

3 AIA CE CREDITS

MISSION: POSSIBLE

NAVIGATING THE FALLOUT OF CLIENT RELATIONS



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INTRODUCTION



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AGENDA:

SECTION 1 **Keys to Effective Internal and External Communications**

SECTION 2 **Arbitration v. Litigation? Factors to Consider When Choosing Your Resolution Method**

SECTION 3 **Tips on Managing a Challenging Client Relationship**



IMPORTANT NOTE:

This presentation is for general informational purposes only. This information does not amend, or otherwise affect, the terms, conditions or coverages of any insurance policy issued by Travelers. This information is not a representation that coverage does or does not exist for any particular claim or loss under any such policy. Coverage depends on the facts and circumstances involved in the claim or loss, all applicable policy provisions, and any applicable law.

Claims scenarios are based on actual claims, composites of actual claims, or hypothetical situations. Resolution amounts are approximations of both actual and anticipated losses and defense costs. Facts may have been changed to protect confidentiality.





KEYS TO EFFECTIVE

INTERNAL AND EXTERNAL COMMUNICATIONS

AGENDA

- Introduction
- Internal Communications
- Communications With Clients
- Documenting Communications
- Communicating Technical, Difficult or Unfavorable Information
- Problems on the Project - What Not To Say
- Other Communications

INTRODUCTION

Why is effective communication so important?

- The most critical tool in delivering a successful project
- Sets and manages client expectations
- Builds and preserves relationships and teams
- Helps identify, troubleshoot and resolve problems
- Helps to avoid, or at least minimize, claims

INTRODUCTION

Types of Communications

- **Formal:** letters, emails, memos, meetings
- **Informal:** phone calls, texts
- **New technologies:** web meetings, instant messages, file-sharing
- Changes in the post-pandemic world

INTERNAL COMMUNICATIONS

Benefits of Effective Internal Communication:

- Promotes a culture of openness and transparency
- Employee engagement
- Coordination and quality assurance
- Sharing ideas and issues, offering suggestions and support
- Mitigating risk

INTERNAL COMMUNICATIONS

Ways to promote effective internal communications:

- Regular meetings (in-person v. remote)
- Facilitate open discussion and participation
- Encourage sharing mistakes, issues, problems
- Roundtable potential solutions
- “Town Hall” style meetings with principals
- Open-door policy
- Ask “How do we...”

CLIENT COMMUNICATIONS

Tips for Successful Client Communications:

- Timeliness and responsiveness
- Clear, concise, complete
- Active listening
- Encourage questions and feedback
- Go slow, use visuals, ensure understanding
- Beware of assumptions
- Keep client up to date – obtain client approval for changes

CLIENT COMMUNICATIONS

Effective client communication begins with your contract!

- Manage client expectations at the start
- Standard of care
- Clearly define your scope of services
- Payment terms
- Schedule

DOCUMENTING COMMUNICATIONS

Document, document, document!

- Written records help to memorialize the parties' understanding and make it easier to defend if a claim is asserted
- Impact of AI in meetings (auto-dictation)

What should you put in writing?

- Your contract (plus revisions/amendments for scope changes)
- Oral communications – confirm in writing
- Design changes, major decisions, client's approval
- When the client decides to go against your advice
 - Provide client with your professional recommendation
 - Put client on notice of potential risks/outcomes

DOCUMENTING COMMUNICATIONS

But...Be Careful What You Put in Writing

- **Project documents (including internal communications) are discoverable**
 - Keep it professional and factual
 - Use a neutral tone
 - Avoid feelings, and emotional and charged comments
 - Avoid discussions of blame or fault
 - Avoid legal references
- **“What would your grandmother think” approach**

DOCUMENTING COMMUNICATIONS

Examples of What NOT to Say:

- “This is the worst project this company has ever done for us, and it’s just one nightmare after another.”
- “Dear engineering team members, you’ve created a Rube Goldberg design that is more likely than not to get us sued. Fix it.”
- “We are in a world of hurt on this project.”
- “We need to fix this before the lawyers get involved.”

