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RISK MANAGEMENT & CONTRACT GUIDE FOR DESIGN PROFESSIONALS

J. Kent Holland, Esq.

3rd Edition (2019)

ConstructionRisk, LLC | Tysons Corner, VA

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About a/e ProNet

a/e ProNet was formed to bring together insurance professionals whose activities in their own market area had already established them as experienced, knowledgeable and personally committed to service the design professional community. Exceptional expertise, value-added services and independence of ties with any particular insurance company have been membership watchwords from the outset.

Since its first formal meeting in January 1988, ***a/e ProNet's*** membership has grown from a handful of members to a group of many firms operating on an international basis with members located in major metropolitan areas throughout the United States, and more recently in the United Kingdom. Geographical location is not a bar to membership. The absence of specialized expertise precludes consideration of membership. The combined ***a/e ProNet*** membership represents a significant share of all U.S. design firms and of the total annual premium volume written by domestic and foreign insurers for this specialized coverage. ***a/e ProNet*** members work with thousands of design firms nationally accounting for over $300 million in premium volume annually.

a/e ProNet's overall market presence is expected to grow annually irrespective of the growth of its membership. This is due to the exceptional expertise and resources available to ***a/e ProNet*** members and made available to ***a/e ProNet*** clients. Evidence of the association's exceptional services is available on the ***a/e ProNet*** website at www.aepronet.org. The ***a/e ProNet*** website is believed to be the most comprehensive collection of a/e specialized risk management information and resources of its kind. Readers of this manual are encouraged to visit the ***a/e ProNet*** website for a firsthand introduction to the extensive collection of *Practice Notes* publications, including professionally written articles under the headings of Guest Essays and Topic of the Day.

This *Contract Guide* is an example of the serious efforts of ***a/e ProNet*** to provide to the design professional community the most current, risk management resources and to introduce design professionals to the legal and liability risks they may encounter in their practice. Proper utilization of this *Guide* will provide practitioners with effective ways to eliminate, modify or assume the risks of professional practice with confidence and to minimize the likelihood of assuming liability that exceeds their insurance coverage. We are pleased that you are participating in the learning experience provided by this Guide and wish you good luck in the completion of the Continuing Education Courses should you elect to participate.

a/e ProNet Mission Statement

- To establish an internal information and resource sharing network that enhances services to the design professional community and their professional societies;
- To provided a forum for strengthening communications with the professional liability insurance markets serving the design community.
- To maintain an independent source of professional liability information, risk management, loss prevention and continuing education services for design professionals and their professional societies; and
- To maintain the highest ethical industry standards among our members.

Contact: Dave Johnston, Executive Director; (407) 870-2030; Dave@aeProNet.org; www.aepronet.org.

About the Author

J. Kent Holland received his Juris Doctor from the Villanova University School of Law. He is a construction lawyer located in Tysons Corner, Virginia, (formerly with Wickwire Gavin, P.C. and now with Construction*Risk* Counsel, PLLC) representing design professionals, contractors and project owners. He is also founder and president of a consulting firm, ConstructionRisk, LLC, providing consulting services to owners, design professionals, contractors and attorneys on construction projects – including assistance with contract drafting, review and negotiation; change order and claims analysis (preparation or defense); risk management advice concerning insurance coverage – including assistance with negotiating and drafting the terms and conditions of policies and endorsements, advice to insurance underwriters; and guidance to those procuring insurance. Mr. Holland is publisher of a web-based construction risk management library (ConstructionRisk.com) and a risk management/legal newsletter (ConstructionRisk.com Report).

Mr. Holland has written several books, including, for example, *Working on Purpose* (2011); *Risk Management for Design Professionals in a World of Change* (2010); *Risk Management & Contract Guide for Design Professionals* (1995, 2005, 2014 and 2019); *Construction Law & Risk Management – Case Notes and Articles,* (Vol. I, 2003, and Vol. II, 2006).

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Introduction

This contract guide will assist design professionals in better understanding key issues concerning risks and liabilities potentially arising out of contracts, communication, and documentation.

Space did not permit inclusion of every contract term and condition that may impact risk. Approximately 40 clauses that may be of particular concern are discussed. For each of these clauses, one or more key issues are considered. Please note that this is not intended to be a comprehensive review. The conclusions are not intended to provide legal or other professional advice. Obtain the advice of counsel before drafting clauses for specific projects.

Most of the example clauses are excerpts from longer clauses that are copyrighted by the American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC) and are not to be reproduced or used without authorization of the appropriate organization.

In addition to discussing example contract clauses, we have included a discussion of risk management of communication and documentation. As you will see from the litigation examples referenced, many claims against design professionals could be avoided or mitigated through better communication and documentation. This is such an important issue that entire seminars are devoted to it.

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Chapter 1

Some Risk Management Essentials

Risk managers often speak of three primary means of risk management: risk avoidance, risk allocation, and risk reduction. Key points concerning these three methods are briefly presented below.

1.1 Risk Avoidance

The most obvious way to avoid risk is to not perform services. Don't accept a bad contract. In reality, however, design professionals who want to be retained for assignments are often only too anxious to sign contracts, even if they contain onerous terms and conditions. Because accepting contracts and performing services are critical to a design professional's livelihood, the key is to recognize and avoid those risks that are unacceptable.

Terms and conditions that contain onerous risks, especially risks that are uninsurable under a professional liability policy should be identified before the contract is signed and revised so as to be acceptable and insurable to the greatest extent possible. If it isn't possible to negotiate a reasonable contract, the safe course of action may very well be to decline the contract and the project.

To accept uninsurable risks is to bet the firm on the assumption that the risks that arise will minimal or will not materialize. The client who insists on shifting owner and contractor risks to the design firm is often the client who is most likely to have unreasonable expectations. That same client may also be quickest to take you to court when things don't go as hoped. In such circumstances, the best decision you can make in managing your firm might be to reject a bad contract.

Risk avoidance also includes rejecting requests for your services on projects that fall outside your area of knowledge and experience. Even if your firm has the requisite experience, the personnel with that expertise may be tied up on other projects. In both situations, it is usually safer to reject the project than to attempt to have inexperienced personnel perform the services.

In the rebounding construction market of the past several years it may not been uncommon to see design firms submit proposals on multiple projects expecting to be awarded no more than one contract and being awarded contracts on multiple projects. This might seem great until you realize that your key personnel are unavailable because they are still working on another project, for a different owner, in a distant location. This has been particularly problematic when construction contractors are late in completing their work, delaying the completion of the design services during

construction, and thereby preventing the release of your key personnel to move over to other projects.

1.2 Risk Allocation

In allocating risks by contract terms and conditions, the goal is to allocate the specific risks to the party with the best ability to manage them. Although a contract can assign ownership of risks to any party, there can be serious adverse consequences if a party assumes risks it can't manage. A design firm, for example, isn't in a position to manage site safety responsibilities that most appropriately belong to the construction contractor. Despite the practicalities, however, of who is actually in the best position to manage site safety, if the design firm agrees to such responsibility by contract, the designer may be found liable for site safety by courts and possibly the Department of Labor.

To be reasonable, a contract must be reasonable for all parties involved. If a contract attempts to shift all the risks to one party or the other, it will create problems on the project. A one-sided contract is likely to cause hard feelings during contract administration. It is also increases the likelihood of claims turning into litigation. As a practical matter, this means parties are better served by negotiators who don't try to negotiate a contract that unreasonably shifts risk possible to someone who can't logically manage it or accept legal responsibility for it. Such risk transfer will cause problems in the long run, and may even create uninsurable losses and claims.

In evaluating who the various risks should be assigned to, parties can develop a table or list of responsibilities and risks to more easily see which risks most logically belong to each party. For example, site safety typically falls to the construction contractor. Easements and rights-of-way, as well as site data, including geotechnical information, may logically be allocated to the project owner. Responsibility for exercising due care in the planning and designing of a project generally falls to the design professional performing those services.

Problems begin when any of these risks are allocated to the party that is not technically responsible for the related services. Unless you are in a position to manage a particular risk, it is not appropriate for you to accept contractual liability for that risk.

1.3 Risk Reduction

After you have decided to accept risks by taking on the project, and you have negotiated as best you can for a reasonable allocation of risks, you are ready for the next step of risk management: risk reduction. Risk reduction involves taking preventative actions to decrease the probability, frequency, and severity of losses. Sometimes called proactive, these activities can be planned in advance to respond to risks that are known and that are manageable when encountered. What these proactive steps will include depends upon the nature of the project, the location, and the risk.

construction and design professional services generally state the terms under which a firm may rely

Chapter 2

Documenting Communication between the Parties

2.1 Written Documentation

When it comes to determining what was said, when it was said, and who decided what, the best evidence generally is written documentation. This includes correspondence, memoranda, notes, faxes, and e-mails. As discussed elsewhere in this book, written documentation can be particularly important to prove you complied with contract requirements. Written evidence that you met all contractual notice requirements and obtained proper and timely approvals can be vital to your success in presenting claims or defending against them. It can also prove you gave sufficient information to others so they could make intelligent decisions and possibly even assume the risk of their decisions.

Many initial communications between the parties will take place orally in the ordinary course of conversation on the project. Unless these oral conversations are somehow reduced to writing in the form of meeting minutes, memoranda, or correspondence, their content and value may be lost.

If you are orally communicating information that you believe is important to project decisions, document it in writing and preserve it. Likewise, if you are receiving oral communication that has significance to the project, make a written record of that conversation. You may, otherwise, find yourself in a dispute several years after the project has been completed, when memories have faded, and you will have nothing to prove how the decisions were made.

