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# Sabo & Zahn

Attorneys at Law

## Professional Liability Insurance

When it comes to insurance, many architects and owners are at a loss in understanding the nuances of the various coverages that are available. This article will attempt to shed some light on the subject. However, the best information can be obtained directly from your insurance agent who will advise you of the requirements of your policies and the many options that are available to you.

Unfortunately, many architects today are practicing “bare”, that is, without the benefit of professional liability insurance. Their excuses for going bare range from: 1) they do not qualify for professional liability coverage; 2) they choose not to purchase such coverage due to the high cost of obtaining same; 3) they simply haven’t gotten around to purchasing it because they are so busy; or 4) they are very careful and the job is small, so they don’t need it.

Professional liability insurance is generally available to architects practicing on a full time basis. It is generally not available to architects who are moonlighting while employed by another firm. If you are a newly established practice, perseverance in searching for a company willing to write you a policy will usually pay off and the policy will be written. The limits of coverage and cost may not be exactly as you desire, but at least you will have some coverage. As you gain experience and establish a track record, the limits of coverage can be increased, and the cost may decrease.

Many architects claim that the cost of coverage is higher than they are willing to pay, even though the cost is currently extremely reasonable. One lawsuit without insurance protection and the cost of coverage will seem to have been very reasonable. Additionally, no one can successfully isolate themselves from a lawsuit. People sue other people for a number of reasons, some of them legitimate and others not. It makes no difference. If a person is mad enough to sue, they will do so rightfully or wrongfully.

If you decide to purchase professional liability insurance, there is

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no better time to do so than today. The longer you procrastinate, the greater the risk you'll be sued and wish you had purchased the coverage when you had the chance. Insurance does you no good when purchased after a claim is made against you.

The mistaken belief that by being very careful you will avoid a suit is wishful thinking on your part. The other common belief that the project is small and unlikely to produce a suit is equally mistaken. Being careful is certainly a desired trait and working on small projects may tend to reduce your exposure to a lawsuit, but not eliminate it. The truth of the matter is if someone wants to sue you they will. No matter if you've been careful or not, and no matter if the project is large or small. People sue architects because they think architects have lots of money. Even if they don't, their insurance companies certainly have. Most plaintiffs think that all architects have professional liability coverage that will pay for their claims. Most of your clients think that you have professional liability coverage. If you do not have such coverage, you may consider telling them that you are going bare, but in doing so, you may lose the commission to do the project. Clients expect their architects to have insurance coverage to protect the client's interests.

There is very little that you can do to prevent a lawsuit being filed against you. One of the things you can do is to make sure that you are fully communicating with your client. If things are going smoothly, that's an easy thing to do. When things start to go awry, that is no time to distance yourself from the client. Quite the contrary, that is exactly the time to increase your communication with the client. Let the client know that it is your intent to do everything possible to resolve the problem. Do not put yourself in a defensive mode, trying to blame someone else for the problem. Work positively together with the client to quickly resolve the problem at hand. If the client perceives you as being cooperative and helpful, the client will be less likely to sue you. If you are evasive or distant, keep your attorney's phone number handy. You may need it.

When negotiating your Owner/Architect Agreement, owners frequently ask for things that are impossible to provide. One such example is the owner requesting to be named as an additional insured on your professional liability policy. That request is an impossibility as the insurance carrier will provide coverage for errors and omissions only to the licensed design professional named on the policy. Owners are normally not licensed to practice and cannot be named as an additional insured on your policy.

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Occasionally owners demand that all policies be “occurrence” based policies rather than “claims-made” policies. Claims-made policies are the only type of professional liability policies available in the marketplace. Claims for projects constructed within the professional liability policy period are covered if the claim is also filed within the policy period. If the architect discontinues its professional liability insurance after the project is constructed, claims filed after that discontinuation of coverage will not be covered by insurance. To avoid the gap in coverage, the architect must obtain new or continued professional liability insurance coverage and that coverage must also include a prior acts endorsement covering acts, errors or omissions occurring after the retroactive date stated in the architect’s policy.

