

CSDZ Webinar Design Professionals

Do's and Don'ts When Claims Occur

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Overview

1. Statutory Basis For Claims Against Designer
2. Common Sources of Claims
3. Statutory Licensing Violations
4. Avoiding Claims
5. Contact Insurance Broker/Agent
6. Contact Legal Counsel
7. Document Preservation
8. Design Professional Experts

1. Statutory Basis for Claims Against Designer

In order to bring a legal claim against an architect/engineer, or other professional licensed professional, then the Claimant must comply with Minn. Stat. Sec. 544.42.

Minn. Stat. §544.42

- In professional negligence claims against engineers, expert testimony is required to establish a prima facie case
- **STEP ONE:** Plaintiff must serve with Complaint an affidavit that the case has been reviewed by expert whose qualifications provide expectation that opinion is admissible at trial
- Defendant architect/engineer deviated from applicable standard of care
- Caused plaintiff's damages
- § 544.42 subds. 2(1) and 3(a)(1)

1. Statutory Basis for Claims Against Designer

Minn. Stat. §544.42

- **STEP TWO:** Plaintiff must serve second affidavit (or expert interrogatory answer) within 180 days identifying plaintiff's expert witness and stating substance of facts and opinion expert will testify to and grounds for opinion.
- Minn. Stat. § 544.42 subds. 2(2) and 4(a)

1. Statutory Basis for Claims Against Designer

Minn. Stat. §544.42

- Failure to comply with either provision **mandates** dismissal of claim against engineer.
- Minn. Stat. 544.42 subds. 6(a) and (c)
- What is required?
 - Articulate standard of care recognized by the engineering community in general
 - Breach of standard of care
 - Specific standards and specific actions
 - Causation (empty conclusions not enough)



2. Common Sources of Claims

Breach of Contract

Breach occurs when there is failure (without legal justification) to perform a (substantial part) (important part) of the contract

Examples

- Failure to bring project in on budget
- Excessive fees spent in one area
- Architect/engineer contracted for is not working on project
- Delay – failure to create plans in timely manner
- Failure to correct errors

2. Common Sources of Claims

Negligence

- Failure to use reasonable care
 - Ask yourself what a reasonable person would have done under the circumstances
 - Architect/engineer does something a reasonable person would not do
 - Architect/engineer does not do something a reasonable person would do



2. Common Sources of Claims



Misrepresentation/Fraud

- **Architect/engineer falsely represented a past or present fact to plaintiff**
 - At the time of the false representation architect/engineer knew the fact was false, or represented that he knew the fact when he did not know if it was true or false
 - Plaintiff relied on the false representation
 - Plaintiff was harmed as a direct result

3. Statutory Licensing Violations



Engineers

- **In Minnesota, it is improper for an individual to hold himself or herself out as a licensed engineer when he or she is not licensed to practice engineering**
 - It shall be unlawful for any person to practice * * * professional engineering * * * or to use the, assume , use or advertise any title or description tending to convey the impression that the person is a professional engineer * * * unless such person is qualified by licensure * * * .
 - Minn. Stat. § 326.02, subd. 1; see Minn. Stat. § 326.02, subd. 3 (“Any person shall be deemed to be practicing professional engineering * * * who holds out as being able to perform or who does perform [the work of a professional engineer]”)

3. Statutory Licensing Violations

VIOLATION

Architects

- **Cannot hold oneself out as being able to perform work as licensed architect**
- **Cannot perform work as though licensed architect**
 - **Cannot refer to non-architect in firm as architect**
 - **Cannot represent on invoice that non-architect is architect**
 - **Invoices should clearly distinguish draftsman from licensed architect**

3. Statutory Licensing Violations

- **Often hear licensed architect/engineer did not “disclose” the fact that people working on project were not licensed**
 - **Statute does not require disclosure – as long as use is consistent with statute**
- **Legal to employ person with requisite skill needed to design structure**
- **Failure to disclose is not same as affirmatively holding out person as licensed architect/engineer**

3. Statutory Licensing Violations

- **Non-licensed architect/engineer signed documents as “partner” or “principal” in firm**
- **Referred to non-licensed person as “professional engineer” or “engineer” instead of “intern” or “draftsperson”**
- **Business card of non-licensed person reads “professional engineer,” “engineer,” or “architect”**
- **Title block on plans lists non-licensed person as “professional engineer”**

3. Statutory Licensing Violations

Unlicensed employee engaging in supervised architectural/engineering work

- Licensed architect/engineer has “responsible charge” over work
- Minnesota law entitles unlicensed employees of a firm to engage in architectural/engineering work, so long as under the supervision of a licensed individual:
- A corporation, partnership or other firm may engage in work of an architectural or engineering character * * * in this state, provided the person or persons connected with such corporation, partnership or other firm in responsible charge of such work is or are licensed or certified as herein required for the practice of engineering* * * .
- Minn. Stat. § 326.14 (2004)

3. Statutory Licensing Violations

Licensed architect/engineer has “responsible charge” over work

The Minnesota Rules define “responsible charge” as follows:

- A person in *responsible charge* of engineering * * * work as used in Minnesota Statutes, section 326.14 means the person who determines design policy, including technical questions, advises with the client, superintends subordinates during the course of the work and, in general, the person whose professional skill and judgment are embodied in the plans, designs, and advice involved in the work.
- Minn. R. 1805.1600, subp. 1 (emphasis added).