A discussion of case examples later in this text explains how a project owner in one HVAC case denied receiving a memorandum from the design professional warning of the risk of substituting equipment. This type of a denial could be avoided if there was a record of the memorandum to prove that the communication had been made.

As suggested earlier, a record can be a fax confirmation notice, an e-mail confirmation notice, a certified mail-return receipt, or a note from the client acknowledging the design professional's recommendation. Even if no written record is made to confirm that the client received the recommendation, there may be other methods to prove that the client received the notice and acted upon it.

A follow-up note to the client referencing the written recommendation can be useful. This can state something to the effect that you are sending it to confirm that you sent the earlier memo and will be taking action in accordance with any understandings that may have been reached concerning those recommendations. You could also raise the issue at a formal project meeting and have the matter, including the fact that the written recommendation was made, recorded into the meeting minutes.

Even telephone logs and notes are useful as contemporaneous business records to show that a conversation occurred concerning the recommendation contained in the memorandum that was never formally acknowledged by the client. By doing these things, you are making it more difficult for the client to later deny having received the written recommendation.

Documents that should be maintained in well-organized files for ready access include:

- Requests for Information (RFIs);
- Telephone logs;
- Change order requests and change orders;
- Inspection Logs (i.e., monitoring or reviewing reports);
- Daily reports (e.g., weather, laborers, etc.);
- Safety reports;
- Payment requests;
- Certifications; and
- Lien waivers.

These are some of the more significant types of documents, but this is by no means an exclusive or exhaustive list. Other documentation that has proved invaluable in prosecuting claims or defending against them include audio recordings of pre-bid conferences, photographs of job progress, and video recordings of job progress.

2.2 Clear, Concise and Temperate Language

It goes without saying that we should not put anything in writing for distribution outside our own firm that we believe could in any way embarrass or damage us. This same principle should be applied to all notes, memos, yellow sticky notes, and e-mail notes that are intended for viewing only by those inside the firm.

If attorneys pursue document discovery in a claim that involves your firm, you may be sure that any damaging comment, observation, or statement contained in your internal files and memoranda will be among the first items sought by the reviewing attorneys.

The risk management principles applicable to formal documentation between parties also apply to the language we use internally in reports, correspondence, memoranda, telephone logs, meeting minutes, yellow sticky notes, and any other written materials intended for in-house use.

2.3 Pre-Proposal or Pre-Bid Data and Information Provided By Client

Design professionals should be able to rely upon geotechnical reports, site data, client program requirements, and other information provided by the client. Standard form contracts for both

construction and design professional services generally state the terms under which a firm may rely upon that information. Not all contracts, however, permit such reliance. Recent contracts generated by project owners have included language stating that any site conditions information provided by the owner is done so merely for general information and shall not be deemed a part of the contract, nor may it be relied upon by designers or contractors. Some of these contracts state that the designer or bidder is expected to perform its own site investigation and make its own determinations of what will be encountered at the site.

By disclaiming any responsibility for the information it provides, the owner may be able to avoid paying for additional services or change orders. Several courts, including those in Florida and Texas, have recently published decisions holding that municipal governments had no duty to grant change orders based on differing site conditions where the contracts had expressly disclaimed reliance upon site information provided by the owner.

Despite a differing site conditions clause in the construction contract, one court held that the contractor couldn't argue for a differing site condition based upon misleading and inaccurate information provided with geotechnical reports that were included with the Invitation for Bid (IFB). This was because the contract included a separate clause stating that all reports and information provided with the IFB were for general information purposes only and not to be relied upon by the bidders. That clause further stated that the reports and information were expressly excluded from the contract and that the owner was making no representations of site conditions whatsoever.

An owner's refusal to allow bidders to rely upon documentation and data provided by the owner may adversely impact the design professional. A contractor that is denied recovery under a differing site condition clause may find creative ways to argue its damages were actually caused by acts, errors and omissions of the design professional. Or it might argue that there were misrepresentations by the design professional or interference by the design professional with the contractor's means, methods and procedures of performance. In a number of states, contractors may seek recovery directly against the design firm for their damages.

Denying a contractor's right to rely on site information documentation may cause an increase in claims and litigation. This is because, to get around the unreasonable contract provision, contractors are forced to find creative ways to make themselves whole from the loss they will otherwise suffer.

Bidders that are contractually barred from relying upon information provided with the IFB may seek to include in their bids extra costs for unknown site condition contingencies. This may adversely impact the design professional who has committed to designing a facility for a specified construction cost budget.

Bids may exceed the budget if the contractor fears there is a real likelihood of incurring costs it can't recover by change order. If the design firm provides the owner with a project budget and estimates of construction costs that are exceeded by the high bids, that design professional may find itself redesigning the project (at its own costs) in order to get the contractor's price within the budget.

Design firms need to take this into consideration when agreeing to responsibility for cost estimates and redesigning a facility to bring it within budget. This is discussed later under the topic of cost estimates.

The key points to remember are that design professionals and contractors need to understand how documentation provided by the owner in advance of accepting professional proposals and contractor bids may be relied upon, and how contract language may affect how much reliance, if any, can be placed on such information and documentation.

Assuming that you are entitled to rely upon the documentation, it is important that the records that you generate in your files at the time of preparing your proposal or bid refer to those documents and show that you relied upon them.

As a design professional, you may get an additional benefit from referring to these documents in the proposal that you submit to the owner. You will be able to demonstrate the underlying assumptions upon which you have based your proposal.

If the owner subsequently requests you to perform services differing from what was anticipated based upon the documentation provided to you in advance of your proposal, you may be able to use that documentation to prove that you are being required to perform additional services entitling you to additional fee.

2.4 Reports and Written Recommendations

Put recommendations in writing, including an explanation of the potential benefits of following the recommendations and the potential risks of failing to do so. If alternative solutions or recommendations are available, conveying that information to the client, in writing, facilitates informed and well-reasoned decisions by the client. This has the added advantage of later showing a client or court that you provided your services reasonably and that the client made certain decisions assuming appropriate risks for their project program and budget.

Enough detail should be provided in the written recommendation so that the client cannot assert that it did not understand the ramifications of the decision it was making.

In one example of a claim against an architect, the owner asserted that the architect was responsible for all damages caused by the failure of the Heating, Air Conditioning and Ventilation (HVAC) system to meet the performance requirements of the building. In its defense, the architect asserted that the owner had overruled its advice to reject the "or equal" equipment substitution that was being offered by the construction contractor.

The architect in this HVAC case proved it had provided a written recommendation to reject the equipment. The owner acknowledged it received the recommendation, but argued that it was so bland and devoid of detail that it failed to provide adequate information and details on which to reject the equipment.

According to the owner, the language seemed equivocal and did not contain facts, figures, or data to persuade it to reject the equipment that was promised to save it money. The owner argued that if the architect felt so strongly that the equipment should be rejected, it should have made its recommendation so clear and obvious (with scientific reasoning to support it) that the owner would have made the right decision.

construction and design professional services generally state the terms under which a firm may rely recommendation. It also argued that the firm was negligent for ultimately approving the installation of the HVAC system.

In another case involving an HVAC system, the design firm provided a detailed written memorandum to the owner recommending the rejection of equipment. Again, the owner decided to accept the equipment despite that recommendation. When the equipment failed, the owner sought to recover the cost of its damages from the architect.

The design firm in this case defended itself by asserting that it had given its client appropriate information by way of a written memorandum, and that the client had assumed the risk of failure by accepting the "or equal" equipment. A copy of the memorandum was in the architect's files, but the project owner denied receiving it.

Fortunately for the design firm, a copy of a fax confirmation was eventually found in the architect's files. It showed a copy of the first page of the memo with the fax telephone number, date, number of pages transmitted, and delivery confirmation printed neatly across its top. Because of this evidence, the matter came to a prompt conclusion, with the architect avoiding any liability.

These cases demonstrate the need to put recommendations in writing, and to provide appropriately detailed information. They also serve as a warning to preserve written evidence that the design firm made appropriate recommendations and that the client received them.

It goes without saying that it isn't necessary or practical to send everything certified mail, return receipt requested. You can communicate and document that communication without antagonizing the client. It's advisable to obtain written responses from your clients regarding your recommendations.

These do not have to be overly formal. In many situations, a simple note or e-mail acknowledging receipt of the recommendation will be adequate, provided that you properly file this documentation in an appropriate folder for future reference.

Keep in mind that in the example above, the design firm that eventually got out of the case by producing a fax confirmation spent a lot of money in legal fees and wasted a lot of time in the months prior to finding that piece of paper. Keeping such documents organized so they can be easily found is the key.

If the client does not respond in writing, create your own paper record showing that he received the recommendation. For example, send a short follow-up memorandum such as a speed memo, fax, or e-mail to the client reiterating that you gave him a written recommendation, and mentioning any conversations you and the client may have had pertaining to that recommendation and any related decisions that were made by the client.

If the client later denies receiving the original recommendation, these kinds of confirmation notes will be helpful in persuading both the client, and possibly the court, that the client original recommendation was received.

Nothing in the above examples is intended to suggest that owners don't act ethically. It is simply a fact of life on large projects that with multiple people working in the owner's office as

well as in the trailers of the design professionals and contractors, papers are sometimes misrouted or misplaced before they are read by the appropriate people.

If oral communication is not followed with written confirmation, it may be difficult or impossible to reconstruct what happened if a subsequent dispute is later litigated.