Since there is no assurance to an owner that the architect will continue carrying its professional liability coverage, some owners require that their architects contractually agree in the Owner/Architect Agreement to continue their professional liability insurance for a specified period of years to assure them of coverage in case a claim is filed. This is somewhat dangerous for the architect, because the architect has no control over its ability to obtain coverage, nor does it have control over the availability of coverage at commercially reasonable rates. Additionally, if the architect retires or otherwise goes out of business during the time required for coverage, the architect will be breaching the agreement executed with the owner if the architect fails to continue carrying the required insurance.

Unlike a claims-made policy, the “occurrence based” policy will pay for any claim relating back to the time the policy was in force. Even if the policy is not renewed, occurrence based policies will pay for any claim that arose during the policy period. Contractors can obtain occurrence based commercial general liability policies that will cover claims that relate back to their construction of the project. Owners are comfortable with these policies because they don’t have to worry whether the policy is renewed or not; either way, they’re still covered. Unfortunately, insurance companies do not write occurrence based policies for professional liability insurance. As stated above, the only type available is the claims-made policy.

Every agreement between an owner and architect should state the limits of coverages and the types of insurance coverage the architect is required to carry. These limits and types of coverages should be reviewed with your insurance carrier before you execute

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the contract. If there are any additional costs for such coverage, you want to know that before you execute the agreement so you may adjust your fee for the project.

Owners will expect you to advise them regarding the types and amounts of coverage to require of the contractor building the project. Always avoid suggesting the amounts of coverage the contractor should provide for the owner. If the owner accepts your advice and requires the contractor to carry the amounts you recommended, you may be held responsible for any damages exceeding the insurance limits you suggested. If you suggest to the owner that a \$2,000,000 insurance limit is adequate for the contractor to carry and a judgment is entered against the contractor for \$5,000,000 for damages sustained by the owner, the owner may look to you to be responsible for the \$3,000,000 shortfall. The owner will claim that you are the professional and you should have known how much insurance was required to successfully protect his interests. The argument will be that you, not the owner, are the expert and you failed to protect his interests leaving him with a large shortfall. Whenever the subject of limits of coverage arises, the smart architect will tell the owner to discuss those limits with his insurance agent. If you suggest limits, be prepared to accept responsibility for any shortfalls in coverage.

Also be wary of owners who claim to self insure. The Owner/Contractor Agreement should describe the insurance coverages provided for the project by the owner. Such coverages would normally include property insurance, covering the owner's existing property which may, or may not, be incorporated into the finished project. Additionally, the owner should provide builder's risk coverage in the full amount of the contractor's contract amount. Such policy should also name the architect as an additional insured. If there is a loss, the insurance company will pay for any architectural services required in bringing the building back to the condition it was in prior to the loss. The builder's risk coverage insures the work of the project that is constructed by the contractor until the building is turned over to the owner at substantial completion. If a loss occurs before the building is turned over, the builder's risk insurance would pay for the damages to the work of the contractor and the property insurance would pay for damages caused to the owner's property that was not included in the scope of the work of the contractor. Most agreements also call for a "waiver of subrogation" which would prevent the insurance company from stepping in the shoes of the insured to bring an action against the party who caused the damage. Waivers of subrogation

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are intended to prevent litigation from continuing once a claim is paid for by the insurance carrier. Isn't that why people carry insurance in the first place?

In situations where owners self insure, the owner will not allow for any waivers of subrogation. They will probably pay for the damages, although reluctantly, and they will surely pursue litigation against the responsible party for causing the damage. Even if the damage is caused by an act of God, they will pursue someone else to pay for it. Municipalities, school districts, some park districts, some villages and some cities self insure. They want the benefit of saving the insurance premiums, but they also want to be able to collect the monies they expend from some other party. It is a good practice to negotiate strongly for waivers of subrogation to keep from being dragged into a lawsuit that would not happen if the owner had an insurance policy instead of the owner being self insured.

Insurance matters are always complex and confusing. The best advice you can get is obtainable from your agent or directly from your insurance company. They know exactly what your policies cover and can answer any questions you may have.

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