



Trend Alert



Design Professional

The do's and don'ts of structural condition assessments

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At times, owners will look for quick assurances, and, while eager to help, design firms called upon to fulfill these requests need to approach them carefully – ensuring they protect themselves from potential liability issues.

The integrity of a design firm or a structure's stability is not something owners necessarily want to question when a project is completed. At times, owners will look for quick assurances, and, while eager to help, design firms called upon to fulfill these requests need to approach them carefully – ensuring they protect themselves from potential liability issues.

AXA XL Design Professional policyholders contact us when they need guidance on how to protect themselves when clients, lenders, homeowner associations (HOAs), and other entities want guarantees that their structure is safe, and they want those guarantees immediately. If asked, here's what architects, engineers and other design professionals should – and shouldn't – do when performing structural condition assessments.

Unless faced with an immediate emergency, we urge our policyholders to do one thing first – take a deep breath. While there may be a sense of urgency and design professionals are eager to support former and current clients, there's also a lot at stake. Design professionals need to be mindful of their potential liability to the owner and third parties, as well as their professional responsibilities for public safety.

If our insured is not a structural engineer trained to provide structural condition assessments, we strongly recommend that they engage directly with an engineer to provide these services, rather than agree to retain the engineer as their subconsultant or provide any review of their prior projects themselves.

For policyholders who are structural engineers and do regularly provide these services, here are some suggestions we ask them to consider:

- **Talk to the client.** Explain exactly what a structural assessment is...and what it is not. The scopes of structural condition assessments vary widely and might include one, some, or all, of the following: observation, probing, photographing, sampling, field and laboratory testing, analysis, documentation, and reports. Many owners think an assessment constitutes an express warranty. Explain why you cannot – must not – warrant or guarantee the condition of anything you cannot know for sure.



Ask for an indemnity, tailored to the circumstances of your services and your jurisdiction. You and your lawyer can suggest a mutual indemnity or, if circumstances and risks merit it, have your client indemnify you.

- **Avoid any representations about your services that would heighten your standard of care or that could be construed as a warranty.** For example, don't use "highest qualifications" and/or promises of specific results of your reports. (Indeed, your findings might be non-conclusive.) This means taking care in your proposals, letters, brochures...and your conversations.
- **Nail down the scope of your investigation and the nature of the report.** Agree, up-front, how much preliminary research, destructive investigation, and testing you will provide. If your client is unwilling to pay for – or won't take the time for – a full assessment or invasive testing, this should be made clear in your contract (and in your reports). However, if you recommend a detailed survey and the client refuses to follow your advice, there should be a clear paper trail documenting the decision in writing to the client.
- **Work with your lawyer to develop an agreement that addresses your responsibilities and risks.** If you are a member of American Council of Engineering Companies (ACEC) consider using (and modifying, as necessary) **a standard form agreement such as those developed by ACEC's Coalition of Structural Engineers (CASE)**. The ACEC acknowledges that this is a sample Agreement for structural engineers to use when providing a structural condition assessment directly to a client. Upgrading the structure for an increase in imposed loads; for damage from fire, wind, or earthquake; for seismic retrofitting; for historic preservation or change in occupancy; or for adding new structures upon or adjacent to an existing structure.
- In general, your agreement should address the following:
 - **Your scope of services** should spell out what services you'll provide for a basic fee. Your agreement should also list what services are excluded, either because you do not offer them, or the client has specifically declined them. You can also catalog those services you can provide but as additional services.
 - **Identify who can rely on your report.** Ideally, your report should be for the sole use and benefit of the client, and not to be provided to any other person or entity without your prior written consent.
- **Work with your lawyer to craft a disclaimer** tailored to the scope of your report. Here's one example: *The Consultant has not had the opportunity to review plans, calculations, or soils data for the structure or other information normally available to consultants, nor has the Consultant been able to perform detailed analyses or structural calculations. The Consultant's opinions and conclusions are based on limited visual observations and, as such, should be considered preliminary only. The Client must have these opinions and conclusions verified by detailed analysis. No warranty, either express or implied, is made or intended.*
- **Don't agree to certify or warrant anything.** Your agreement should include affirmative language such as *The Consultant will not be required to execute any document that would result in the Consultant certifying, guaranteeing, or warranting the existence of any conditions.*
- **Disclaim third-party beneficiaries.** Make it clear that nothing contained in your agreement will create a contractual relationship with or a cause of action in favor of any third party against either you or the client.
- **Affirm your standard of care,** that you'll perform in a manner consistent with the degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality.
- **Limit your liability (LoL)** to an agreed-upon amount or the amount available on your professional liability insurance policy. (In the "Limitation of Liability" chapter of **AXA XL's Contract Guide**, we offer some suggested language and detailed guidance.)
- **Disclaim responsibility for the accuracy of any information supplied by or produced by others,** including by the client and its consultants and contractors, and agree that the client will bear the resulting risk.

As part of the process, our insureds get advice from our skilled Claims Specialists and, if appropriate, the free services of a lawyer who can advise them from behind the scenes and help manage the situation before it becomes a claim.



- **Ask for an indemnity**, tailored to the circumstances of your services and your jurisdiction. You and your lawyer can suggest a mutual indemnity or, if circumstances and risks merit it, have your client indemnify you. Here's one example: *Because evaluation of the existing structure requires that certain assumptions be made regarding existing conditions, and because some of these assumptions cannot be verified without expending additional sums of money or destroying otherwise adequate or serviceable portions of the building, the Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees, and subconsultants (collectively, Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising out of or in any way connected with this Project, excepting only those damages, liabilities or costs attributable to the sole negligence or willful misconduct by the Consultant.*
- **Include other important terms.** Your agreement should also address billing and payment terms, dispute resolution, ownership of your instruments of service, governing law, and the termination of your agreement. Include a mutual waiver of consequential damages.

Finally, don't hesitate to reach out to your insurance broker or insurer. Our Design Professional team works with many policyholders as they address their own clients' requests for structural assessments, among other services. In situations that could give rise to an insurance claim, our policyholders consult with their A&E insurance broker and us, and we open what we call a loss prevention file. As part of the process, our insureds get advice from our skilled Claims Specialists and, if appropriate, the free services of a lawyer who can advise them from behind the scenes and help manage the situation before it becomes a claim.

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