Even if all the right people on the project had excellent oral communication about decisions to be made, when litigation later ensues the individuals may have long since forgotten the project details. This is where maintenance of written documentation becomes especially vital. It memorializes what went on even after memories have faded or the individuals involved are no longer accessible.

2.4.1 State Foundation and Assumptions Underlying Opinions

When drafting a report offering a professional opinion, state the foundation and assumptions upon which the opinion is based. Reference the information that was provided by the client or others for your use. Reference, too, the basic assumptions that you made based upon the client's program for the project and information provided to you.

If there are limitations impacting your ability to formulate an opinion, note these limitations in the report. Budget restrictions, for example, impact the design and construction. In instances where you would propose something too expensive for the owner's restrictive budget, point this out in a written report so the client can make a well-informed decision on how to proceed.

2.4.2 Impact of Time Limitations

Time limitations may impact your ability to conduct the full research and investigation you would typically do on a similar project. There have been cases, for example, where property assessment investigations were rushed because the purchaser of real estate waited until the day before settlement to contract with a firm to perform the investigation.

In one case, instead of postponing the real estate settlement, the purchasers contracted a consultant to perform a Phase I environmental site assessment of multiple parcels of industrial land only three days before the real estate closing date. The consultant agreed to perform these services, subject to certain disclaimers and conditions. Its contract terms included a statement that the site assessment report would state that the services were limited by the time restrictions and that this affected the completeness and reliability of the information presented.

The client also agreed to indemnify and hold harmless the consultant from damages and claims arising out of the consultant's services.

2.4.3 Identify Limitations on Information

Limitations on the information, data, and site access provided by the client should be identified in writing in the report and recommendations. A building owner requested an architect to prepare a report estimating what it would cost to renovate part of an old building into new office space. A limitation was placed on the architect's access to the premises that would impact its ability to give an opinion: the owner forbade the architect from removing ceiling tiles to determine whether there was asbestos in the plenum.

Unless it knew what was above the ceiling tiles, the architect could not provide an estimate of construction costs with a significant degree of reasonable probability. If asbestos was later discovered in the ceiling and had to be removed as part of the renovation, the architect's original opinion of probable costs could be too low.

In this example, the architect accepted the contract with those conditions. It drafted a preliminary sketch of renovations and provided a preliminary estimate of costs. This estimate, however, included a boldly stated caveat that the architect was not making any warranties, guarantees, or representations concerning the estimate in the event that any additional work needed to be performed as a result of anything that could not be observed by the architect in the area at or above the ceiling tiles.

By clearly stating the limitations upon its access to the building and the limitation on information, the architect hoped to limit its client's (or others') ability to rely upon its report. Stating such a limitation is one risk management tool that may give the architect some protection in this situation. Other architects in a similar situation might manage the risk by declining, thereby avoiding the potential liability that could arise later. This becomes a matter of prudent client selection.

When professionals work for clients who choose to close their eyes to environmental issues impacting their property, they may come under pressure to issue reports that do not state their findings and opinions with the degree of clarity and forcefulness that they deem ethically appropriate. Some environmental regulations create an independent duty for consultants who have knowledge of an on-going pollution release to notify government agencies about it. This type of situation is discussed below in the analysis of the confidentiality clause.

Conditions in the consultant's contract with its client attempting to limit such disclosures will not excuse the consultant from meeting its independent duty to the governing agencies. For this reason, if there is a clause in your contract addressing confidentiality of information and documents acquired by the consultant from the client, it should be drafted in such a manner as to allow you to provide to others the information that is legally required.

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Chapter 3

Keeping the Records Straight

3.1 Benefits of Knowing How to Find Your Records

Being able to promptly locate records can instantly end potential claims. As previously described in Section 2.4, a building owner sued a design firm, alleging that the design firm failed to properly advise of the risk of accepting an "or equal" equipment substitution offered by the contractor. The design firm asserted it had given the owner a detailed memorandum explaining why the equipment should be rejected, and that the owner had ignored that advice at its own peril. In response, the owner claimed that it had never received such a memorandum. After months of document discovery and depositions, someone finally located in the design firm's files a fax confirmation of the missing memorandum.

The fax confirmation showed a small copy of the first page of the fax, as well as the date it was sent, to whom it was sent, and the number of pages received. In light of this evidence, the matter was promptly dismissed.

If a copy of the missing document had been made available to the project owner at the outset, it's likely the suit never would have been filed. Giving the owner the benefit of presumed honesty, it seems likely that the warning memo was misplaced or misfiled so that the owner's principals were not aware of its existence when the problems with the substitute equipment began to surface and demands and claims were made against the design firm.

If the design firm had filed its own copy of that memorandum in a logical place, clear and quick communication with the owner would have been possible and the misunderstanding that led to the litigation could have been avoided.

Maintain project documentation in a manner so that it can be easily retrieved. This makes good sense from a claims and litigation point of view. But more than that, it enhances communication and makes it possible to more efficiently manage the project during design and construction if the parties can quickly locate documents and use them in making their decisions.

Good document management enhances project quality control and provides a means to benchmark changes that are being made to original program requirements, drawings, and contract agreements.

Time spent in establishing and maintaining a logical document control system will prevent time from being wasted later in looking for information and documents that have been misplaced, misfiled, lost, or unintentionally destroyed.

Records that are maintained contemporaneously in the ordinary course of business can serve as invaluable evidence in proving what communications took place on a project.

3.2 Records to Maintain

Documents and information need to be managed. This is not the same thing as just keep everything forever. Nor is it sufficient to just throw everything into boxes and put them into a self-storage facility to be forgotten.

Documents maintained in a logical, easily accessible manner can become vital tools in your day-to-day business not only on the project to which they pertain, but in performing services on other projects as well. If you have performed calculations and completed research on one project, the calculations and research may very well have applicability on your other projects.

Even without creating a subject matter index or filing system, you may be able to remember files that you personally worked on that can provide useful information to assist you in performing services on other projects. But others in your office who don't know about your files won't have access to this information unless it is maintained someplace other than your memory.

By creating (and maintaining) a basic indexing system (manual or electronic), a firm can make records more accessible to everyone in the firm. Computer software programs can facilitate the searching of words or tables of contents in certain electronic documents. Even without sophisticated software, much can be done to organize records for future reference.

With time and age, memories fade, but the recorded, filed, written word lives on. Establish a system to access records and you reduce the amount of time and work needed to perform the new services. It also provides some enhanced quality control particularly if the previous briefs had proved to be winners. This translates into more cost-effective services for the current client. When these notebooks are placed on the library shelves for others in the office to use, and when electronic files are put onto external hard drives, USB flash drives, or CDs, where they can be accessed by others, the benefits are multiplied. (Note that if you give up ownership and copyright of your work product to the project owner, you may deprive yourself of the ability to re-use your own work on other projects and defeat the benefits referenced above).

3.3 Organizing Electronic Files

For easy access and retrieval, your electronic data files including drawings, specifications, correspondence, memoranda, e-mails, and other types of documents should be carefully filed in electronic folders on either a computer network or hard drive, or external hard drive, USB flash drive, or CDs. Use of e-Rooms and cloud storage are also means of organizing and saving data for retrieval. If you are operating in an office environment, saving the files to a network is usually the safer course because networks are typically backed up more frequently than hard drives.

If your documents are co-mingled with electronic files from other projects or other general files, you may be required to give the requesting counsel access to your entire computer or e-mail

system, unintentionally giving them access to sensitive information that is not even related to the case at hand. This could even be embarrassing if you have been keeping personal information and correspondence on your computer. Keep project specific files separate and apart from all other non-related files.

If you're using your home computer to do work for your employer, understand that the electronic files that you are creating for your employer's business become the responsibility of your employer for purposes of document control and document discovery. If you don't want to risk sharing the contents of your entire computer with strangers (and attorneys opposing your firm), it is advisable that all data related to your employer's business be kept in separate electronic folders while you are working on them, and then moved from your computer's hard drive onto CDs, USB flash drives.

3.4 Keep Attorney-Client Privileged Files Separate From Others

If you're receiving advice from legal counsel during your project, it's important that correspondence between you and your counsel be maintained in a manner that will enable you to distinguish them from your general office files later. They should be marked as confidential, Attorney-client privileged, Attorney work product, or other such designations so that you and others in your office will recognize that these documents are not to be given to a requester during discovery before your attorney has an opportunity to review them. If these documents are copied and put into numerous files around the office or jobsite trailer, there is a significant chance that some of them will be inadvertently revealed during discovery.

It is not the purpose of this book to study the details of the attorney-client privilege, or the ethics of how to handle privileged documentation that may be inadvertently given to the requester. It is better to manage the documentation so that it does not become necessary to argue over it later. By keeping documents properly segregated, your attorney will be able to review them and make a decision concerning how they are to be handled during discovery.

Typically, your attorney will provide a letter to the requester identifying the documents for which the privilege is claimed. This permits the parties to argue over the matter before a judge, if necessary, but it at least prevents the documents from getting into the hands of the requester unless and until a judge orders them to be released.

3.5 Document Contract Negotiations

The "parol evidence" rule generally prevents evidence from outside the four corners of a signed contract from being used during litigation to attempt to change or alter the terms of the contract. Despite this rule, however, there may be times that documentation between the contract parties may be accepted by a court as evidence.

In one case, the architect and property owner exchanged multiple versions of contracts for designing and building a large house. While the architect started its design, the parties continued haggling over the contract terms. They never signed a contract. Ultimately, the owner terminated and replaced the architect. The second architect used the original architect's design documents to complete the final design and construct the house.