DIFFICULT, TECHNICAL OR UNFAVORABLE INFORMATION

How to deliver bad news and still preserve the client relationship?

- **Communicating Design Changes**
 - Timeliness
 - Transparency
 - Schedule/budget impacts
 - Confirm client's approval

DIFFICULT, TECHNICAL OR UNFAVORABLE INFORMATION

Communicating Technical Information

- Make sure client understands implications, ramifications, impacts to project and bottom line

Know When to Say “No”

- When something is not feasible or permissible - violations of life and safety
- Remember professional duties and standard of care
- Stay within your scope of services

PROBLEMS ON THE PROJECT – WHAT NOT TO SAY

What do you do when you realize there may be a mistake?

- Escalate the issue, but be careful what you put in writing
- Investigate possible solutions
- Notify your broker and carrier immediately

Discussions with your client

- Stick to the facts
- Focus on timely, effective solutions
- The Design Professional needs to walk a fine line between acknowledging the issue and not admitting liability – discuss with your carrier!

PROBLEMS ON THE PROJECT – WHAT NOT TO SAY

Do not admit fault or accept liability until you have consulted with your carrier and attorney

- Usually ok to discuss facts, potential solutions
- If you admit fault there can be both legal and coverage implications
- An error or omission may not create legal liability
- There may be other parties also responsible, or other factors/events contributing to the problem
- There may be defenses to damages (betterment, less expensive repairs or limitations of liability)

PROBLEMS ON THE PROJECT - WHAT NOT TO SAY

- **You must speak with your carrier before agreeing to assume responsibility!**
 - Possible coverage implications:
 - Voluntary payment
 - Voiding coverage
- Advise your client that you need to notify your insurance carrier of any claims and end further discussion that concerns the claim

OTHER COMMUNICATIONS

- Communications with prime (upstream) and subconsultant(s) (downstream)
- Communications with contractors or third parties
- Contractual requirements regarding the chain of communications
- Attorney-client privileged communications



ARBITRATION V. LITIGATION

FACTORS TO CONSIDER WHEN CHOOSING YOUR RESOLUTION METHOD

AGENDA:

- Overview of Dispute Resolution Options
- Factors To Consider
- When To Decide Your Resolution Strategy
- Where Does Mediation Fit?
- Q&A (Time Permitting)





DEFINING YOUR FATE

What Does It Mean to:

- Arbitrate?
- Litigate?
- Mediate?

Or Should I Just Negotiate?

ARBITRATION V. LITIGATION: FACTORS TO CONSIDER

- Speed
- Cost
- Confidentiality
- Knowledge of Decision Maker
- Client Type/ Opponent
- Joinder of Parties & Other Procedural Considerations
- Appellate Rights

ARBITRATION V. LITIGATION: SPEED OF PROCESS

- Typical Timeline
 - How much discovery is contemplated?
- Controlling the Timeframe

ARBITRATION V. LITIGATION: EXPENSE OF PROCESS

- Costs Involved in Arbitration
- Costs Involved in Litigation
- Is Less Expensive Better?
- Ways To Control Cost

ARBITRATION V. LITIGATION: DECIDING ON THE DECISION MAKER

Types of Decision Makers

- Arbitrators
- Judges
- Juries

Pros and Cons of:

- Arbitrators
- Judges
- Juries

Jurisdiction and Its Effect on the Decision Makers

- Governing Law
- Judge or Jury Pool
- Arbitrator Availability

ARBITRATION V. LITIGATION: CLIENT TYPE/ OPPONENT

- Types of Clients
- Private Owners / Developers
- Design Professionals
- Public Entities / Municipalities
- Contractors
- Why Client Type Matters?

ARBITRATION V. LITIGATION: PROCEDURAL POINTS

Joinder of Parties

- What is "Joinder"?
- Joining Parties in Arbitration
- Joining Parties in Litigation

Other Procedural Considerations

- Applicability of procedural and/or evidentiary rules
- Permissibility of discovery
- Dispositive motions?

