that a dispute or claim could be imminent. An engineer must proceed cautiously when attempting to resolve these matters or a claim will likely ensue.

When working with project participants to resolve a dispute, start by looking for a resolution that neither admits responsibility, nor assigns blame. At the early stages of a problem, it is very difficult to know the true cause. You may initially think that you are to blame, but before “you fall on your sword” take a step back and investigate the real cause, while taking another look at your firm’s performance to date. Might the problem have really been caused by an unforeseen condition? Even if you see errors or omissions in your work, that does NOT mean you are liable and therefore you definitely SHOULD NOT admit liability. The mistakes may not be the actual cause of the problem and possibly given the conditions under which you were working (tight timetable for deliverables) your work may still meet the standard of care. Remember, our legal system does not require perfection from an engineer, only to act reasonably and prudently given the circumstances under which you are performing so as not to cause harm. Be fair to your project team. Leave the decision of whether you met the standard of care to an independent party, such as a court or arbitrator if it ever comes down to that.

At this early stage, the real focus of the effort needs to be on how to resolve the problem so that the project may proceed. Seek to find a solution. If the owner, contractor or other project participant wants to assign blame, remind them that can be sorted out later, but in the best interests of the project, the immediate objective is to find a solution so that the project can stay on track. Avoid becoming defensive or argumentative. Also, bear in mind contractual requirements and avoid waiving any rights you might have. The project participants may want

to reserve contractual rights while seeking potential solutions. Most important – DO NOT accept blame. The goal should be to move the project along to avoid additional delay costs.

Certainly senior management should be involved with the dispute and its resolution. You likely have a very valuable client relationship at stake. Senior management assistance may go a long way in reaching a favorable resolution. It also demonstrates to the client, that the firm stands behind the work.

It is also essential that you alert the firm's professional liability insurer of the potential for a claim. Professional liability insurers offer pre-claim assistance free of charge to help you resolve a dispute before it becomes a claim. This assistance generally involves hiring counsel to assist you behind the scenes while you are seeking a resolution. Such assistance can protect you from inadvertently saying or doing something that now causes your firm to be responsible for damages.

Professional liability insurance policies define a claim as a demand for money or additional services to be performed by you without compensation alleging you caused some harm. A claim is not limited to just a lawsuit filed in court. Any time a demand is made, EVEN IF you think it will go away, it must be reported to the insurance company or you risk voiding coverage for the matter under the policy.

If you might later be seeking recovery from a professional liability insurer for legal costs and to satisfy any damages you might be obligated to pay, you must first FULLY cooperate with the professional liability insurer and do what the insurer instructs you to do.

Unfortunately, firms have found out the hard way attempting to resolve disputes without involving the insurer led to actions taken that ultimately prejudiced the insurer's rights to achieve a favorable settlement. As such, the insurer no longer owed a duty to cover the claim. All states have laws that protect insurers, so that their policies do not become a bank account of funds to pay whatever claimants and policyholders want. When the insurer is finally engaged, but the only thing left to do is for the insurer to write a check, then their rights are likely prejudiced and thus insurance coverage could be voided.

Consider all of the stakeholders involved when a dispute or claim arises. A clear, level headed process that includes all stakeholders in the resolution is the only way to achieve a fair and reasonable outcome.

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