In a suit alleging copyright infringement, the original architect was permitted by the court to present a series of letters and draft contracts that had been transmitted back and forth between the architect and owner. These persuaded the court that the architect did not intend to give up ownership and copyright to the drawings. This case demonstrates the importance of maintaining copies of documents that were generated prior to contract finalization. These can, in some cases, assist the parties and the court in determining the intent of the parties.

3.6 Web-Based Systems

Web-based project management systems are becoming widely used on large construction projects, and even for projects that are not so large. A survey by one provider of web-based systems found that the reasons customers used their system included: it plays a role in eliminating or reducing the barriers and delay points in communications, workflow, and processing information and documentation; (b) it reduces claims and litigation; and (c) it increases productivity.

With respect to increasing productivity, web-based systems have been credited with: (a) making it quicker to submit and turnaround RFIs; (b) reducing barriers in communications; (c) automating document creation; and (d) reducing the time it takes to find files and documents. 99% of the survey respondents stated that the system has improved document management and thus improved the firm's ability to manage risks and reduce claims and litigation.

Using electronic data and storage, it is possible to store all kinds of documents correspondence, RFIs, minutes, notes, and logs with relatively little effort for long periods of time.

Because electronic data tends to lose integrity over time, however, it may be advisable to duplicate the disks periodically over the years of storage. It is also generally advisable to maintain hard copies of the final instruments of service in order to have a standard against which to benchmark any electronic files that may have been given to the A/E's client or others. In fact, retaining the hard copies may the best (or even only) way to protect against a client's future suit that alleges the electronic data is defective.

3.7 E-mail

E-mail as a form of project documentation runs the gamut from being highly effective to extremely dangerous or even disastrous for the unwary. It is so fast and easy to use that it has become the principal mode of communication on many projects. Some firms swear by it and others swear at it. Why is there such a difference of opinion and why are the results so variable?

E-mail can be a good way to communicate. With oral communication, the speaker may not be certain that the listener really understood and received the message the speaker intended to send. With e-mail, you see, in writing, what someone is saying. You get to respond in writing. And the other party can fire back a quick note telling you that you misunderstood and got the meaning all wrong. With a quick series of written messages, the parties can easily figure out (and even document) what each is saying and come to an agreement on what they intend to do.

Participants in construction projects must understand that when they communicate by e-mail, they are creating a document that may very well become a project record. Such a document may be used as key evidence in proving or defending claims. E-mail may be entered into evidence in

litigation. With that in mind, it must be handled with due care. Some simple rules for dealing with e-mail include:

(a) Be careful what you write. Think before you automatically type the first thoughts that go through your mind. Don't write anything that you would not be proud to see published in the newspaper the next day.

(b) Don't be too informal. Be careful, for example, about the use of politically incorrect language, jokes, and remarks that may seem funny to you but boorish to others.

O.J. Simpson was found not guilty by a jury that probably couldn't help but be angry about prejudicial remarks made by the key investigating detective for Los Angeles.

Microsoft was found liable for monopolistic, anti-competitive practices by a trial court judge who later told the press that Bill Gate's e-mail messages proved he had not been honest in his oral testimony. Ironically, the judge's comments to the press proved to be imprudent, and an appellate court accepted an appeal from Microsoft based at least in part on its concern about the judge's comments.

(c) Check your spelling and grammar including punctuation before you click send. Write with the thought that this may be the only document a judge or jury will ever see in support of some issue of vital importance to the case. Provide a subject matter line, an addressee line, a proper salutation, and a proper closing.

(d) Get approval first. If your document was a memorandum rather than an e-mail and the agreement of others would be necessary before you distributed it, get those individuals to concur with your e-mail before you send it.

(e) Don't add additional services to your scope based on e-mails from people who do not have the contractual authority to assign additional services or approve change orders. E-mail messages are not deemed acceptable substitutes for properly executed approvals for additional services or properly executed change orders.

(f) If your contract calls for the use of specified procedures for requesting information and scope changes, use those procedures. Don't use e-mail as a substitute.

(g) Organize your outgoing and incoming e-mail into electronic folders for easy access and retrieval. If you co-mingle personal and work-related e-mails, you may be required during litigation to provide all of your e-mail messages.

(h) Print e-mail messages and put them into appropriate files for future reference. Electronic folders may be accidentally destroyed or lost. If the message is evidence of some decision or matter of potential significance, it should be saved with other documents addressing that issue in a form that will not be accidentally or inadvertently lost.

(i) Delete e-mail from your system and erase it from any back-up tapes or other disks, computers, and servers in a manner consistent with your corporate records purging/retention policy.

Contrary to what some people think, e-mail is not just a temporary document that lives in the nether world of the electronic universe. Even after e-mail messages have been deleted from your computer, they may still be retrieved from a server in some other location.

Another confounding issue is that the e-mail you thought was a private communication between you and one other person may get forwarded either intentionally or accidentally to others. Before you know it, your little message is being read by half the world. You might recall that during the Senate hearings of Oliver North regarding the Iran-Contra scandal, senators demanded to see his e-mail. He responded that it had all been deleted from his computer much earlier. To his surprise, the government was able to use some simple disk utility programs to resurrect his dead e-mails. It seems that e-mails have a life of their own.

To permanently destroy e-mail, consult with an experienced IT adviser. There are ways to delete it, erase it, and re-record over it to make its deletion more permanent. But be careful that you don't erase e-mails that may be subject to discovery requests in pending claims. This is discussed in greater detail below.

Chapter 4

Records Retention, Destruction & Litigation

4.1 How Long Must Records be Kept?

Time periods established by state statutes of limitations and statutes of repose can be useful guides in determining how long to maintain project records. State statutes of repose typically bar claims that are brought more than a specified number of years after substantial completion of construction.

Time periods vary from state to state, with each state statute being different with regard to the time limit, who is covered by it, and for what kinds of services or work. As a general rule, if a statute of repose applies to your services or work, you should maintain significant project records at least through the end of the time period established under that statute. It may be prudent, however, to maintain records for an even longer period. If you are working under a contract for a federal, state or local government or agency, for example, you may have statutory or regulatory obligations to maintain your records for a significant number of years beyond what you might normally expect.

4.2 What Documents Must be Given in Response to Discovery Requests?

When you receive a document production request in the course of a claim or litigation, you are required to provide copies or access to not only those documents that are part of your official file, but also to those copies that may be in working files, desk drawers, job-site trailers, workers' homes, computers at the office and home, and any other documents that pertain to the request. As owner of these records, you have the responsibility to locate them and make them available to those who are requesting them through discovery.

There have been a number of cases where the documents most vital to the plaintiff's case were found in the home of one of the defendant's employees. If the plaintiff locates such a document after the defendant denied its existence or otherwise failed to produce it, the court could impose sanctions against the defendant.

In federal courts, as well as in many state jurisdictions, parties to litigation are required to provide the other party with all documents relevant to the case, even if not requested to do so by the opposing counsel. This creates an affirmative duty on each party and requires due diligence in reviewing your records and providing access to the other side. This duty makes it all the more important that you establish and follow a formal records retention policy so that you do not

unnecessarily create an obligation to give someone records that should have long since been destroyed.

4.3 Records Retention and Negligent Spoliation of Evidence

There can be serious liability and potential sanctions for intentionally destroying evidence to avoid discovery of damaging information. The newspapers are full of reports about corporations and accounting firms that have allegedly destroyed records in order to prevent shareholders, courts, and even congressional committees from seeing those records that might contain embarrassing or damaging information. In some particularly egregious situations, it is argued that the destruction of records may even constitute a crime punishable with prison sentences.

Courts in some states recognize a tort of negligent spoliation of evidence. *Foster v. Lawrence Memorial Hospital*, 809 F.Supp.831 (D.Kan.). Some of the factors considered by the courts in deciding whether to impose liability for negligently destroying evidence include the following: (1) there was a duty to maintain the evidence imposed either by law or contract; (2) a potential claim or law suit existed; (3) evidence has been destroyed; (4) the ability of the plaintiff to prove its case has been significantly impaired by the destruction of documentation; and (5) the plaintiff has suffered damages as a result of the document destruction.

In *Kirkland v. NYCHA*, 236 A.D. 170, 666 NYS 2d 609, a New York court held that dismissal of a suit was an appropriate sanction against a litigant who disposed of evidence before its adversary had an opportunity to inspect it. This was held to be so regardless of whether the destruction was done intentionally or negligently.

Implementing a document retention policy and practices to consistently follow that policy are important risk management tools. Records might be routinely purged from your files and destroyed as part of your standard business practices. It might be deemed inappropriate to destroy the same records in the absence of an established procedure.

At some point, you may be in litigation where the plaintiff asserts that you destroyed records that once had been a part of your files. In such a situation, the court may consider not only whether you had a records retention/records destruction policy, but also whether the specific destruction of records at issue was done pursuant to that policy, and whether the records were destroyed before or after you knew of the dispute.

A records retention policy that is designed and carried out in good faith in the ordinary course of business may provide you an excellent defense to claims of spoliation of evidence. But remember that if you are in litigation or a dispute with either your client or a third party, or if there is an investigation or audit by a governmental agency, you must preserve the records rather than following the scheduled document destruction policy.

Once a "records retention" and purging policy has been established, it is important to consistently review your records on a periodic basis to make sure you comply with the policy. Purge and destroy those records that the policy states are to be purged, and faithfully file and maintain those records that are still to be maintained pursuant to that same policy.