ARBITRATION V. LITIGATION: APPELLATE RIGHTS

- Appellate Rights for Each Option
- Pros and Cons of an Appeal

WHEN TO DETERMINE YOUR RESOLUTION STRATEGY

- While Negotiating Your Contract?
- After a Claim is Asserted?
- After Negotiations or Mediation Reach an Impasse?



TIPS ON MANAGING

A CHALLENGING CLIENT RELATIONSHIP

AGENDA:

- Who is Your “Client?”
- Tips on How to Respond to a Challenging Client
- What Are the Signs of a Challenging Client
- Key Takeaways
- Resources from Travelers
- Q&A

WHO IS YOUR “CLIENT?”

Direct Relationships

- Project Owners
 - Public Entity
 - Private Developer
 - Private Individual, e.g., a Homeowner
- Contractors
- Another Design Professional

Indirect Relationships

- Members of the community and other stakeholders

TIPS ON HOW TO RESPOND TO A CHALLENGING CLIENT

BEFORE THE RELATIONSHIP STARTS

- Choose the right clients. Look for warning signs in initial conversations which may include:
 - Unrealistic expectations
 - History of working with a lot of different design professionals
- Be honest and manage expectations
- Establish boundaries
- Match personalities, interest, expectations, etc.
 - Who in the firm is best suited for this relationship?

TIPS ON HOW TO RESPOND TO A CHALLENGING CLIENT

DURING THE RELATIONSHIP

- Get it in writing and refer back to the document when memories differ
 - Professional services agreement
 - Documentation of conversations and decisions
- Listen and show empathy when appropriate
 - Try to defuse “tense” conversations
 - Utilize diplomacy and tact
 - Apologize... without apologizing

TIPS ON HOW TO RESPOND TO A CHALLENGING CLIENT

DURING THE RELATIONSHIP

- Prepare your client for unexpected or “bad” news
 - Same as managing expectations which is continuous
- When a situation gets to be “confrontational,” seek outside help and advice
 - Counsel
 - Broker
 - Travelers
- Know when to “walk away”
 - Suspend or terminate services

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

13%

NO PROFESSIONAL SERVICES AGREEMENT

- Your client does not want to sign an agreement PRIOR to the start of professional services

"I got your draft of the agreement... I'll look it over and get back to you in a few weeks but go ahead and get started. We'll worry about the contract later."

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

32%

WILL NOT NEGOTIATE

- Your client insists on contractual provisions that increase your professional liability risk, or are outside the scope of professional liability coverage, AND refuses to make appropriate modifications

"It is a deal breaker if the duty to defend clause is excluded. And we absolutely must be listed as an additional insured on the professional liability policy."

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

60%

WILL NOT PAY

- Your client does not want to pay invoices or consistently pay on time

"Yeah... I got your September invoice and I know I also have to send you payment for the August invoice as well. But you know we are good for it. We are just busy at the moment."

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

73%

EXPANDS EXPECTATIONS

- Your client wants to expand services but does not want you to increase your fee or extend the schedule

"We need to add four classrooms to the school you are designing. Just duplicate one of the classrooms four times and add them to the North wing. And we still need to be ready to move in next August and keep to budget, so just do a "copy and paste" which will save time and money."

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

73%

LACKS COMMITMENT

- Your client will not make a “decision” in a timely manner or consistently changes prior decisions

“I just cannot make up my mind about which option is best for us. Give us a few more weeks. Also, I know we told you to put in a traffic signal where the bike path crosses the new road but now, we don’t want that, and it will save some time and money if we don’t include it.”

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

35%

COMBATIVE, CONFRONTATIONAL OR THREATENING

- Your client's communications are combative, confrontational or threatening

"I have no idea why you keep bugging me about signing the agreement! Focus on completing the design or I'll find another design professional!! We need to keep on schedule!!! I'LL GET BACK TO YOU WITH THE CONTRACT WHEN I'M READY!!!!"

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

47%

NONRESPONSIVE

- Your client is nonresponsive to communications

"I have sent several emails and left several voice messages over the last three weeks with no response. We really need to get some feedback on how to proceed if we hope to stay on schedule. Please respond as soon as possible!"

