Don’t Go It Alone on Legal Matters

Your agent and insurer can help you properly respond to legal requests and avoid claims, but only if you notify them.

Imagine hiring an attorney to design a new highway interchange or a $2 million residence. It probably wouldn’t go too well, right? The smart choice would be to hire a design professional, someone trained in the skills these projects demand.

Now imagine engineers and architects deciding how to respond to, say, subpoenas. Unfortunately, these situations do occur and, far too often, the results are just what you might expect.

Nancy Rigassio, Esq., Executive Claims Counsel and Assistant Vice President for XL Group’s Design Professional team in Bloomfield, NJ, recalls an instance in which an engineering firm was one of several parties brought into litigation involving a luxury residential development. During the pretrial discovery process, Rigassio was surprised to learn that the plaintiff’s attorney was in possession of the engineering firm’s entire project file, including a memo that documented the firm’s internal discussion of problems on the project.

“When I asked the firm’s president how the plaintiff’s attorney obtained such a document,” Rigassio says, “he informed me that the firm had received a subpoena regarding the project a couple of years earlier and responded by providing a copy of the entire file.” Needless to say, the firm hadn’t notified its agent or insurer of the subpoena.
Rigassio and her colleague Carol Stair, Esq., Regional Claims Manager for XL Group in San Francisco, both of whom are attorneys, stress the importance of design professionals and their firms notifying their insurer upon receipt of a subpoena or other legal request or document. “When you receive a legal document, don’t assume you know how to handle it,” Stair says. “Unless you also happen to be a lawyer, do the right thing and let the legal professionals respond.” For example, a subpoena for a copy of a project file may sound like a simple request, but is actually much more complex. “Depending on how the subpoena is written,” she says, “there are some documents you’re not necessarily obligated to turn over.”

If you do receive a subpoena or other legal document, the proper first step is to notify your insurance agent.

To illustrate the problems that can result when XL Group isn’t aware of such requests, Stair describes working with a design firm that received a subpoena, failed to notify XL Group, produced all the records requested and ended up getting sued. “If the firm had notified us first, it wouldn’t have produced the undiscoverable records that triggered the suit,” Stair says. “The plaintiff’s attorney was clearly on a ‘fishing expedition,’ requesting all project documents in the hope that the basis for a claim would surface. We could have objected to the scope of the subpoena and the suit probably could have been avoided.”

When an overly broad subpoena is received, an XL Group claims consultant hires a local attorney to contact the issuer of the subpoena to determine whether there’s a substantive matter the plaintiff is investigating, in an effort to root out such fishing expeditions. The attorney will also attempt to narrow the scope of the subpoena to identify documents specific to the issue in dispute.

If you do receive a subpoena or other legal document, the proper first step is to notify your insurance agent. The agent will then notify XL Group, which will open a loss prevention file and assign a claims consultant to work with you. Should outside counsel be needed, XL Group will hire someone based on relevant experience and track record. (Let your claims consultant retain the attorney to assist you in responding to the subpoena to make sure the attorney’s fees will be paid in Loss Prevention mode.)

Rigassio says that notice of the circumstance “puts our loss prevention mechanisms into play, which is a valuable feature of the coverage XL Group policies provide. The money we spend in loss prevention mode to investigate the issue is not allocated against the insured’s policy or deductible. And the number of files we open doesn’t reflect negatively on the insured when we calculate its premium on renewal.”

Stair says design professionals should also be wary when asked to appear at a deposition, mediation, trial or arbitration, even if there’s been no pleading filed against the designer. “The worst thing you can do is to walk into a room full of other parties and their attorneys, without an attorney of your own to protect you,” she says. Again, the best course of action is to notify your agent who will then contact XL Group to determine an appropriate response to the request.

Both Rigassio and Stair understand that design professionals want to be viewed as accommodating when they receive a request—after all, helping others is a central part of their chosen profession. However, they emphasize that when a subpoena or other legal document is received, a designer’s self-preservation instincts should take precedence. “Notifying your agent not only lets us know what’s going on, it demonstrates that you take loss prevention seriously,” Stair says. “And that always reflects favorably upon you and your firm.”
Project by Txt? OMG!

Along with new forms of communication come new risk management challenges. Are you ready to adapt?

No doubt the vast majority of architects and engineers have become accustomed to using email as a routine form of project communication. After all, email is simply a digital version of hard-copy letters and faxes. For the most part, the messages look the same, their format is familiar (e.g. “cc”) and they’re often much easier to put your hands on when needed.

