

Understanding PROFESSIONAL LIABILITY

Protecting the PUBLIC and YOURSELF ▼

ARIDO Mandate: Protecting the Public

Like most regulatory bodies in Ontario, ARIDO's mandate is to regulate the profession of Interior Design in Ontario and protect the public's interest. As part of the mandate to regulate, ARIDO sets and enforces standards including the requirement for ongoing professional development and the requirement to carry professional liability. Both requirements are examples of standards that are intended to protect the public interest.



As a requirement of ARIDO membership, Intern and Registered Members are required to carry professional liability insurance.



Association
of Registered
Interior Designers
of Ontario



Canada's Insurance Connection

This publication was created in collaboration between the **Association of Registered Interior Designers of Ontario (ARIDO)** and **LMS Prolink**, the Canadian provider of the national liability program. The content is intended to provide education and guidance to ARIDO members of the benefits and importance of professional liability insurance.

Why Professional Liability Insurance is Important

It is essential for ARIDO Members to have professional liability insurance coverage to protect you and your practice from these costs if a claim is made against you for alleged professional negligence, errors, or omissions in your business or practice. Lawsuits for professional errors and omissions claims have increased considerably in the past 10 to 15 years. In addition to this fact, there is an increasing number of lawsuits, all in the name of protecting someone else's rights and in other cases, they may be frivolous in nature.

Courts awarding million dollar claims are not uncommon in today's litigious society. Even if you win your case, defense costs alone can cost you thousands of dollars in out of pocket costs if you do not have professional liability insurance coverage in place.

Professional Interior Designers cannot ultimately protect their assets from claims by simply incorporating their businesses, limiting liability through contract or outsourcing services to others.

In Common Law, those who hold themselves as having special knowledge and skill upon which others rely directly, can be liable for the losses sustained as a result of their failure to meet the required level of that skill and performance. Where that skill is of an intellectual nature and the person holds a special designation recognizing that intellectual ability, then the law applies a much higher degree of care to be required of that person.

What is Professional Liability?

Professional Liability protects both Interior Designers and the clients they serve. Professional liability insurance (PLI), commonly known as errors & omissions (E&O), is a form of liability insurance that helps protect individual designers and/or their companies from a negligence claim made by a client or other third party. It does so by enabling the client or member of the public to have adequate financial compensation covering legal liability for damages due to injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of any tortuous act, error, or omission while in the performance of such services as a qualified Interior Designer.

The coverage is triggered by an allegation of an actual or alleged wrongful act (error or omission) made by another party seeking compensation for a financial loss, bodily injury or property damage claim caused by an error or omission in the service provided by the policyholder (interior designer and/or Company).

The IDC national policy provides defense costs in defending a claim and extends to pay the damages awarded by a court if it is found that a designer and/or company committed a wrongful act. If you are not currently in the IDC national plan, you should call your current provider and ask if you are covered for legal representation as opposed to assuming you do.

What is a Claim?

A claim is:

- ▶ a demand for monetary or non-monetary relief;
- ▶ a civil proceeding commenced by the service of a notice of action, notice of application, statement of claim, complaint or other similar proceeding;
- ▶ an arbitration proceeding;
- ▶ made or brought against an insured for any actual or alleged breach of duty, neglect misstatement, or omission committed by you for interior design services.

What is covered?

The insurance policy is a claims-made and reported policy that provides defense costs and indemnity (if found negligent) for actual or alleged claims in rendering or failure to render professional interior design services.

Please note that a claim must be both made against the insured (Designer or Firm) and reported to the insurer during the policy period for coverage to apply. Failure to inform the Insurer once an actual or alleged claim is realized could affect defense and indemnity under the policy.

Who is covered under the professional liability policy?

In the event you are a sole practitioner, you are provided coverage as well as any employees you may have. Where Partnership and Corporations are concerned, the policy provides coverage to any present or former partner, officer, director or employee while acting on behalf of the Partnership/Corporation while providing Interior Design services.

What is NOT covered under professional liability policy?