Firms have gotten into trouble for destroying records on the eve of discovery by an opposing party even though they may have been able to destroy those same records years earlier pursuant to the firms' formal records retention policy. A records retention policy is no good unless you use it

contemporaneously and consistently. In fact, a records retention policy can be used against you if you destroy records in a manner inconsistent with that policy.

It is necessary to apply record retention policies consistently to each project and to all of the documents covered by the policy.

When purging records from your files in the ordinary course of business, pursuant to a proper records retention policy, care should be exercised in how the records are disposed. Copies of confidential client records should not be thrown into the trash or recycle bin where they might be improperly viewed and used by other individuals. They should be shredded or otherwise destroyed. There have been unfortunate situations where careless disposal has resulted in client-confidential information being released into the hands of the public.

We see then that records can protect you in the event of misunderstandings by others on the project, and can help you to prosecute or defend a case in the event of litigation. Some forms of documentation may also hurt you, especially if they have been imprudently written or maintained. Create clear and temperate communication through written and electronic documentation. This will help you proactively manage any future disputes and litigation and improve the communication and management within your firm and with your clients and others.

4.4 E-Mail Confidentiality and Discovery During Litigation

As a general rule, computerized data is discoverable. Thus, even if a party produces a hard copy of electronic evidence, he or she may still be required to produce the electronic version. Examples include *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp.2d 1050 (S.D. Cal. 1999) and *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 52 Red.R.Serv.3d 168 (2002 WL 246439 (E.D. La)).

Numerous confidentiality issues arise in connection with the use of e-mails. There are many stories about e-mail being accidentally sent to the wrong recipient. Correctly distributed e-mail is often easily forwarded with the click of a button to people never anticipated by the originator. A supervisor ends up with a forwarded copy of a disgruntled employee's e-mail to other employees, for example. Or in the context of litigation between parties, someone inadvertently forwards a copy of an internal e-mail to counsel for the opposing party.

At a minimum, when sending e-mail that you believe contains confidential or privileged information intended only for the eyes of the recipient, it is wise to include a confidentiality and privilege notice with the message, as well as a statement requesting that if someone other than the intended recipient receives it they are to advise you of the error and destroy the message. An example of such a notice is as follows:

> This e-mail/telefax message and any documents accompanying this transmission contain ATTORNEY-CLIENT PRIVILEGED INFORMATION and ATTORNEY WORK PRODUCT. It is confidential information and is intended solely for the addressee(s) named above. If you are not the intended addressee/recipient, you are hereby notified that any use of, disclosure, copying, distribution, or reliance on the contents of this e-mail/telefax is strictly prohibited and may result in legal action against you. Please reply to the sender advising of the error in transmission and immediately delete/destroy the message and any accompanying documents. Thank you.

When sending e-mail, we need to be mindful of who may gain access to the message and any attached documents. We also need to be aware that when the message is deleted from the e-mail folders of the sender and receiver, it may still exist on e-mail servers and computers elsewhere, as well as on backup disks or tapes.

We have learned from recent case law, such as the two cases cited above, that parties to litigation are required to provide their electronic documentation to counsel for the opposing party, and to maintain and preserve such documentation just as they would paper documentation. The electronic documentation must also be presented in a usable manner.

In the *Fluor* case, the court stated that computer back-up tapes containing e-mails would have to be reformatted at the cost of the party that made them, so they could be read by the other party.

A number of courts have issued adverse sanctions against parties for deleting electronic documents that were subject to discovery in litigation. If you are creating a document retention policy, it should address maintenance and retention of electronic documentation (including e-mail) just as it does paper records.

Chapter 5

Current Issues and Recent Case Law Affecting Design Professionals

5.1 Certificate of Merit

Many states require that when a complaint is filed against a design professional, an affidavit of an expert must be filed simultaneously (or within a short period thereafter) stating that in the opinion of the expert the defendant design professional failed to meet the standard of care for the design professional services that are the subject of the complaint.

In a case by a contractor against a consulting firm that performed independent inspection services of the construction work, the Nevada Supreme Court held that the services constituted professional services, that the inspector met the definition of a design professional under the state statute, and that failure of the contractor to file an expert affidavit/report with the complaint was a fatal error that required the complaint to be dismissed with prejudice. *City Center v. Converse Professional Group*, 310 P.3d 574 (NV 2013).

Other states, such as Maryland, require a certificate of merit be filed, but instead of dismissing with prejudice, the case is dismissed without prejudice in the event that the certificate has not been timely filed. That means the plaintiff can file a new complaint against the design professional, so long as the statute of limitations has not lapsed.

5.2 Standard of Care

The standard of care is generally established by common law as being the generally accepted standard that would be applied by design professionals performing similar services under similar circumstances. The design professional agreement, however, can potentially increase what is required and thereby heighten the standard of care and create uninsurable risk, as explained in the discussion later in this book concerning standard of care clauses. But the agreement can likewise help establish and limit the standard of care by carefully defining the scope of service.

In one recent case, the court held that the contract set forth the standard of care as "the degree of skill and care and diligence normally employed by professional engineers or consultants performing the same or similar services."

Based on this contract language, the court held "the standard of care was limited to the degree of skill and diligence normally employed by professional engineers performing the same or similar services, namely, replacing the bridge deck — [and] replacing the bridge deck did not include improving the bridge deck or considering or adding a Jersey barrier."

For these reasons, the court found the appellate court incorrectly permitted the plaintiff's expert witness affidavit to attempt to raise a question of fact whether the engineer's standard of care required it to improve the bridge to include a Jersey barrier.

The court concluded that the scope of the engineer's duty is defined by the contract between it and its client and that the question of whether the standard of care is met is appropriately addressed on summary judgment motion rather than permitting expert testimony to be considered by a jury as a fact question to decide whether the expand the engineer's services and duties beyond those stated on the face of the contract. *Corrine Thompson v. Christie Gordon*, (N. 110066, Sup. Ct. Illinois, January 21, 2011).

This case demonstrates the importance of crafting a detailed scope of service and then adhering to that scope.

5.3 Indemnification

Professional consultants are judged by whether or not they satisfied the professional standard of care (i.e., were not negligent in the performance of their services). That is what is covered under a professional liability policy; therefore, it is critical that the indemnification obligations be limited to damages to the extent caused by the consultant's negligence. Anything more is barred from coverage pursuant to the contractual liability exclusion of the professional policy. By agreeing to more than that, the consultant effectively agrees to a higher standard of care that is uninsurable.

Under the common law of the states, the professional consultant is not held to a standard of perfection, but instead is required only to meet the generally accepted standard of care.

Language is sometimes buried deep within the insurance article of a contract that states the consultant must provide insurance with contractual liability coverage for the indemnity agreement. This is not acceptable for professional liability, as those policies do not provide such contractual liability coverage for defense costs. Additionally, they will not cover damages within the indemnity costs other than what would have been incurred in the absence of the contractual indemnity provision.

5.4 Strike Any "Duty to Defend" Language

There is no common law duty of a consultant to defend its client against third-party actions. That duty can only arise as a result of a contractual liability created through the indemnification clause of the contract. Since this is a contractual liability, it is excluded from coverage pursuant to the contractual liability exclusion of the errors and omissions policy.

Courts interpreting indemnification provisions that include "duty to defend" language have explained that this means the consultant must defend its client (i.e., pay legal fees on behalf of) as the litigation is ongoing. It cannot wait until the conclusion of the litigation to determine whether the consultant is found to have negligently performed services and therefore owe a separate duty to

indemnify. The courts see the duty to defend and the duty to indemnify as two separate and unique duties.

The professional liability insurance policy only covers damages to the extent they are caused by the consultant's negligence — and that determination can only be reached at the conclusion of the case or by settlement to which the carrier agrees.

Although it is theoretically possible that the damages awarded by a court might include some attorney's fees if there is a statute that requires the same, attorney's fees are generally not awarded as part of a judgment in the American system of justice. Therefore, a clause stating that the consultant will defend (pay on behalf of) or indemnify (pay attorney's fees after judgment is rendered) may create uninsurable liability.

Agreeing to defend on behalf of a client, however, is the far worse situation. The consultant would be paying out of its own pocket its client's attorney's fees as they are incurred to defend against a third-party claim. Ultimately, that claim might not even be found to have been caused by the consultant's negligence.

Typical advice to professional consultants from risk managers and insurance professionals is that any duty to defend the client pursuant to an indemnification clause, or other provision of the contract, is uninsurable pursuant to the contractual liability provision of the contract. Therefore, it should be struck from the contract language accordingly.

In most states it is not good enough that the contract states that the duty to defend and indemnify is limited to damages resulting from the negligent performance of professional services.

Even where the trigger is limited to "negligent performance," a court could reasonably interpret the duty to defend to be such a broad duty that the consultant could be expected to begin defending a claim on behalf of its client (paying attorney's fees as they are incurred) as soon as any allegations of negligence are made. This could be true regardless of whether those allegations are frivolous and ultimately disproved.

Please note, however, that the result varies from state to state, and is therefore important to obtain legal advice from an attorney knowledgeable about the applicable state law.

5.5 Limit the Indemnification to Third Party Claims

Does a typical indemnification clause that requires a party such as a contractor or design professional to indemnify its client for damages the client sustains due to the actions of Indemnitor apply only to damages resulting from third party claims against the client, or does it apply even if there is no third party claim but the client suffers a loss due to the Indemnitor's actions?

