Common risks for architects

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Common risk areas for architects include liability for free advice, partial services, design and documentation without contract administration, contract administration on another architects' design, certification without full inspection and contract administration, pre-purchase and other inspections, valuations, pro bono services, working in specialist areas, secondment of staff and staff qualifications.

Liability for free advice

When advice is paid for it is compelling evidence that both the speaker and listener expect the advice to be relied upon. However, there are also myriad circumstances where the listener can successfully sue for free advice. Architects can be liable for negligent words which cause economic loss and which are said in circumstances where the parties had reason to rely on them. The fact that the advice is given gratuitously will not excuse the architect.

There are two major implications. First, give a disclaimer when advice is provided without charge or when a report is written that might be widely circulated. For example:

> *This (report) is prepared for the use of (client) by (architect). No one other than (client) may rely on it and (architect) does not accept responsibility to any other user.*

It is important to note that disclaimers do not always work. However, in circumstances such as this, the existence of the disclaimer may make it more difficult for any potential plaintiff to establish that they reasonably relied on the architect's advice.

Secondly, when getting information from those who have neither statutory nor contractual obligations to provide it, make the request in writing stating why it is required, and if a disclaimer is made when the advice is received, tell your client.

Although, there is a world of difference between casual statements on social or informal occasions and serious communications warranting reliance, architects should act cautiously. The person who seeks your advice at a cocktail party, knowing you are an architect, might rely on it to their detriment. To be on the safe side, either don't advise, or make a disclaimer that tells the listener they cannot rely on your advice.

This rule has been applied and interpreted in a wide variety of different circumstances. Architects have been liable in cases involving defective building work, building failures and different types of loss, such as physical injury or pure economic loss, such as loss of income.

Sketch or development documents

Architects who provide partial services should be alert to the liabilities associated with these services. The risk is not as high in this area as in some others, but if you fail to provide the service required by your client and a delay is caused which results in a loss, legal proceedings could result.

Design and documentation without contract administration

This form of service produces a disproportionate number of legal claims, probably because the architect is not there to see the contractor's mistakes as they occur, but also because any discrepancies in documentation are not corrected as they emerge.

There is a common misunderstanding that the end of documentation brings to a close all design. This is rarely so. It is of benefit to the client for the architect to be able to assist the contractor in making final decisions regarding the selection of building elements or systems during the construction process. The selections considered at this time often impact on earlier design decisions which may need to be revised.

It is best to undertake full services if possible, but if it is not possible, care should be taken in documentation to avoid matters that might lead to problems later.

Your fees should reflect the extra 'hand over' work to minimise your risk that has to be undertaken when you are engaged for only partial services.

Contract administration on another architects' design

This is substantially more difficult than inspecting a building you have designed. You don't know it as well, and the potential problems may not be as obvious. Your fees should allow for extra time to become familiar with the documents needed to minimise your risk.

Certification without full inspection and contract administration

It is hard to imagine circumstances that justify the risk in this practice and it is not recommended. You are being asked to certify matters about which you will almost always have insufficient information.

Pre-purchase and other inspections

Pre-purchase and similar inspections are not recommended, as there are specialists in this activity readily available to your client whose report you can refer to in your advice. Such inspections are relatively high risk, particularly where access to parts of the building or its roof or subfloor is limited and you are not well practised at this activity. Potential problems with a building are not limited to termites, borers and presence of asbestos – they are many, and expensive consequences can arise from an erroneous assessment. Very few PI insurers

consider pre-purchase inspections part of an architect's normal activities, so you are unlikely to be covered unless your broker or insurer confirms that you are. Also, some states and territories require a licence to conduct property inspections – the relevant state building regulator or consumer affairs department should be consulted.

Valuations

Valuation is another high risk activity. You should not allow your client to be misled into thinking you are able to provide reliable advice. Only licensed valuers can provide sworn valuations. Architects' PI is very unlikely to cover you for giving valuation advice.

Pro bono services

Donating services does not make them any safer because your liability is the same. While it is possible to limit your liability it should be done in writing with legal advice.

Working in specialist areas

A number of claims against architects arise as a result of architects undertaking work in fields in which they have little or no experience. Their general design approach may be excellent, yet aspects of the job which are common knowledge to specialist architects or other specialist consultants experienced in a particular field may be overlooked.

Architects should be cautious about taking on work in specialist areas – for example, sustainability, planning, nursing homes or research facilities – in which they are not experienced. If you work in an area in which you are not a specialist, it is good professional practice to get the advice of someone who is, and then advise your client of the action taken. This could save you from a serious claim for professional negligence. If you allow your client to believe that you possess expertise in a specialist area, the law will expect you to apply the level of skill of a specialist in that area and will deem you negligent if you fail to do so. The fact that you did not, in fact, possess that expertise is no defence.

