

Between the Lines

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Insights From a Career Claims Professional



Get Paid or Get Resolution Compromising Your Payment at the End of a Project

Frequently at my first meeting or discussion with the designer of a project where a problem had arisen, I would learn that the design firm had a significant account receivable pending with the client. Sometimes the firm had already internally written the fees off as a loss; other times, they had agreed to accept a lesser amount without receiving anything in return, and occasionally they continued to regularly bill the client with no active payments having been made. Sometimes, the invoices have been pending for so long that the potential fee claim was time-barred.

Another fairly common practice I encountered was that a firm had performed additional services after an issue had arisen on a project for which they had not billed the client or if they had billed for the services they had not been paid. Sometimes the design done as an additional service becomes part of a claim made against the design professional. In my experience, not billing for services you've rendered is perceived by the client, and later should a dispute arise by others, as an admission of at least partial responsibility.

My advice to design firms is straightforward. Don't walk away from your hard-earned money. Small, medium, or large, every firm should have a regular process regarding collecting their fees. Follow-up with the client should be regular, professional, and in keeping with the contract. If the client is not paying you and provides a reason for the nonpayment, that reason should be documented in a follow-up email confirming the discussion that is put in a specific folder. That should happen each time such an exchange takes place. Frequently, those reasons change by the end of a project, so when they tell you at the time what the reason is, confirm it in a short email so that you will have a history to dispute the new story, should that occur. This creates a straightforward chronology and prevents the client from making revisionist history.

If your contract calls for interest on unpaid fees, assess it regularly. This has been put in the contract, agreed to, and is in there for a reason. It's also something that can be negotiated away if you are so inclined later, but it is harder to make a case for if you have not included it in the invoices.

The same advice goes for asking for additional services. You are entitled to be paid for your designs. This advice is particularly true if the reason that the redesign is needed is unclear. If you provide it for nothing, a fact finder, often an average person off the street, will not understand that you did it for the good of the project. The contractor will undoubtedly submit a change order, and if you've done the design for free, it will be assumed that it was out of a sense of responsibility. Other professionals do not provide services for free, and generally, a Judge, juror, or even arbitrator has had experience with other professionals, but only a handful of them have experience with the design community. While I and others in the profession may know it's common practice, a fact finder will not understand it. If work is done for nothing, it is hard to convince someone that you didn't have responsibility for the issue. Designers are problem solvers, and the instinct is always to help solve the problem, but you should be paid for providing the services that lead to that resolution.

There are several reasons for my strong feelings on this issue. In my experience, clients treat designers who ask for payment professionally and in keeping with the contract differently. They become less of a natural target should problems arise because mutual respect has been created.

Additionally, creating the paper trail helps to establish that the money owed to your firm is indisputable. There are various exclusions related to fees in your insurance policy.

However, suppose it is clear from the correspondence that the client agreed the money is owed during the project. In that case, it becomes easier to make a solid argument if a claim is made that a waiver of the fees as part of a settlement should be in the settlement agreement and should count as indemnity dollars against the deductible. While there are no guarantees the fees waived will be honored by the carrier as “real” contribution, good documentation strengthens the arguments that they should be and therefore decreases the chance you will have to both pay your deductible and contribute the unpaid fees as part of a settlement should a claim be made. Alternatively, if the carrier won’t consider this, it makes for a much stronger case that there should be an exchange of checks at the settlement.

Lastly, and most importantly, **never** compromise a fee without getting something in return. If a client wants you to write off part of your fee, get an agreement with them that ends your relationship and settles all known issues to date. It can be an informal release that sets the terms of the agreement, and it can protect you from becoming involved in frivolous litigation in the future. I’d suggest not overreaching. Suppose the amount of controversy is large enough. In that case, you may want to involve your carrier or consult a lawyer regarding language, but I’d ask them to ensure the document is straightforward and not full of legal jargon. It should indicate that all parties agree that the fee forgiven is the final resolution of all known issues on the project.

Ames & Gough, as your insurance and risk management advisor, is providing this update to assist you in your risk management efforts. While insurance is a critical component of any risk management and risk financing plan, the most important thing your organization can do is to work to prevent or minimize losses before they occur. If you have any questions or need further information about this topic and related issues, please contact your Ames & Gough client executive.

About the Author: **Lauren Rhodes Martin** is a risk management and claims specialist focusing on the firm’s architect and engineer accounts. In her role, Lauren, who is based in the Ames & Gough Washington, DC office, works directly with the firm’s partners and client executives on all aspects of design firm clients’ risk management, including contract reviews, claims advocacy, loss prevention training and advice. Prior to joining Ames & Gough, Lauren had a distinguished career of nearly 35 years at CNA, where she held positions of increasing responsibility in claims and client management, culminating with her appointment in 2018 as A/E Platinum Accounts Director. For more than three decades she was directly responsible for handling architect and engineer errors and omissions (E&O) claims.

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