Historically, it was generally understood that indemnification was only to apply to damages resulting from third party claims against the indemnified party. But several recent cases around the country are concluding that indemnification is broader than that.

Some courts are interpreting contracts to require indemnification for damages and losses the Owner sustains even if there is no third party claim involved. To avoid that result, it may be advisable to add language to the indemnification clause of the contract to specifically state that they

indemnification only applies to the damages the client sustains as a result of third party claims to the extent caused by the design professional's negligence.

5.6 Limitation of Liability

An important tool to protect a design professional from damages far exceeding the value of the contract is the limitation of liability (LoL) clause. The enforceability of these clauses varies from state to state. But generally speaking, when the parties to the contract are two commercial entities with equal bargaining position, the courts in most states look favorably upon such a clause.

For example, an architect's contract containing a limitation of liability (LoL) clause was enforced to grant a partial summary judgment limiting the architect's liability to $70,000 in the face of a $4.2 million claim for damages due to structural problems that required a nearly completed hotel to have to be demolished. The U.S. Court of Appeals for the Seventh Circuit, in the case of *Sams Hotel Group, LLC v. Environs, Inc.,* 716 F.3d 432 (7th Cir. 2013), held the LoL clause in question applied to claims arising out of the indemnitor's own negligence.

In this case, the court explained the distinction between an exculpatory clause that removes all liability from a party, in contrast to an LoL clause that allows damage – even if only nominal in comparison to the total damages claimed. Applying Indiana law, the court stated that parties have freedom of contract and that "includes the freedom to make a bad bargain."

To allow the plaintiff to get out from under the bargained for LoL clause here, said the court, "would permit an end-run around Indiana's economic loss rule and [plaintiff's] own contract with [the design professional]."

It is important in drafting LoL clauses to specify each type of cause of action to which the LoL applies, including, for example, tort, negligence, breach of contract, and breach of warranty. Courts generally enforce the clause exactly as written.

Some courts will find that if the LoL states it applies to all causes of action, this is unenforceable against negligence claims because the clause did not specifically state it applied to negligence. It is important to be familiar with the requirements of the applicable state law when drafting LoL clauses for contracts.

5.7 Site Safety

Who is legally responsible for project site safety? Contractors, design professionals and project owners all have different roles and responsibilities when it comes to site safety. Responsibility and liability can arise under both statutory and common law. Contract terms and conditions may also be the basis by which parties become responsible for site safety. In addition, actions by parties in the project field may establish responsibility, even if such responsibility would not otherwise exist by law or contract terms.

Construction contractors typically have overall responsibility for project safety. Project owners generally limit their own safety responsibility by contractually making the contractor and design professionals "independent contractors" such that the owner is not responsible for their actions.

indemnify. The courts see the duty to defend and the duty to indemnify as two separate and unique owners stating that the consultant is not responsible for the contractor's means, methods and procedures—including matters of safety, and the contractor is solely responsible for site safety.

Despite such contractual language, injured construction workers often seek to recover damages from entities other than their employer so they can obtain more than would be available under workers compensation.

Design professionals and professional consultants also need to take precautions against accepting responsibility for the safety of anyone other than their own employees. Numerous court decisions have addressed the question of whether a firm such as an architect, engineer or CM has liability for someone else's employee despite not being directly or even indirectly responsible for causing the injuries.

The first question addressed by courts is whether the contract between the consultant and the project owner established consultant safety responsibilities. Even if the contract language clearly states that the consultant has no responsibility for project site safety and the contractor is solely responsible (e.g., AIA B 101-2017, § 3.6.1.2 and AIA A 201-2017, § 11.1.4), the court will not stop there with its analysis. Rather, the courts will look at the facts of the case to determine whether the consultant did anything or should have done anything in the field during construction affecting site safety.

A recent decision will be discussed here to give an example of what the courts may consider when determining whether a design professional or construction manager has taken on responsibility for the safety of others. A construction manager (CM) is not liable for injuries suffered by a contractor's employee where the CM's contract with the project owner did not establish CM contractual responsibility for jobsite safety and where:

(1) the contractor's contract with the Owner stated the contractor was the controlling employer responsible for its own safety programs and precautions for its employees and that the CM responsibility did not extend to direct control over or charge of acts or omissions of the subcontractor and its employees, and

(2) the CM did not undertake any extra contractual responsibility in the field that would have created any legal duty or responsibility for the safety of all employees. These types of cases are rather typical where an employee can only recover workers compensation benefits and cannot sue its own employer – thus setting the stage for an attempt to obtain greater damages by asserting that someone other than the employer is at fault – such as the CM or possibly a project owner.

In *Hunt Construction Group, Inc. v. Garrett* (964 N.E. 2d 222, Indiana 2012), an employee of a concrete contractor (Baker Concrete Construction, Inc.) was injured in a workplace during construction of a stadium. While removing forming material from concrete, one of her co-workers dropped a piece of wood that struck her on her head and hand.

Although employed by Baker, she sought to recover from the CM (Hunt). She alleged that the CM had a legal duty of care for jobsite-employee safety. The CM's only contract was with the project owner. It had no contractual relationship with Baker Concrete or any other contractors on the project.

indemnification only applies to the damages the client sustains as a result of third party claims to vicariously liable for the actions of Baker Concrete that led to the claimant's injuries. On appeal, the appellate court reversed the trial court's judgment on vicarious liability, holding that the CM did not become liable for the contractor's safety responsibilities merely because CM safety representatives inspected the site daily for violations of the project safety program and conducted safety committee meetings.

The court found that where the contract did not obligate the CM to provide jobsite safety, the CM would not be deemed to have legally assumed a legal duty of care for safety unless it undertook specific supervisory responsibilities beyond those set forth in the original construction documents.

In deciding whether the CM owes a duty, the court explained that it focuses on determining "whether (1) such a duty was imposed upon the CM by a contract to which it was a party and (2) the CM assumed such a duty, either gratuitously or voluntarily." In this case, the court found that no legal duty of care for jobsite-employee safety was imposed upon the CM by any contract to which it was a party. The court said:

> "First, the CM contract itself did not specify that the CM had any responsibility for safety whatsoever. Second, counterpart construction contracts signed by the contractors and subcontractors indicated that they had responsibility for project safety and the safety of their employees. Third, those contracts expressly disclaimed any direct or indirect responsibility on the part of the construction manager for project safety."

Although there were safety requirements in the CM contract, the court noted "But none of the safety provisions in the CM contract here impose upon Hunt any specific legal duty or responsibility for the safety of all employees at the construction site."

In fact, the contract supports the opposite conclusion according to the court, which stated:

> "Hunt's contract expressly states that its CM services are to be 'rendered solely for the benefit of [the client] and not for the benefit of the Contractors, the Architect, or other parties performing Work or services with respect to the Project.' Moreover, the contract provided that Hunt was not 'assuming the safety obligations and responsibilities of individual contractors,' and that Hunt was not to have 'control over or charge of or be responsible for … safety precautions and programs in connection with the Work of each of the Contractors, since these are the Contractor's responsibilities.'"

The court concluded: "In short, Hunt did not undertake in its contract a duty to act as the insurer of safety for everyone on the project. Rather, Hunt's responsibilities were owed only to [the Client], not to workers…."

The court also pointed out that with regard to the CM's responsibility to review and monitor the contractor's safety programs, the contract reiterates that Baker Concrete was "the controlling employer responsible for [its own] safety programs and precautions", and Hunt's reviewing and monitoring of these programs did not "extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors…."

It is important to note that the court was quite critical of what it called the plaintiff's "all-or-nothing" proposition that by agreeing to certain safety items in its contract with the Owner the CM

had become responsible for all jobsite safety – including that which pertained to employees of contractors. In rejecting that argument, it suggested that if this argument were accepted and CM's were made liable in situations like this one, this would be bad for jobsite safety.

As explained by the court,

> "[S]afety at construction sites, especially at large public-works projects like this one, should not be sacrificed for fear of exposure to liability. The contract at issue here reflects a way of promoting safety without exposing construction managers to suits like this one. We agree with Judge Friedlander that the position advanced by [claimant] would 'make it virtually impossible for a contractor taking on the role of construction manager to limit its liability so as not to become an insurer of safety for workers of other contractors.'"

Having determined that the CM owed no contractual duty for jobsite safety, the court next focused on whether the CM undertook such responsibility by its actions in the field. As stated above, the court found that the CM did nothing in the way of safety actions that went beyond the requirements of its contract. Consequently, the CM had no liability based on assumed site safety responsibilities.

This case once again demonstrates the importance of having contract language that clearly delineates what job site safety requirements apply to the contractor and what apply to the construction manager. As shown by the example of the plaintiffs arguments in this case, even where there is good contract language, a creative argument may be made that the construction manager somehow exercised jobsite safety responsibilities that went beyond what was contractually called for, and that in doing so the CM assumed responsibilities (and consequent liabilities) related to the actions taken by CM staff in the field related to site safety.

In this case, even though the CM did indeed participate in site safety meetings and do site safety reports and other safety related activities, the court found that all of these were within the scope of the contractually agreed upon services performed strictly for the benefit of the owner-client and not for the benefit of employees of any of the contractors. This seems to be the key in many of these decisions – that the CM demonstrates that by its contract and by its actions in the field it was only serving the interests of its client and not anyone else.

5.8 Inspections and Site Observation

When drafting language concerning the professional's role during construction phase services, much can be learned from a decision by the Court of Appeals of Texas in *Black + Vernooy Architects v. Smith*. An earlier decision by the same court in this case held that an Architect could be liable to a young woman who fell 20 feet and sustained permanent injuries when she fell from a balcony due to defective construction work that the Architect failed to report to its client – the homeowner – during its construction administration services.

