

ARCHITECT EMPOWERMENT

IS A GOOD IDEA FOR THE ARCHITECT AND THE OWNER: SHAPING THE ARCHITECT'S ROLE AS A TRUSTED ADVISOR, NOT A SOURCE OF CLAIM MONEY

During the past 10 years, architects have seen their role diminish and more often architects are awarded contracts based, at least in significant part, on price. To a degree, the architect has lost the ear of the client -- the property owner. To many, architects are no longer the owner's confidant, offering professional advice; instead the architect's services are seen as a commodity.

To provide the best service, the architect needs to be in a position of trust with the client where quality, professionalism and excellent communications guide the relationship. And even more importantly, the architect needs to feel empowered, feel a stake in the process and place a high priority in protecting the client's interests.

The reality is that the architect more often is treated as a low bid contractor -- there is an adversary relationship under which the client demand's, at the outset, to know the lowest hourly rates the architect can offer, the limits of professional malpractice insurance which they, as clients, may wish later to tap. Quite often, the client will demand a contract setting even broader legal responsibilities than the malpractice insurance covers.

Preventing and controlling professional liability claims takes continuous focus on the client relationship. The following are suggestions on how the architect might shape the relationship, achieve the right balance in dealing with the client and present professional liability claims.

1. Insist on receiving the information needed from the owner. Quite often, when hiring an architect, the owner does not have all of the information needed to prepare bid documents for construction or renovation. An environmental assessment of the site may not have been done or subsurface conditions may not have been examined. If the architect proceeds without this necessary information, the owner is likely to blame the architect when unanticipated conditions are encountered later, during the construction phase. The architect simply must find a way to effectively insist upon receiving the information needed.

2. Insist on being paid for the necessary level of pre-project due diligence. Quite often, owners do not accept that doing additional destructive testing or taking additional borings will save money and diminish risk, in the long run. The more thorough the architect is, the more reliable the upfront project budget.

3. Do not agree to indemnity clauses which go beyond reasonable limits. The owner needs to realize that architects should not be required to indemnify other parties on the construction or renovation project for their own sole negligence. Under New York State's General Obligations Law, clauses which attempt to require this type of indemnity are void as against public policy. Further, indemnity clauses which go too far are not insurable.

4. Develop a limitation of liability clause which helps in achieving a balance of risk. Proliferation of recovery of damages against architects, including a wide range of consequential damages (such as lost rent or delay damages) makes a limitation of liability clause a necessity. The limit may be the policy limits of the professional malpractice policy, the architect's fee, amount or an arbitrary lump sum -- many contracts limit the recovery against the architect to \$50,000.

5. Insist on being paid timely and determine any unusual billing issues before the contract is signed. Do not accept work on which the owner requires the architect to accept late payment.

6. Always get a written agreement before proceeding. A signed contract is a necessity to defining the architect's responsibility and to making sure that the payment terms have been clearly spelled out.

7. The Architect who stands up for its own rights, may be expected to best protect the owner's interests. The architect who has a focus when protecting its own rights can be expected to do a better job for the client.

8. Obtain written confirmation that the architect bears no responsibility for the contractor's means and methods or for site safety.

9. Deal clearly and fairly with your own consultants. Very often architects do not get paid promptly by an owner, and, to make up for this, architects delay payments to the mechanical and structural engineer. This approach does not produce favorable results because it creates ill will among the professionals you retain.

10. The architect needs to make decisions based upon thoroughly developed information, delivered promptly.

11. Resist having your services treated as a commodity and avoid dealing with owners who may not respect the architect's role.

12. Make sure that all disputes on site project are resolved promptly and efficiently.

13. Do not stand back when it comes to solving a problem or remedying a failure during the project, even if the contract allows this approach.

14. Learn to use the architect's role in the field as a sword rather than a shield. The architect's role on the project might be defined carefully. The architect needs to know the full practice and use project leverage effectively on the clients and its own behalf.

15. Take charge of information. Communication and access to the owner has become more difficult. Beware of litigation risks. Limiting liability and diminishing responsibility has not kept architects from being sued.

Conclusion

Architect empowerment promotes the owner's respect of the architect's skill and professionalism when the architect assumes a strategic role in planning, design and construction, the client is best served. When the architect's role is upgraded, the project is more satisfying for the architect, communications are improved and it is more likely that the project will be completed on time and on budget, and without unresolved claims at the end.

By John E. Osborn, Esq.

John E. Osborn, Esq. is a partner of the New York City and Chappaqua, New York, construction contract and environmental law firm of John E. Osborn P.C.