Each policy will have its own set of exclusions whereby the insurer will not be liable to pay compensation to the insured in the event that a claim is made. Some typical exclusions listed on professional indemnity policies include:

- ▶ **Claims arising following cancellation of policy:** It is not unusual for many claims to be made against businesses and/or professionals a significant period of time following the provision of the service and even after they have ceased business. As many professional liability policies expire when they are cancelled, the policy owner may not be covered for claims made against them even if they have already retired. This can be avoided by continuing the policy with an extended reporting period.
- ▶ **Claims arising out of any claims or circumstance previously reported under a prior insurance policy or where known to the Insurer.** The insurers' intent is to avoid exposure for the "burning building" (i.e. claims which the insured knew about or should expect when they purchased the policy).
- ▶ **Professional fees:** Compensation will not be paid for any claim arising from the insured for claims by clients for fees or charges for their professional service. No refund of fees or charges from the insured will be paid by the insurer.
- ▶ **Asbestos:** Claims or legal costs that arise in respect of asbestos.
- ▶ **Radioactivity and pollution:** Claims that are attributable to or are the consequence of radioactivity or a pollution related claim.
- ▶ **Dishonest, fraudulent or criminal acts:** Claims arising where the policyholder has intentionally engaged in dishonest, fraudulent or criminal acts.

- ▶ **Fines and penalties:** Claims arising for compensation to cover fines or penalties suffered by the insured.
- ▶ **Insolvency:** Claims made against the insured where all or part of the claim is attributed to the insolvency of the insured or their suppliers/contractors.
- ▶ **Manufacturing, efficacy, faulty workmanship:** Claims for loss arising out of poor manufacturing or faulty workmanship by the insured.
- ▶ **Retroactive date:** Claims for things done or that are thought to have taken place prior to the retroactive date.
- ▶ **War or act of terrorism:** Any claim arising from war or terrorism regardless of any cause or event.

These are very broad definitions of some typical exclusions that may be placed on certain policies. It is essential that anyone looking to take out coverage is aware of all policy exclusions and the conditions for claim payment prior to application.

Do employees working for a design firm need coverage?

Employees should be covered under their employer's professional Liability insurance. In the event that the employee decides to undertake work that is independent of their employer, they will need to take out their own cover for that work. One such example is an employed Interior Designer working for a firm that undertakes work for a client independently from their employer.

Similarly, an Interior Designer that works for a non-Interior Design business will be required to take out his or her own cover. In any event, it is wise for employees to review their companies professional liability insurance to know exactly what they are covered for and if they need to purchase individual cover.

Does coverage apply to independent contractors?

Generally, Professional Liability policies do not extend coverage to independent Contractors. The IDC insurance policy does include coverage for individuals, business or corporations providing interior designer services on your behalf, but only if specified within a written contractual agreement. Coverage is not, however, extended to architects or engineers.

Coverage for Non-Practicing members

As it is not uncommon for claims to be made years after the alleged wrongful act took place, it is crucial that all non-practicing members apply for an extension of their license when they stop or temporarily hold off of practicing. IDC members receive a free, no charge extended reporting period that covers all past cases from the effective policy date onwards and is of unlimited duration in case of death or retirement of the insured for as long as the IDC program is underwritten by Berkley Canada. This reporting period also applies to all past projects for members who are or become inactive for parental or medical leave, for as long as they are inactive. Further information can be obtained from the policy provider.

Please note: During the reporting period, only claims for past projects will be accepted. Any projects that are undertaken after the member has become inactive will not be eligible for coverage.

Liability and Outsourcing Design and/or Production

Outsourcing Services to Others

Whether using your own employed Interior designers or subcontracting to other consultants or subcontractors providing services on your behalf, you likely have a professional liability exposure. While you may have transferred a portion of the risk via contract to a subcontracted consultant or contractor, the responsibility for the provided services still remains with you as the principal (contracted party) to the client (owner). These subcontracted services may involve only one specific service or could include other services like demolition, construction, design and installation of HVAC, Electrical, or Acoustic services. Additionally, some projects may also involve Architect or Engineering services that represent a portion of your overall project.

An error or omission involving services performed by others can result in significant claims against the Interior Designer as a client who relied on these services could now seek recovery for bodily injury, property damage or economic damages they have suffered should an error or omission occur. We will discuss this concept of Shared Responsibility next.

Shared Responsibility - Partnerships and Joint Venture agreements

A joint venture is essentially a partnership and it is usually specific to a certain parts of an overall project, but provides for a single point of responsibility for the entire project for your client (i.e. design, construction or installation and other services necessary for the completion of a project).

In these types of agreements, it is important to allocate responsibility and compensation between and among the parties involved in the project.

Comprehensive agreements (contracts) with these subcontracted parties can address responsibility of performance and deal with issues that could arise, such as determining fault and rectifying situations involving loss, damage or injury through indemnification provisions and hold harmless agreements.

These agreements are the basic framework for the distribution of liability between the participants involved. However, it should be noted that the framework cannot always insulate each of the participants involved for all risks caused by others.