One solution is to engage an experienced specialist architect or specialist consultant as a subconsultant. By adding this expertise to your team you are showing the client that you take the complexity of the project seriously. This in turn builds credibility and confidence in your team to provide specialist advice when required. While a good specialist subconsultant may be expensive, part of the fee for the advice should be regarded as a capital cost in building up the expertise of the practice. Further, this assistance may save 'reinventing the wheel' within the firm.

Another way is to recommend that your client engages a specialist architect or other specialist consultant as part of the project team. If the client does not agree to this, the recommendation and confirmation that the client has declined this recommendation should be stated in writing.

A third alternative is to enter into association with a specialist architect or consultant for the particular project. Your client's acknowledgement of and agreement to this course of action

should also be confirmed in writing.

In any of the above scenarios, engagement agreements including copyright and moral rights issues need to be resolved for all parties.

Whichever course is followed, the client should at all times be advised that the action is being taken as part of a professional service to gain particular expertise for the client's benefit.

For a sub-consultant agreement, refer Architect-Specialist Consultant Agreement 2017

Secondment of staff

Clients may ask architects to provide a staff member on site, particularly on large or design-build projects. Architects should carefully consider the potential risks before agreeing.

Examples of such a request include 'We don't want you to do any contract administration, but could you provide X to sort out any documentation problems?' or 'We want X to take an on-site role; of course you are not responsible'.

In some instances the client and architect try to agree that there will be split responsibility for the on-site employee; for example, the architect will be responsible for design matters and the client for contract administration.

The problem with seconding is the difficulty in defining where the client's responsibility starts and the architect's stops. The scope of tasks carried out by an on-site employee may far exceed the architect's usual role in contract administration and thus substantially increase the architect's risk of litigation.

As with most other aspects of architects' liability, the problem can be exacerbated by a failure to adequately document the relationship.

If a client requests you to provide an employee on site, before agreeing to the secondment you should carefully consider the risks:

- ensure by checking with your insurer that your insurance will cover you and the seconded person for any mistakes made by the seconded person
- set out clearly and precisely who is responsible for and to the employee and obtain the client's written agreement
- set out clearly and precisely what the employee is to do and why, and obtain the client's written agreement.

Staff qualifications

The most obvious risk-management strategy in the context of a professional practice is for work and services to be undertaken by suitably qualified staff, and where unqualified staff are employed, to ensure that qualified personnel supervise their work and services.

It is common to see client-generated consultancy agreements place contractual obligations on architectural practices to only use suitably qualified (and often specifically nominated) staff on projects.

A client who engages a practice's architectural services is entitled to expect that the service provided will be in accordance with the standards of the reasonably competent architect, despite the fact that the person actually carrying out the work may be a draftsperson, an architecture student or an unregistered architecture graduate.

Similarly, a builder will usually be entitled to rely on the instruction of a practice employee, whether or not they are appropriately qualified, and may claim payment on a certificate they sign.

Professional-indemnity policies generally cover the 'insured' for breach of professional duty committed or alleged to have been committed in the conduct of the business, if the business has been disclosed in the insurance proposal.

Some policies extend indemnity only to the 'insured', defined as only professionally qualified principals and employees. By that it is meant that they have appropriate professional qualifications which equip them to carry out the work or services they are undertaking in the course of their business. If this ever became an issue in the context of a claim, the issue of whether qualifications were appropriate in all of the circumstances would be determined by peer evidence from other members of the profession. In this situation, if the practice had employed an unqualified staff member and that staff member's negligence gave rise to a claim under the policy, then the 'insured' (the firm or the principal) would be covered for its liability for the negligent conduct of its unqualified staff member, either because of its own negligence in failing to adequately supervise the staff member or by reason of its own vicarious liability for the staff member's conduct.

The only caveat to this would be if there was some other issue arising under the policy, such as non-disclosure or misrepresentation going to the nature of the risk which the insurer agreed to accept. For example, if the practice had represented to the insurer that it only employed qualified staff.

The unqualified staff member (if sued by the claimant as well) would not be entitled to indemnity under the policy and might be susceptible to a claim for contribution or indemnity by the 'insured' (or the insurer in any subrogated recovery action) in respect of the loss suffered.

Reference Info:

Common risks for architects 2017, February 28. Retrieved from https://acumen.architecture.com.au/practice/risk-management-and-insurances/common-risks-for-architects/