Top Ten Tips for Design Professionals
TOP TEN TIPS FOR DESIGN PROFESSIONALS

MODERATOR:

Kenneth J. Wittman, Senior Vice President, Dealey, Renton & Associates

PANELISTS:

Nicole L. Mangino, JD, CPCU, RPLU, Vice President, Underwriting, XL Insurance
Jeffrey R. Neidle, Vice President, OneBeacon Professional Insurance
Wendy D. Testa, Esq., Partner, Wilson Elser
Concerning Your Legal Bill.....?$!!?

- #1 Contract Issue
- Contractual defense obligations likely are not insurable
- Tenders of defense from Indemnities are routinely denied
- Insurer’s reservation of rights letters are common
- Anti indemnification statutes are uncommon
- A potential problem for acquisition transactions
- Failure to defend indemnities creates leverage at mediation
Be All That You Can Be

Are You an Additional Insured or a Contractual Indemnitee?

- Getting the Policy
- Do you sit in the shoes of the Named Insured if you demand additional insured status under a contract
- Coverage considerations versus a party’s contractual obligations to insure
- Coverage on a primary, non-contingent basis
- Certificates of insurance – no limitations; what do they really mean
- Contractual malaise - Contracts and Coverage…keeping up with emerging risks and legal precedent; Do policies under which you seek coverage really respond to the obligations under the contract?
Limitation of Liability...
Leveling the Playing Field

• An argument for fairness based on risk and reward

• An effective tool in the majority of jurisdictions

• Construct a sensible limitation of liability clause

• If the prime contract includes a limitation clause, pass it on to sub-consultants
Managing Sub-Consultant Risks

• Proper Vetting

• Certificates of Insurance

• Alignment of subcontract with Prime contract terms

• Focus on quality coordination, and communication

• In the event of a claim, consider joint defense opportunities
Nobody’s Perfect:
Professional Standard of Care

- Not the same as client expectations
- Reasonable professional standard...**Not Perfection**!
- Are they reasonable, normal and prudent under the given circumstances
- *Ordinary skill and care used by other reasonably competent practitioners of the same discipline under similar circumstances and geography*
- Watch out for...contractual expansion of ‘standard’
Don’t Lose Your Shirt
By Wearing Too Many Hats

The Perils of Performing Services Outside the
Traditional Scope of Work

• Define your scope of work carefully as more detail results in less duty
• Avoid identifying yourself in contracts with a title that creates ambiguity as to your actual scope of work on a job
• Attempts to “add value” by performing services outside traditional design professional services during periods of construction depression has resulted in increased potential liability
Dispute Resolution… Anticipate That Things May Go Wrong

• Dispute resolution process…detailed in the contract

• Which process is more efficient/effective…litigation or arbitration?

• Shaping arbitration

• Contractually require mediation
Be Careful What You Ask For…
Negotiating Magic Language

• State specific as to language that will be enforced to be afforded contractual protection
• Trigger for Alleged Negligence (Not Actual)
  • For injury to your own employees and property regardless of your own “alleged” or actual negligence
  • Avoid Overreaching (In Whole or In Part)
• Resist risk transfer through language ambiguities
• Know Your Law - Statutory Anti-Indemnity
Can You Teach an Old Dog “SAFE” Tricks: Loss Management and Risk Control

- Avoidance, Transfer, Assumption, … CONTROL
- Important to understand where claims come from and avoid them
- Technical versus Non-technical
- Risk management education programs for staff
- Contracts, Communications, Documentation
Great Expectations – BIM

• 3-D depiction helps users instantly visualize and understand the relationships between the structure and its systems in regard to aesthetics, performance, and program issues

• Expanded client expectations….more efficient, less errors, useful for building maintenance

• Version control and ownership of documents

• Teaming issues and project team capabilities