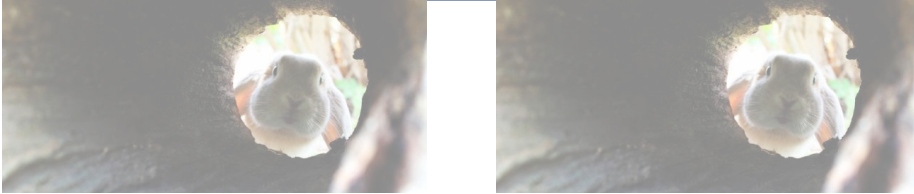
3. Statutory Licensing Violations



Examples

- **Licensed architect/engineer turned project over to non-licensed person for substantial lengths of time**
- **Billing records indicate disproportionate amount of time by non-licensed employees**
- **Licensed architect not in regular contact with staff or client**

4. Avoiding Claims



Complaining party seeks disgorgement of fees paid to engineer, plus damages

- Use contracts
- Properly itemize invoices
- Complete work on time or seek extension in writing
- Get approval of plans in writing
- Get approval for phases of work in writing

4. Avoiding Claims



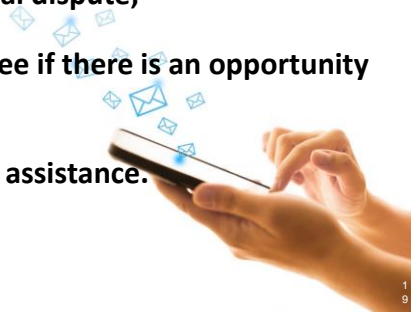
Tips for avoiding Claims

- Do not let clients get behind in payment
- Make payment terms clear (when due, interest charged)
- Refer to employees by proper title
- Show employee title on invoices
- Assure title block on plans is accurate

5. Contact Insurance Agent

As soon as a legitimate claim arises, you should contacting your insurance broker/agent.

- **Will give insurance an opportunity to assign counsel;**
- **Many insurers do not give you a bad mark for reporting claims, if that claim does not turn into an actual dispute;**
- **Many insurers want early notice to see if there is an opportunity for early resolution; and**
- **There many be options for pre-claim assistance.**



6. Contact Legal Counsel

As soon as a legitimate claim arises, you should consider contacting legal counsel.

- **Discuss possible claims with counsel to determine initial defenses;**
- **Understand how to approach the opposing parties to best position yourself to resolve any disputes;**
- **Consider early mediation –whether by contract requirements or voluntary;**
- **All attorney-client conversations will be considered privileged and confidential.**



7. Document Preservation



If a claim arises, then you will have duties and obligations to maintain and preserve your documents and project file. To fulfill this duties, you should:

- **Carefully file all electronic and hard-copy documents into a “Project File;”**
- **Maintain all hard-copy files in your normal business manner;**
- **Prevent any accidental electronic documents – including stopping any automatic deletion systems.**

8. Design Professional Experts



- **Minn. Stat. § 544.42 requires expert review of architect/engineer’s work before bringing claim**
- **Created new market for architects/engineers to work as experts**
- **Expert witness defined as a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Federal Rule of Evidence 702.**

8. Design Professional Experts



Expert Witness - Qualifications

- Education/training
- Licensed in home state (and preferably in venue state)
- Specific work experience related to subject matter
- Professional Associations
- Teaching
- Articles

8. Design Professional Experts



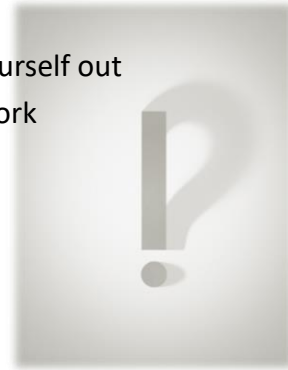
Expert Witness – Special Considerations

- Credibility
- Effectiveness
- Consistency of opinions
- Vulnerability on cross-examination
- Cannot have a conflict

8. Design Professional Experts

Tips for Expert Witness Work

- **Conflict Check**
 - Are you being asked to take position contrary to your usual practice
 - Consider reputation and how you hold yourself out
 - Work needs to be consistent with prior work
- **Budget**
- **Retainer Agreement**
- **Scheduling**



8. Design Professional Experts

Tips for Expert Witness Work



Scope of Project

- Consulting or testifying expert
- Investigation
- Report
 - Expert is author of report
 - Attorney assures language is consistent with theory
 - Review content before anything put in writing

8. Design Professional Experts



Tips for Expert Witness Work

Confidentiality

- Communication between attorney and expert is discoverable
 - Do not communicate in writing
 - Be careful in note taking
 - No draft reports unless specifically requested
 - Attorney gives direction, not client

8. Design Professional Experts

Testifying as an Expert Witness

- Experts testify via:



Report



Deposition



Trial

8. Design Professional Experts

Testifying as an Expert Witness



- Live testimony under oath
 - Listen to question
 - Listen to objection
 - Pause and collect answer
 - Only answer question asked
 - Tell the truth
 - Ask for clarification
 - Sporting event
- Do not speak to fill silence
- Be aware of traps
- Know the written record
- Do not volunteer to illustrate anything

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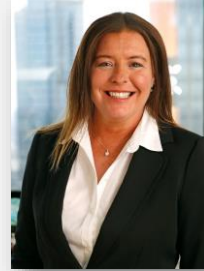


Thank you for your **time!**



Questions?

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