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Loss Prevention: A Top Ten List

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There are many top ten lists out today. The top ten most livable cities, the top ten cities with the worst traffic and David Letterman's nightly list.

RA&MCO, one of the leading insurers of professional liability insurance for architects, engineers and contractors has published a booklet entitled "Ten Commandments of Loss Prevention," Gunther O. Carrle.

I'd like to briefly run through their top ten list with you because, no matter how long you have been in practice, it never hurts to review these issues.

- 1. Define your scope of services.** This may be one of the most important things you can do to protect yourself against claims. Your scope needs to specify what services you will perform, what services you will perform as additional services and what services need to be performed by others. This clearly defined allocation of responsibilities helps to remove the ambiguities that can result in claims.
- 2. Do not become the insurer or guarantor of the success of the project.** Be careful about language in client drafted contracts that require you to perform your services to the "highest" degree of professional skill. Watch for language that asks you to warrant any aspect of your services such as compliance with all codes and regulations. The words warranty and guarantee may not be included in the language but other words can imply the same thing. Be aware of that.
- 3. Foresee the foreseeable.** Identify those areas of the contract that traditionally have been a source of liability for architects and engineers and address them in the negotiations and/or language of the contract. This includes areas in the contract dealing with shop drawings; ownership of documents; construction cost; "as-built" or record drawings and owner or vendor supplied information.
- 4. Make certain that your subconsultants must live by the same rules that you do.** I will make a side comment here. While this is important advice for prime consultants, it does not mean that subconsultants should accept unreasonable language in the prime agreement. This is particularly important in the areas of dispute resolution, waiving lien rights, ownership of documents, insurance requirements and indemnification responsibilities.
- 5. Be wary of the scope of your duties during site visits.** Do not assume responsibility for safety or for guarding the owner from faulty workmanship. Avoid words such as

“inspection” and “supervision.” Agree that your review of the construction is limited only to general compliance with your plans and specifications. Have procedures in place so that your field personnel will know what to do and what not to do while on the jobsite.

6. Never begin services until the agreement is completed. I know that sometimes this advice, although good, is not practical. Be aware that it is always more difficult to negotiate terms after you have started the work. Starting work without a contract should never be considered when working for an unknown client.

7. After making a contract, adhere to its terms and modify it only by written amendment. Your words and actions can alter the contract, so strict compliance with the terms and conditions is very important.

8. Treat certifications like a bad neighbor. Certifications can be construed as warranties or guarantees that are specifically excluded from all professional liability policies. You can certify things that you know to be absolutely true. For example, you can certify that you are a licensed architect or engineer in the state of Washington. If required to certify something make sure the certification is based on “your information, knowledge and belief” or on your “professional judgment exercised as reasonable and prudent using usual and customary professional skill and care.”

9. If you can't prove it, it doesn't exist. Documentation is very important. It can stop a frivolous claim in its tracks or can provide a sound defense.

10. It's easier to avoid a lawsuit than it is to win one.

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