That earlier decision appeared to find that the third party had rights as a third party beneficiary of the Architect/Owner agreement and also had rights under the common law as a foreseeable person that could be injured from defective work. That holding was such an extraordinary deviation from normal case law, that the court was persuaded to reconsider its decision.

On reconsideration, the court reached the opposite conclusions from the previous holding – finding that the AIA B141 (1997) contract between the Architect and Owner only created

contractual obligations of the architect to the owner, and it expressly precluded any third party beneficiary rights. It should be noted that the current AIA B101-2017 contains similar language, but actually has improved upon the language of the B141 by removing the statement that the design professional is to "endeavor to guard" the client against a contractor's defective work.

As to the alleged common law duty, the court held there was no such duty because even if the plaintiff was a foreseeable user of the balcony that likely would be injured from defective work, the architect owed her no independent duty of care under the circumstances – particularly because the Architect did not perform the defective construction and its contract did not give it control over the contractor who did the work. The court found the Architect did not notice the defects and it therefore did not violate its contract that only required it to report to the Owner "known deviations."

The court quoted extensively from the AIA contract and explained that, based on the contract language, it was clear that Architects were not guarantors or insurers of the contractor's work, but that the plaintiff's theory of the case would be to render Architects guarantors. Nailing this argument, the court concluded,

> "The duty sought by the [plaintiff] would expose the Architects to lawsuits brought by parties that the Architects could not have identified at the time of entering into the contract. To protect against liability, the Architects would have needed to effectively take on the duty of care of a guarantor so as to ensure that all critical matters were fully observed."

The court further observed that:

> "Holding the Architects liable would also have the consequence of curtailing the freedom of homeowners and architects to establish by contract the nature and scope of an architect's services."
>
> "If the homeowner had desired for the Architects to be guarantors they could have contracted for such services, says the court, "and would likely have to pay a higher fee…."

The court further explained:

> "Under this type of agreement, the owner obtains an architect's assistance without having to pay for a full guarantee, and the architect provides assistance without having to incur the type of liability involved with providing a guarantee. Imposing the type of duty suggested by the [plaintiff] onto architects under the type of industry-standard agreement at issue in this case would reduce the likelihood that architects would agree to enter into such agreements in the future or, at the very least, increase the compensation required for the architect's services, despite the significant social utility of such agreements."

For these reasons the court withdrew its 2010 decision and issued *Black + Vernooy Architects v. Smith*, 346 S.W. 3d 877, (TX 2011), and decided in favor of the architect, thus reversing the judgment of the district court.

There was never any question concerning the architects' design. The problem was not the design but rather the fact that the contractor's balcony subcontractor failed to follow the very clearly delineated design details for the balcony of the vacation house.

The design drawings required that the metal pipes supporting the balcony be welded to steel plate tabs, which would then be bolted to the balcony. As constructed, however, the metal support pipes were attached to the balcony using thin metal clips.

The design drawings also required that a metal support piece, referred to as a "joist hanger," be used to reinforce the attachment of each of the balcony joists to the exterior wall of the house. In the actual construction of the balcony, however, no joist hangers were used. Although required by the design drawings, the balcony handrail was not bolted to the house.

Finally, the design drawings called for the balcony to be attached to the exterior wall of the house by bolting it to a one-and-one-half-inch-thick rim joist and another one-and-one-half inches of wood blocking. Contrary to the plans and specifications, the contractor did not attach the balcony to the house with bolts, a rim joist, and blocking, but was instead nailed to a one-half-inch piece of plywood.

A year after the vacation house was completed, two young women stepped onto the balcony and a few seconds later the balcony separated from the exterior wall of the house and collapsed, causing the two women to fall approximately 20 feet to the ground, where one was rendered a paraplegic as a result. They sued the homeowner and general contractor, along with the architects. The owner and contractor agreed to a settlement of $1.4 million, but the architects did not settle.

The case against the Architects went to a jury trial that determined the architects to be 10% responsible for the injuries on the basis of negligent performance of its contractual duty to perform construction administration services. In reviewing the mater on appeal, the appellate court stated, "We have only been asked to decide whether the contractual duty that the Architects owed to the homeowners also extended to the [plaintiffs]."

In reviewing whether the architects had any contractual liability, the court focused squarely on contract language which called for "periodic site visits" for the purpose of reporting "known deviations from the Contract Documents."

The court noted the significance of the fact that the language did not call for continuous site visits. The 1997 version of the AIA B141 stated that the Architect was to perform its services "to endeavor to guard … against defects and deficiencies" and to determine "generally" whether construction of the home was being done in accordance with the plans and specifications.

In the 2010 decision of the appeal, the court suggested that this "endeavor to guard" language created a greater duty on the part of the architects. This time around, however, the court found that language did not change the limited purpose of the architects' services as otherwise stated in the contract, or increase the scope of the services to extend to the benefit of anyone other than the owner.

In this regard, the court quoted language from the agreement stating that "[n]othing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of any third party…."

contractual obligations of the architect to the owner, and it expressly precluded any third party the contract intend that to be so and entered into the contract for that third party's behalf. In this case, the contract reveals that no third party beneficiary status was intended to be granted to anyone.

For these reasons, the court concluded that when they entered into the contract the Architects assumed no contractual duty to third-parties to the agreement.

With regard to any potential common law duty allegedly owed by the architects to the plaintiffs, the court noted that in the absence of contractual authority to control the contractor and the absence of actual control of the contractor in the field, the architects could have no responsibility for the contractor's defective workmanship. The court characterized the plaintiff's argument as follows:

> "[Plaintiffs]urge that the Architects' owed a legal duty extending to them as house guests because they were 'foreseeable users.' In addition, the Smiths assert that due to the dangers resulting from faulty construction and due to the public's reliance on architects, 'public policy' demands that contractual privity not be an indispensable requirement for a duty of care to houseguests, or other for[e]seeable users of the balcony."

The court acknowledged that the plaintiffs might be foreseeable users of the balcony, but nevertheless concluded:

> "[F]oreseeability and likelihood of injury are not the only factors to consider when deciding whether a duty exists. Rather, the risk, foreseeability, and likelihood of injury are to be weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the "actor." The "right to control" consideration weighs against extending an architect's duty to third parties in this case."

As explained by the court,

> "Specifically, the agreement provided that the Architects "shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work." Instead, the agreement explained that those obligations "are solely the Contractor's [ ] rights and responsibilities." Further, the agreement specified that the Architects were responsible for their own acts or omissions but that they "shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work."

Similarly, the agreement stated that the Architects were not "responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents." In addition, the agreement explained that neither the authority bestowed on the Architects by the agreement "nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect[s] to the Contractor, Subcontractors, … their agents or employees or other persons or entities performing portions of the Work."

In contrast to the agreement between the Architects and the Owner, the construction contract between the Owner and the contractor gave the contractor the absolute right to control the worksite and the means of construction and also imposed on the contractor significant supervisory responsibilities and liability.

As further explained by the court,

> "Specifically, the agreement stated that Nash "shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect[s] … or by tests, inspections or approvals required or performed by persons other than the Contractor." Moreover, the agreement also explained that Nash "shall supervise and direct the work[;] …. shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work[;] …. shall be responsible to the [Owner] for acts and omissions of [Contractor's] employees [and] Subcontractors[;]" and "shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition." In addition, the agreement provided that [Contractor] "warrants to the [Owner] and [the] Architect[s] … that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents." Finally, the agreement explained that the "Contractor shall indemnify and hold harmless the [Owner and the] Architect[s] … from and against claims, damages, losses and expenses … to the extent" that the claims, damages, or losses were "caused by the negligent acts or omissions of [Contractor or] a Subcontractor."

The next step in this analysis was the court's conclusion that nothing in the record established that the Architects exercised actual control over the construction of the balcony.

One final argument of note by the plaintiff was that by signing certain payment certifications the architects had expanded and exceeded the contractual scope of service. According to the court, "As proof that the Architects exceeded the scope of the agreement, the Smiths point to the language in some of the certificates that stated that the Architects had 'inspected' the construction."

In rejecting this argument, the court stated that even if the "inspection" language in the certification forms that had been prepared by the contractor did indeed increase the scope, it would have been solely for the benefit of the owner and not any third parties.

For all these reasons, the court reversed the trial court decision and ruled that the architect was not liable.

This decision, especially in conjunction with the earlier withdrawn decision by the same court in December 2010, is fascinating. There is enough contract and legal analysis contained in these decisions to provide sufficient material for a full day seminar on the standard of care, what duties are owed by design professionals and to whom, and finally contractual risk management.

It is particularly significant that this decision corrects a previous decision that many attorneys and risk managers felt had expanded the duties of design professionals in a manner that made them responsible for finding and reporting to its client all errors in a contractor's work, and essentially guaranteeing that the work was not defective.

As if this uninsurable liability of the design professional to its client was not bad enough, the previous decision created an independent duty of the design professional to third parties contrary to the clearly expressed intend of the contract language of both the AIA Owner-Architect agreement and the Owner-Contractor agreement.

This decision is in line with that of courts from jurisdictions around the country that enforce the contract as written, and solely for the benefit of the parties to the contract and not to third parties.

Contract language favorably quoted by the court from the AIA is affirmation of the prudence of using standard form contracts such as those of the AIA and EJCDC whenever possible.