Imagine the shock one designer felt, however, when a project conducted via cellphone text message, also known as SMS (short message service).

The Next Generation

“I’m a documenter,” says the designer, who requested anonymity so as not to jeopardize her long-standing relationship with the owner. “I still document phone calls by summarizing them in writing and sending a hard-copy letter to the owner to make sure there aren’t any misunderstandings. So after 27 years in the profession, having someone insist on using texts to communicate on a major project really threw me for a loop.”

While it’s certainly easy to see why the designer would be taken aback, she should probably prepare herself for similar requests in the future, according to Randy Lewis, VP of Loss Prevention & Client Education for XL Group’s Design Professional team. Lewis says he predicts that the industry could very well cause many designers to change the way they communicate. “The surveys and stories I read indicate that Millennials are no more likely to use email than a rotary telephone,” he says. “The question isn’t how do we get everyone to stop texting, but how do we continue to manage risk while using these newer forms of project communication?”

Storing and Sorting

To get some advice on backing up text messages, we turned to the Library of Congress in Washington, D.C., where Mike Ashenfelder is Digital Preservation Project Coordinator. “We’re still too busy enjoying using these new forms of communication in real time to devote much attention to preserving them,” he says. Nevertheless, he adds, there is a growing set of best practices we can all use to save text messages.

Ashenfelder explains that the method of saving text messages depends on the type of cellphone you use. Both “basic” and “smart” phones save your text messages on a drive or detachable SIM (subscriber identity module) card. The key is transferring those texts to a computer so you can save them, search them and back them up.

Saving text messages from a basic phone requires a separate SIM card reader, an inexpensive device that plugs into a computer. Once displayed on a computer, the text messages can be saved to a file. Saving text messages from a smartphone involves attaching the phone to a computer either using a cable or wirelessly, using Bluetooth technology. (You can also use a SIM card reader with a smartphone.) There are plenty of apps available that will actually transfer the messages from a smartphone to a
computer. You can search for these apps by using phrases such as “SMS backup” or “app save text messages.”

Ashenfelder says that the format of text messages—TXT—is one of the least complex file formats, which makes the messages easy to import into a basic text editing program or more sophisticated applications such as Microsoft Word or Excel, or Apple’s Pages or Numbers. From there, you can sort the messages into categories, use the app’s search feature and take advantage of other functions.

As with any project documents, you also need a regular backup plan for your text message files. Ashenfelder advises not putting all your eggs in one basket, meaning that if you decide to use a “cloud” service such as Dropbox, you’ll also want to back up the messages to a hard drive separate from the one on your computer. Ashenfelder also recommends moving your stored files to whatever the latest storage technology is, every five to seven years. “You don’t want to find that the files you suddenly need are stuck on a floppy disk or other outdated storage medium with no way to access them,” he cautions.

Playing Catch-up

After trying several solutions, such as backing up her texts to her mobile service provider, our beleaguered designer found software that helped her download texts onto her computer, which she then archived. However, she says, getting caught unprepared forced her into using less-than-optimal software that was not very easy to use and took a lot of time, none of which had been budgeted.

At that point in the project, she had few, if any, choices. However, Lewis recommends that anyone in a similar spot write a letter (hard-copy, that is) that makes the owner aware that texting will be the primary form of communication used on the project, as requested by the owner’s rep. “That way you can defend yourself against any complaints the owner may have later about a lack of hard-copy communication on the project,” Lewis says.

The most effective way to make sure your project communication protocols are specified upfront, of course, is to write them into your contract. “As with any other aspect of your project contract,” Lewis says, “the methods of acceptable communication should be negotiated and reduced to writing. Then, if someone changes, say, using email to using texts, in the middle of the project, you have a formal means of addressing the situation. And if everyone agrees to the change, you should amend the contract and, if appropriate, the budget.”


Regarding the legal requirements for retaining text message archives for a project, Lewis says you should consider text messaging as you do any other form of project communication. “Adhere to your firm’s established policy for electronic record retention,” he says, “and if you don’t have such a policy, you need one yesterday.” Lewis recommends reading the chapter entitled, “Document Retention” in XL Group’s Contract eGuide for Design Professionals.

Be prepared, Lewis says, for these and other unpredictable forms of communication that Millennials or successive generations may nudge designers into using. “Before you know it,” he says, “you may encounter an owner’s rep, or even one of your own employees, who insists on communicating all project details and decisions via Twitter.”