Nothing in a joint venture agreement limits the separate liability of joint ventures to a client or a third party. The perception is that the joint venture is truly a single point of responsibility for a project, and that perception is usually reasonable and recognized in any litigation against the joint venture. Under the law, parties to the agreement are “jointly and severally” liable for any contractual breach or professional negligence which means an injured party – whether the project client or other third party – may recover the full scope of damages awarded by a variety of facts that a court determines from either party or from both parties in any combination.

Planning for Professional Liability Exposure

In any teaming arrangement, joint venture or partnership the participants must be concerned for their exposure to claims from their client and from other third parties as a result of one of the participant’s action or inaction. While each firm’s professional liability insurance usually covers the specific firm for its own exposure to professional liability claims caused by its negligence in the performance of professional services, project specific policies are sometimes utilized because of the shared liability and the fact that the negligence of another participant might cause a firm to be concerned that its own policy could be eroded by negligence of another that is essentially out of its control.

In these situations, a project specific policy covering all parties to the agreement is much more beneficial as the resolution of any professional liability claim is much easier when it is handled by one Insurer representing all parties rather than multiple Insurers representing individual interests.

When does your coverage become void?

As with any policy, material non-disclosure will void professional liability insurance. What constitutes “material” will of course depend on the facts of the specific case; however, failure to disclose a known claim to the insurer during the application process or misrepresenting a material fact will most likely result in the insurer voiding the coverage.

There may also be situations where an Insurer could deny covering a claim as well. The Primary grounds on which claims could be denied are as follows:

- ▶ Claims and losses outside policy and/or excluded from the policy
- ▶ Intentional or Fraudulent acts of an Insured
- ▶ Pre-loss breach of condition or breach of duty owed by the Insured under the policy
- ▶ Post-loss breach of condition/breach of other duty by the Insured
- ▶ Existence of other insurance alleged to be primary

Drawings and Your Professional Liability Coverage

CAD Drawings and Ownership

There are many nuances related to CAD drawings and ownership. Copyright and ownership of the drawings belongs to and remains with the Interior Designer unless given away via contract or a written license release. The client has a right to use the drawings for the purpose intended (e.g. the client's contractor uses as reference to build). The contractor or other consultants should not expect to be given CAD drawings unless it is stated in the written specs or bid documents.

Please Note: The Professional Liability policy does not provide any legal cost or the cost of a lawyer should a designer or firm seek damages for a client's infringement of a copyright or a dispute regarding ownership of the drawings.

Drawings to be provided to another party at request of client

If you are requested to provide drawings to contractors or other parties for their use, protect yourself with a letter of agreement. The letter of agreement should state that the drawings are instruments of service and cannot be used other than for the referenced project. The client and/or other party should also hold you harmless and make no claims against you for any loss or other damages that result from unauthorized use or amendments to the original drawings. It would be imperative to consult a lawyer to draft an appropriate agreement in such circumstances.

Drawings shared with another professional

Unforeseen consequences can occur when parties share drawings amongst each other. If you receive drawings from another party and are asked to construct, modify or otherwise use those plans, you should require the party providing those plans to indemnify you for any copyright infringement claims that may arise from them. The written indemnification provision should include indemnification for any other forms of intellectual property or unfair competition claims that may arise from your use of those drawings and should include a duty to defend any related litigation in addition to the duty to indemnify.

Collaboration with an Architect - Permissions

In some projects, an Interior Designer may contract with an architect to assist in part of a design for a project. Regardless of payment, if a contract does not state otherwise, the original architect could retain ownership of the copyrights and the Interior Designer merely obtains a non-exclusive license to use the plans for that particular project. The Interior Designer does not necessarily have the right to use the purchased plans for any other project. Interior Designer may wish to insist that their design contract contain a written assignment of all copyrights and other intellectual property that the architect has to ensure the architect does not retain any intellectual property rights in the design, which could create issues down the road. The Interior designer should obtain written permission from the original architect before reusing plans on other possible projects.

If the design's uniqueness is important to the interior designer, they should also insist that its license be exclusive. Otherwise, an architect could possibly resell the design to others. It is important to note that the original architect remains the owner of any copyrights in the design, even if the Interior Designer paid for the design.

Contracts and Your Professional Liability Coverage

Contracts are an integral part of interior design, and should address all relevant aspects of the design project. Interior Designers should enter into agreements with their clients and supplies that are tailored to the specific needs of the project.

For small project practitioners, using a document tailored specifically to the requirements of the project is of utmost importance.