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

47%

CLAIMS SUPERIOR KNOWLEDGE

- Your client believes they have superior knowledge regarding the design and construction process

"I've been developing successful retail projects for over 20 years. I know you can get 15% more square feet of retail space on that site than what you are currently showing, and we can reduce the number of parking spaces by 10% regardless of what the regulations say."

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

24%

UNLAWFUL OR UNETHICAL REQUEST

- Your client asks you to do something that is unlawful or unethical

"I know you have rejected some of the Work the contractor has completed because it does not conform to the contract documents and code requirements. But to have the contractor correct those issues now will cost time and money and we need to stay on schedule and within budget. Accept the Work even if it does not conform to code."

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

19%

OTHER CHALLENGES

- Similar to “Claims Superior Knowledge”
 - Client expects perfection
 - No permit review comments to address
 - No RFIs or changes required during construction
 - Client sides with Contractor on matters of architect’s professional judgment
 - Client 'can't believe' how much construction costs
 - Client thinks municipal approvals should be faster

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

19%

OTHER CHALLENGES

- Similar to “Claims Superior Knowledge”
 - Client(s) demand excessive insurance relative to scope of work
 - Client will not listen to advice regarding construction budget
 - Client lacks experience and does not respect the recommendations of the team
 - Client will not hire in-house development/project management

WHAT ARE THE SIGNS OF A CHALLENGING CLIENT

19%

OTHER CHALLENGES

- Unlawful or Unethical Request
 - Client insists on a design that will not get approved for a permit or changes during construction that need prior approval
- Similar to “Lacks Commitment”
 - Client 'forgets' previous conversations
 - Client is inexperienced and does not handle decision-making when the normal construction process encounters setbacks or changes
 - Client continues to want changes to the contract during negotiations

TAKEAWAYS TO MANAGING A CHALLENGING CLIENT RELATIONSHIP

- “Clients” may include others who have an interest or are stakeholders, but with no direct relationship or involvement
- Signs often show up early in the relationship
- Utilize a variety of approaches
 - Manage expectations early and throughout the relationship
 - Rely on a contract and other documents
 - Be honest, communicate and show appropriate empathy
 - Seek outside help
 - “Walk away” when appropriate



PAYMENT AND LIEN CLAIMS

PAYMENT DISPUTE PITFALLS

UNANTICIPATED CONSEQUENCES OF PAYMENT DISPUTES

- In addition to tension and animosity, payment disputes often trigger design malpractice claims
- Disputes may directly relate to design services, or contractor applications for payment
- We are seeing more claims arising from "IDM" services, and similar roles set forth in the contracts

UNANTICIPATED CONSEQUENCES OF PAYMENT DISPUTES

- We receive many calls from designers in payment disputes, or asking about liens
- Contracts requiring that liens be discharged – coverage concerns?
- Base services v. additional services
- What is a mechanics' lien?
 - Purpose
 - Key provisions, deadlines
 - Colorado Mechanics' Lien Act v. Public Works Act

RISKS OF MECHANICS' LIEN ACTIONS

- ***Ralph L. Wadsworth v. Regional Rail Partners***

- The project
- The dispute
- Wadsworth's lien
- The litigation
- Trial court rulings
- Appeals court rulings

RISKS OF MECHANICS' LIEN ACTIONS

- *Ralph L. Wadsworth v. Regional Rail Partners*

"As a matter of law, the evidence established that the amended verified statement of claim ... was for an amount greater than the amount due, that there was no reasonable possibility that the entire amount of the claim was due or was related to lienable amounts, and that **Wadsworth knew that the claim was for an amount greater** ... because it included amounts that were not lienable."

RISKS OF MECHANICS' LIEN ACTIONS

- *Lessons learned:*
 - Tread carefully when claiming unliquidated sums
 - Refer to contract for possible damages categories, or limitations on what could be recoverable
 - Refer to Colorado law for what might or might not be claimable as damages (e.g., based upon the project type)
 - Make sure accounting is rock solid, "to the penny"



QUESTIONS?