



Claims Defense from the Attorney's Perspective

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When a claim is made, counsel is retained by the professional liability insurance carrier to defend the claim. Defense counsel is experienced in defending design professionals and will work on behalf of the architect. Resolving a complaint requires a collaborative effort between the architect and attorney. The attorney's role is twofold. First and most obviously, the attorney helps guide the architect through all legal matters associated with the case. Secondly, he or she presents the factual issues of the matter in a light that is most favorable to the architect. The architect can greatly assist the attorney in both these roles.

Initial Conference

The process begins with the initial conference, and Information is the first thing that the attorney will need in resolving a complaint. Apart from simply learning the background of the case, one of the first and foremost actions an attorney will attempt to do is assess the possibility of stopping or limiting the complaint from proceeding. This can take the form of various legal defenses such as asserting the statute of limitations or repose. Or it could involve attempting to pass the matter to other parties who are actually at fault and/or asserting indemnification owed by another. It is likely that the attorney will need to be provided the entire file for the project in question. However, the following is a list of standard items that would likely be useful to provide an attorney prior to or during the initial conference:

- **Complaint:** The attorney needs to see any written demands, correspondence, or case filings. This is necessary not only so that the attorney can determine what is being alleged against the architect, but there may be certain legal defenses that can be asserted to stop the complaint from proceeding and going forward. In addition, the attorney needs to determine if other parties (sub-consultants of the architect, for example) should be involved in addressing the complaint.
- **Contract:** The attorney will examine the contract between the architect and the complainant to assess the rights, duties, and obligations of the parties. The attorney needs to determine the correct forum for resolution (i.e. mediation, arbitration, or court).
- **Other contracts:** If the complaint concerns matter where other individuals are involved, the attorney needs copies of any contracts involving these other individuals. For example, if the complaint addresses issues caused by an architect's sub-consultants or it concerns construction defects that that may have been caused by a contractor, it is imperative the attorney review any contracts the architect or the complainant may have with these individuals so that the attorney can involve them in the resolution process.

- Certificate(s) of Substantial Completion. This will help the attorney assess whether any statute of repose is applicable.
- Other items. Any documents related to any costs of repair that may have occurred or estimates for repair that the complainant has provided. Any complaints made to other individuals (subconsultants, contractors, etc.). Any expert reports that may have been provided by the complainant.

When dealing with an attorney in defending a potential claim, provide the attorney with *any* information which you believe may *possibly* be relevant to the claim. An attorney's ability to effectively defend a claim is only as good as the information that the attorney has at his or her disposal. The law affords attorneys and their clients two privileges: the attorney-client communication privilege and the work product privilege. Generally speaking, these prevent any third party from learning about any conversations between the attorney and the architect as well as their underlying thought processes in developing the case. Therefore, provide all information which you believe is relevant and allow the attorney to make a judgment call on what is and isn't relevant.

Provide the attorney with all information you have regarding any potential witness in the case, especially any information which you feel may affect their testimony or their veracity. For example, if a key witness is a disgruntled former employee, it is important that the attorney is aware early as possible how such witnesses' testimony may be slanted. Similarly, background information on any witnesses for the opposition is particularly helpful as it may affect the ability of the attorney to resolve the claim.

If you are aware of any facts which could negatively impact the defense of the claim, it is critical that you identify and disclose those facts early and make the attorney aware of them. Many times, negative facts that are identified early can be effectively managed. However, a case can be crippled when an attorney is surprised by unknown facts during a hearing, a deposition, at mediation, or at trial.

Let counsel know if involving other parties in a claim might negatively impact your future business relationship with either the parties who may be joined in such a claim.

Development of the Case

An experienced construction attorney should have a general familiarity with many, if not most, of the technical aspects of the complaint. However, the architect is far more familiar with the mechanical, technical, and scientific minutia of the project. Be prepared to discuss these aspects in layman's terms with the attorney and ensure that he understands them. There is always some possibility that the complaint may end up in front of a jury who has no expertise whatsoever. It is imperative that the architect and attorney be able to explain the case in laymen's terms.

If the complaint develops into a lawsuit, you will likely be asked by your attorney to search for documents during the discovery process of the case. This process involves each party having the right to request the other to provide relevant documents. When requested by your attorney to do so, it is important that you engage in thorough, reasonable, and good faith search for such information. Court rules require that relevant documents be produced timely. When documents are "found" in unanticipated places well into a lawsuit, jurors can perceive this as an intent to hide or withhold important information.

Lawsuits will also likely involve the retention of expert witnesses to support the architect's defense of the case. An expert witness is anyone having special knowledge, skill, experience, training or education in a particular field. The defense of an architect typically requires another architect. The client architect should work closely with the attorney in identifying, interviewing, and retaining such experts. Any suggestions an architect can provide is always appreciated.

Trial vs. Settlement

In today's litigious society, lawsuits have become increasingly expensive to resolve. It is an unfortunate fact that even in cases where the complaint has absolutely no merit, the costs of taking the case to trial in order to disprove the allegation can be much more expensive than the amount the claimant is willing to take to settle the matter. Moreover, when one includes the non-fee producing time spent by the client architect away from work and having to address the issues of the case, a trial can be financially devastating.

Every trial poses some amount of risk. An architect should be prepared to have a frank discussion with the attorney about the potential risk and the architect's position on settlement. Approaching that discussion with an open mind is necessary because the stress and costs associated with trial is sometimes underestimated by individuals, especially if they have never been in a trial before. An architect should get a concrete evaluation from his/her attorney of the pros and cons of taking the case to trial or settling the matter.

Defending a claim can be a trying time for a design professional, but when the architect and the attorney have an open and cooperative relationship, a defense can be prepared and managed to the most beneficial advantage.