Professional Liability Checklist

DO

- ✓ Use written contracts for all engagements.
- ✓ Be clear with your client about your mandate and any limitations and confirm it in writing
- ✓ Keep well documented files including notes of conversations - DATED and TIMED
- ✓ Report in a timely and detailed manner
- ✓ Be sensitive to issues of urgency
- ✓ Always treat client information confidentially
- ✓ Always question the reasonableness of facts provided by the client
- ✓ Use voicemail/machines appropriately

DO NOT

- ✗ Do not use industry "jargon"
- ✗ Do not always assume understanding by the client - follow up in writing on any key information where reliance is critical

How can an Interior Designer expect to protect themselves against unreasonable claims from their clients or other parties?

We cannot overemphasize the importance of obtaining written agreements covering every piece of work an interior Designer prepares or co-ordinates. "Handshakes" are good, but in today's complex environment, the written word offers the best and only hope for a successful outcome should a disagreement or claim be brought against an Interior Designer.

In addition to this, the law recognizes parties can use contracts to define their own responsibilities and obligations. The ability to modify legal liabilities by contract means Interior Designers can also assume unintended or at least unexpected risk when signing contracts with other companies including Architects, Engineers and Sub-Consultants.

If a Claim has been filed against you or if you have reason to believe that one will be filed, contact your insurance provider immediately. For those insured under the national program, you can contact ProLink immediately:

► Toll Free: 1-800-663-6828
Tel: 416-595-7484 / Fax: 416-595-1649
480 University Avenue, Suite 800
Toronto, Ontario M5G 1V2
www.prolink.insure

Case Scenarios ►

Interior Design Claim Examples

The following are case scenarios based upon interior design claims received. The facts and details have been altered to protect the privacy of the parties.

- 1 A firm special-ordered \$100,000 worth of chairs and inadvertently used the wrong product code. As a result, the wrong chairs were manufactured. They needed to be modified to fit the needs of the client.

Cost of Claim: Over \$30,000 Paid to have the chairs modified.

- 2 A firm designed kitchen cabinets worth \$31,000. Upon completion of the installation, the client claimed that the cabinets were improperly designed and demanded they be re-ordered and re-installed.

Cost of Claim: Nearly \$30,000 paid plus expenses to investigate the alleged error.

- 3 A designer neglected to inform the plan designer that furniture ordered was to be wall mounted rather than floor mounted. As a result, everything had to be re-designed.

Cost of Claim: Over \$7,500 paid plus expenses to investigate the alleged error.

- 4 A designer was hired to assist in the renovation of an estate. Problems arose with an antique floor that had been removed from a French chateau. The client demanded 1.8 million to remove and replace the entire floor. The Insurance Company's investigation indicated the designer had little to no liability and that the contractor who shipped and installed the floor was liable. Despite all of this, the client refused to reduce his demand, and it was estimated that the cost for taking the case through trial could exceed \$400,000.

The designer agreed to a settlement of \$235,000 and a waiver of their \$70,000 in fees. In addition to the settlement, the insurance company paid more than \$250,000 in legal and expert fees.

Cost of Claim: Over \$500,000

Applicable ARIDO Bylaws and Standards ►

A Business and Professional Ethics

1. A Member shall comply with all laws, regulations, standards of practice and the Act and By-laws of the Association.
19. Where the Member relies on the work, professional opinion, or certification of another professional, the Member shall take reasonable measures to confirm the credentials and/or qualifications of the other professional and advise the client or employer of the Member's reliance on the certification or professional opinion of the other professional.

C Competence and Knowledge

1. A Member shall undertake only work that the Member is competent to perform by virtue of knowledge and experience and shall prepare reports and express opinions on interior design matters only on the basis of adequate knowledge and scientific data and honest conviction.
2. A Member shall comply with all applicable laws of any jurisdiction where work is performed or where a report or an opinion is provided on interior design matters.

D Signing and Sealing of Documents

1. A Member shall sign, stamp and seal only plans, specifications, reports or documents, that the Member has prepared or that have been prepared under the Member's direct supervision and control or that another person has prepared and that the Member has thoroughly reviewed and for which the Member accepts professional responsibility.

G Overruling of Professional Judgment and Duty to Warn

1. A Member shall warn an employer or client about the consequences of proceeding with a work or project for which the Member is responsible, where there is the potential for risk to the public, where the employer or client has overruled the professional advice of the Member with respect to the safety of the work or project.

I Duty to Association

2. A Member shall notify the Registrar in writing of any change of address recorded on the register maintained by the Registrar, notify the Registrar of any change in scope of practice or failure to obtain professional liability insurance or for exemption of insurance and to reply promptly to any demand for information received from the Registrar related to the professional conduct or competence of the Member.