Here are 20 statements, some true and some false, based on recent issues of our Risk Review newsletter. It’s time to test your 2020 (i.e., 20/20) loss prevention vision for the new decade!

1. To avoid professional liability insurance coverage gaps that could make you a prime target in a project claim, you should always demand that your subconsultants carry the same PL insurance limits that your client demands of you. True or false?

2. Professional liability insurers are reporting an uptick in residential claims throughout the U.S. and Canada, largely due to an increase in residential construction. True or false?

3. Privity of contract, a common law principle that prevents anyone from seeking the enforcement of a contract or suing on its terms unless they are a party to that contract, has gained strength in the design and construction industry in recent years. True or false?

4. With split limits insurance, multiple parties who file a claim against a design firm must share equally the aggregate insurance limits available on the policy. True or false?

5. When working on LEED or other "green" projects, you should avoid at all costs specifying new and unproven systems and materials. True or false?
6. Some clients include a contract clause flatly stating that the design professional owes them a fiduciary duty. This is very likely a deal-breaker. True or false?

7. Value engineering is primarily a cost-cutting exercise whereby a construction manager is brought in to examine the project design and recommend ways to reduce expenses. True or false?

8. To prevent your professional liability insurance premiums from unnecessarily rising, it's usually best to wait until a formal claim demand is made against your firm before getting your insurer involved in a project upset. True or false?

9. Statutes of repose set definite time limits during which a cause of action can be brought against a design firm. True or false?

10. From the lead designer's standpoint, a contractor-led design-build arrangement has one major advantage: the designer has little or no responsibility or liability for construction means and methods or jobsite safety. True or false?

11. Having all subconsultant design firms on a project contract directly with the client is a preferable option for the lead designer from a liability standpoint since it avoids vicarious liability for the subconsultant's work. True or false?

12. Certificate of merit laws oblige a potential plaintiff to demonstrate that a case against a design or environmental professional has legal or technical merit before a formal claim or demand can be filed. True or false.

13. Design firms should reject all contractor suggestions for substitutions of materials or systems specified in their plans. True or false?

14. Integrated Project Delivery (IPD) is a whole new design and construction process that changes the way projects are conceptualized, designed and built and alters the traditional relationships, contractual and otherwise, of the key parties to the project. True or false?

15. The cyber risks of having employees conducting company business from home, either full-time or occasionally, are just too significant to allow this practice. True or false?

16. When traveling on company business, it's usually best to forego the added insurance sold by car rental companies because it simply duplicates the auto insurance you already have. True or false?

17. Cyber liability insurance provides narrow coverage that only applies to the cost of identifying, recovering and recreating lost, stolen or damaged data. True or false?

18. Generally speaking, under liquor liability laws, anyone who provides alcoholic beverages to someone who is intoxicated or under age is liable for any property damages or bodily injuries that result from the intoxication. True or false?

19. Due to privacy and discrimination issues, employers should avoid checking the driving records of job candidates and not use a poor driving history as a reason not to hire. True or false?

20. In some states, you don't have to report minor injuries to your workers compensation insurer (and likely take a hike in your premiums) if the injury is adequately handled with first aid delivered by trained employees. True or false?

AND HERE ARE THE ANSWERS:

1: False. As a general rule, it's preferable that your subconsultants carry similar PL insurance limits as those your client demands of you. But you need to be reasonable regarding your insurance requirements on subconsultants. For instance, your client may demand that you carry $5 million in PL insurance. There would be little sense in requiring $5 million in professional liability limits from a landscape architect subcontractor with a modest role on the project.
2: True. A rise in residential claims is spurred by a healthy economy and a shortage of affordable housing. Insurers report that condo, townhome and apartment project claims are all increasing in frequency as well as severity.

3: False. Over the years, privity of contract has been gradually eroded. Judges and juries have ruled that third parties, such as contractors or building occupants, can sue a design professional for damages even though they are not parties to a contract.

4: False. With split limits insurance, you select an aggregate annual limit for your practice policy tied to a lower per-claim limit. For instance, you might purchase a $5 million aggregate split limit professional liability policy with any single claim capped at $2 million of coverage. This helps ensure that your aggregate policy limit won't be exhausted by a single claim.

5: False. It is virtually impossible to be on the leading edge of green design without using new or inadequately tested materials and systems. Indeed, you should acknowledge in your client contract that in your quest to deliver a project that qualifies for LEED or other green certification you may need to specify relatively new or untested products, technologies, materials and systems. Also recognize that these state-of-the-art resources may be of higher cost than traditional materials.

6: True. A contractually imposed fiduciary duty presents a sizable and, likely, uninsured liability. About the only instance it would be acceptable is if the client agrees to limit your liability to a reasonable level. Discuss with your attorney whether a fiduciary contract clause is tolerable, and, if so, the proper contract language for limiting your liability.

