

Educate the Client. Those “good” clients can be tough to find. Your firm could end up negotiating with corporate lawyers or managers who don’t have a construction background.

“They often have no understanding of who bears the risk or of the industry standard of care,” says Richards. “In that instance, it falls on us to educate them.”

Al Rabasca, director of industry relations for the Design Professional Unit of XL Insurance, says firms should explain to the client why transferring risk onto the designer is a mistake. “The client must understand that the design professional doesn’t have the coverage for what they’re demanding, nor do they personally have the financial ability to pay for it themselves,” he explains. “In essence, the client is trying to transfer an uninsurable risk onto an unviable party, so even if they get the engineer to agree, it’s really just a Pyrrhic victory.”

Have the Talk. It’s important early on in the process to sit down with the client and explain project realities.

“Clients need to understand the concept of standard of care, why your work can’t be perfect, why you are reluctant to take on certain terms, and how those terms might hurt them in the long run,” says Marsters.

Richards recommends breaking this news as early as possible. “We try to do it the first time we get into the agreement or scope negotiations,” he says. “That’s when the tone is set.”

Clean Up Marketing Materials. In some court cases, an engineering firm’s marketing materials have been interpreted to elevate the standard of care.

“When you represent in

marketing materials or agreements that you are the best, that you are the experts in your field, then the expectation will be one of perfection, and there will be far less tolerance for the customary changes and mistakes that happen on every single project,” says Drage. “You do not want to find yourself in litigation against a lawyer



arguing that you were supposed to be better than everyone else in the industry and therefore every RFI, change order, error or omission is tantamount to negligent services.”

While the law allows some degree of “puffery” in marketing to put a service provider or even a product in a good light, says Rabasca, “engineering firms can’t afford to make statements about their professional services that are beyond reality and may heighten the standard of care.”

For example, says Marsters, “a firm may claim that a LEED building will save energy and result in more productive employees. But how can that firm possibly guarantee that someone’s employees are going to be happier, or that the building will be oper-

ated and maintained in a way that saves energy?”

When it comes to marketing materials, it’s best to stick to the facts.

“Say things like ‘Our firm has designed 5,000 bridges’ rather than ‘We are an expert in bridge design,’” says Erger. “Facts are more persuasive and won’t get you into trouble.”

Institute Processes. Several processes can help keep your firm out of trouble.

“Document the entire project from beginning to end,” Rabasca says. “The stronger paper trail that you have, the better positioned you will be. It starts with the contract. Have the client initial the key clauses. Document the discussions. These steps can’t stop them from suing you, but they give you the ammunition to defend yourself.”

At Strand, says Richards, “We have our risk managers review proposal language and agreement language. We review our marketing materials as if they would be incorporated into the contract.”

Richards also recommends training staff “on ways to communicate with clients and manage expectations.”

Be Willing to Say No. If clients refuse to budge after all efforts to educate them and allocate risk based on who can best manage it, “You need to just walk away,” Rabasca says. “If you’re having this problem at the start, imagine how they’re going to be by the middle of the project.”

In the 2014 ACEC Professional Liability Survey (*Engineering Inc.*, July/August 2014), 40 percent of participating firms said they sometimes turn down work due to liability concerns. The two most frequent concerns cited were the contract (57 percent) and high risk (54 percent).

“There are certainly times when the risk to the firm is so much greater than the rewards you could expect,” says Erger. “In those instances, you would be well advised to walk away.”

For more on client expectations, please visit the Risk Management webpage of the ACEC website at www.acec.org/risk-management. ■

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