7: False. The primary goal of value engineering is to analyze the design of a project and find ways to deliver more value to the project owner. This value creation may include achieving lower construction and life-cycle cost, but it may also include achieving greater value at an additional cost where the total function/cost ratio improves.

8: False. The sooner a professional liability carrier is aware of a project upset, the sooner it can begin applying loss prevention techniques and resolve the issue before it grows into a full-blown claim. That's why many insurers have instituted early reporting programs that encourage design firms to alert their agents and brokers at the first sign of trouble. Reporting a pre-claim incident typically does not negatively impact your deductible, policy limits or premiums unless it later develops into a claim.

9: True. Under a statute of repose, the time limit during which a cause of action can be brought starts running at the completion of design services or, more typically, the substantial completion of construction, and runs for a specified number of years. Once that timeframe elapses, causes of action are barred.

10: True. With contractor-led design-build, the contractor takes the role of design-builder, reporting directly to the project owner. The lead designer, in turn, reports to the contractor. Indeed, in many cases, the contractor hires the lead designer. The contractor does not report to the lead designer; nor do the two parties enter into a joint venture or similar agreement where they share responsibility for design and construction means and methods.

11: False. Unfortunately, having your client contract directly with all subconsultants typically creates more problems (and liabilities) than it eliminates. As lead designer, you would likely lose your ability to select and manage your design team. The lack of coordination between the lead and the subconsultants would increase the chances of design errors and omissions, and the lead would likely be drawn into any disputes involving the subconsultants' design work regardless of who contracts with whom.

12: True. A certificate of merit law discourages someone from filing a frivolous claim. Furthermore, if the claimant does obtain a certificate of merit, it indicates that there is at least one member of your profession who believes the case against you is valid.

13: False. It may be that a contractor on one of your projects actually knows of a substitute that is superior to your specification. The contractor may have more experience with a project type or geographic local, and can educate you on the latest and greatest in materials and systems.
14: True. With Integrated Project Delivery, traditional roles are blurred. The designer and contractor help determine the client's needs, goals and budgets. The contractor and the client contribute to the design. The client and designer have input on construction means and methods. IPD projects often push participants into unfamiliar responsibilities and relationships, but the positive results can be substantial.

15: False. The advantages of allowing employees to work from home can far outweigh the risks. Employers can attract a larger pool of job candidates from a larger geographic territory. Demands on company office space and, in turn, leases and rents are reduced. Employee productivity and loyalty have shown to increase. Employers would be wise, however, to conduct ergonomic and cyber security reviews of each work-from-home office to identify and eliminate exposures.

16: False. The damage waiver that is part of the insurance sold by car rental companies can be extremely valuable. Essentially, the damage waiver removes all liability for loss of or damage to the rental car, the loss of use of the damaged car following the accident and, likely, any "diminished value" liability for the reduced resale value of the car due to the accident. With the damage waiver, a rental car driver who is in an accident can essentially walk away from the scene with no financial responsibility to the rental car company.

17: False. Great strides have been made in recent years to increase the protective power of cyber insurance. More and more insurers are developing cyber insurance policies that provide a broader range of coverages (including loss of income, business interruption and cyber extortion coverage, to name but a few) as well as education programs and security services that provide protection beyond the policy limits.

18: True. Historically, liquor liability was applied mostly to taverns, bars, restaurants, sporting arenas, hotels, and other establishments that sell alcoholic beverages as a profit-making venture. Today, however, that liability is almost equally applied to "social hosts": organizations or individuals who provide alcohol to others in their homes or at businesses functions but that don't regularly sell alcoholic beverages to make a profit.

19: False. A poor driving record is a valid reason not to hire a job candidate when the job duties include driving company vehicles or driving personal vehicles on company business. Your best option is to avoid having poor drivers on your payroll in the first place, and preventive measures should begin with the hiring process.

20: True. Check the workers comp requirements for reporting minor injuries in your state or province. The Red Cross and similar agencies can provide employees basic first aid training and ensure you have an adequate first aid kit to handle minor injuries.

SO, HOW DID YOU DO?

If you got a perfect score, congratulations! You've got 20/20 risk management vision. If you missed three or fewer questions, consider yourself a student of risk management. If you missed more than five, you may need to sharpen your liability acumen. Ask us about the in-person and online education opportunities available in the areas of risk and practice management.
CAN WE BE OF ASSISTANCE?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We’re a member of the Professional Liability Agents Network (PLAN).

We’re here to help.

For more information, contact

Paula Selvaggio
Senior Vice President,
Industry Segment Leader
Architects and Engineers

phone 855.4OSWALD
email pselvaggio@oswaldcompanies.com

www.OswaldCompanies.com