The AIA forms contain appropriate language specifying the scope of services, the standard of care, and various responsibilities of the architect – and also articulates various matters for which the architect is not responsible – all as explained in this decision.

When assisting design professionals in negotiating non industry standard contracts with owners that have devised their own forms, this decision can provide a good road map for language to be included in those contracts. As noted by the court, if design professionals are to legally become the guarantors of the quality of work performed by contractors, the design professionals will either opt not to provide the service, or if they provide it, the fees charged will have to be significantly higher to justify the increased risk.

With regard to the point about assuming the risk for higher fees, it is likely that most risk managers would advise against accepting guarantee and warranty responsibility regardless of how much extra fee the design professional might obtain, since this effectively creates liability for which the design professional has no professional liability insurance.

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Chapter 6

Contract Essentials

6.1 The Wisdom of Getting it in Writing

Although parties may enter into legally binding contracts that are oral and never reduced to writing, it is wise to put professional services agreements in writing to the greatest extent possible. Design firms virtually always acknowledge that they seek to have a written contract for all services, but that they don't always get them.

The reasons for beginning work without a signed contract vary. Sometimes, an existing client gives a small project to a firm on a fast turn-around and no one thinks to get a written agreement since the parties are familiar with one another and understand the basic billing rates and procedures. Sometimes a contract is not executed because the services begin before the details of the contract get worked out. By the time the parties realize that they cannot agree upon the terms and conditions, the work is too far underway to stop, and the proposed terms are too onerous to accept in writing.

When the parties work without a written contract and there is a dispute over what the parties agreed to, the courts may look to correspondence and draft contracts that were sent back and forth. They might also consider oral evidence to decipher the parties' intent. Without a written contract, there is obviously more room for ambiguity, confusion, and disagreement, which leads to a greater necessity to have courts and arbitrators sort out the mess.

At a bare minimum, even if a written agreement is not being executed, the parties should get a written statement of the scope of services and the fee agreement. Getting the scope and fee established in writing is one of the most critical elements of the contract. It will avoid some of the greatest ambiguities and misunderstandings that typically result in disagreement and litigation.

A written contract has the added benefit of guiding the parties in their early communication with one another so that they better understand the expectations each has for the project. Contract negotiation should not be viewed as just a legal necessity. Instead, it should be seen as the

beginning of the communication process that will help the parties understand each other and their needs throughout the project.

Failure to communicate during the contract negotiation and formation process will make it all the more difficult to communicate effectively during project performance. Good communication is the beginning and the end of effective risk management.

6.2 Basic Elements of the Professional Services Agreement

The key elements of any design professional agreement or contract include: (1) scope of service, (2) performance schedule, (3) fee schedule, and (4) the general terms and conditions.

6.2.1 Scope of Service

Services may be described in the basic agreement or as an attachment to the agreement. Under the American Institute of Architects (AIA) B101-2017, the services are to be specifically enumerated. It is important that this article be filled in with some detail. If the Architect will also be performing Contract Administration Services, the terms and conditions of Article 3.6 of B101, as well as A201-2017 (General Conditions of the Contract for Construction) will apply to those services. Additional services that may be provided for an additional fee are set forth in section 4.1. This section provides a list of thirty additional items, which can be expanded or contracted as appropriate for the project. Item 4.1.1.30 is "Other Supplemental Services," which the architect will identify in at attachment as such "Other Supplemental Services." Under the Engineers Joint Contract Documents Committee (EJCDC) Document, EJCDC E-500 (2014), the Scope of Services is specified in Attachment A to the document.

Whether using an AIA agreement, EJCDC agreement, or some other form, the contract will generally identify basic services to be performed for an agreed upon fee, and additional services that can be performed for additional fee if authorized in advance in writing by the owner. It's important that project managers for the design firm are careful not to perform additional services without first giving the owner notice, as required by contract, and obtaining authorization to perform these services for an additional fee. Otherwise, you may be unable to recover compensation for these services.

6.2.2 Performance Schedule

While negotiating the Agreement, it is important that the parties address expectations for the project schedule and come to agreement on what is reasonable. Unless the client's expectations are realistic, and the schedule agreed to by the design professional is feasible (taking into consideration the time that is needed to plan and design within the reasonable standard of care), there are going to be problems with a dissatisfied project owner.

Project owners who establish unrealistic schedules make bad matters worse when they require the design professional to be absolutely liable (pursuant to a time is of the essence clause) for completion of design services by specified dates. By doing this, they attempt to limit or even prohibit time extensions for excusable delays and may seek to hold the design firm responsible for construction delays beyond the control of the firm.

If a design firm agrees by the terms of its contract to assume liability for schedule delays, it may have an uninsured loss. The errors and omissions policy will only cover losses caused by the negligence of the firm. It will not respond to costs that arise out of warranties or guarantees to meet schedule deadlines.

By agreeing unconditionally to meet a specified schedule, the design firm may put undue pressure on itself to perform services quickly and without the generally accepted thoroughness and care, thereby increasing the risk of making an error.

If a contract establishes specific performance periods for the design professional to meet, it should also require the project owner to meet specified time periods for making necessary decisions and responding to requests from the design professional. Moreover, a provision should be included to clearly state that the design professional is not responsible for delays caused by others or delays that are not within its control.

6.2.3 Fees

Compensation for the design firm should be clearly established. In AIA B101-2017, this is done at Section 11.1 for Basic Services and Section 11.2 for Additional Services and also what now is called "*Architect's Supplemental Services*," which are to be set forth in Section 4.1.1. Sustainability Services required pursuant to Section 4.1.3 are also to be identified and compensation set. If the services change, or if additional services are added, there must be a simple way to calculate the revised fee.

It is important that the design firm not lock itself into a fixed fee (and reimbursable expense) that cannot be adjusted to reflect project changes in costs and time. In addition to the compensation clauses, the agreement should include a provision stating that the failure of the client to pay the consultant within a specified number of days from being invoiced will entitle the design firm to suspend or terminate its services until payment is made.

When design professionals get too far ahead of their client with services that have not been paid for, and then later try to catch up with their billing and payment, it is not uncommon to hear excuses from the client for why the design professional is not entitled to the full amount due. This may lead to the design professional filing a claim against its client to collect the balance of fees it believes is due. Such fee claims seem to inevitably result in the project owner defending itself by alleging that the design professional is not entitled to the fee because it performed its services negligently.

Moreover, as long as the client is defending itself against paying the additional fee, it is rather common for the client to counter-sue to recover from the design professional damages for change order costs it paid to the contractor and any other costs the owner asserts were caused by negligent performance. Prompt billing of the client by the design professional, and prompt action by the design professional to collect what is due when it is due, are two of the surest ways to manage risk. It is far better to argue over the fee today than to litigate over it tomorrow.

The design professional who is too shy to assert its right to a fee during its performance of services is a bad risk to itself and the insurance carrier. The insurance carrier may end up in the position of defending against claims that only came up because the design professional filed an affirmative claim for fee after the job was already complete.

6.2.4 General Terms and Conditions

General terms and conditions should not be overlooked by a contract reviewer as merely boilerplate. In reality, these are vital terms of the contract that should not be glossed over by the parties and should not be assumed by the parties to be of no consequence. It is often in these clauses that the most significant risk is allocated. This is particularly true when the parties alter these terms and conditions by amendments (or interlineations) to the Agreement.

With the advent of electronic versions of the standard form agreements, it has become much easier to amend them. AIA and EJCDC require changes in the standard language to be indicated for easy identification. There may also be an addendum containing modifications to the printed terms which you should be sure to study carefully before signing the contract.

When asking your insurance advisor or attorney to review contract language, to it is advisable to give them the entire contract and not just the clauses you want reviewed. If, for example, you gave your attorney only the insurance and indemnification clauses of a contract to review, he might miss the fact that numerous other sections of the contract also contain indemnification provisions or standards of care, warranties, and guarantees that are not insurable.

6.3 Available Contract Forms

6.3.1 Standard Form Agreements

Obtaining reasonable terms and conditions in contract documents is one of the most vital elements of risk management for the design professional and other parties to a construction project. The age old question is: What is reasonable? Some would argue that just as beauty is in the eye of the beholder, an opinion concerning whether contract language is reasonable will depend upon which party to the contract you ask.

For this reason, contracts drafted by project owners may tend to favor the owner by allocating or shifting risk to the design professional or contractor. Likewise, contracts drafted by individual design professional firms may have a tendency to favor the designer.

In contrast, professional associations such as the American Institute of Architects (AIA), Engineer's Joint Contract Documents Committee (EJCDC), and the Association of General Contractors of America (AGC) have endeavored to produce standard form contracts acceptable to all parties to the agreement.

In drafting these contracts, multiple entities and associations with an interest in construction have been consulted and given their input in creating documents that strive to maintain a reasonable allocation of risk. Reasonable risk allocation occurs when the contract allocates responsibilities and risks to the party in the best legal and practical position to manage the risk through its own actions.

One goal of the associations is to encourage the various project participants to use standard form agreements to the greatest extent possible, even if this means adding an addendum revising a few of the terms and conditions to accommodate the requirements of particular firms and their insurance carriers.

Using standard forms goes a long way toward eliminating confusion and ambiguity over the intent and application of the language. After a contract clause has been interpreted and applied in different fact situations by courts around the country, parties using the form in the future have a pretty good idea of what the language means and what they are agreeing to when they sign such a standard form agreement. Using such contracts can save time during contract negotiation and give greater certainty to the outcome of potential claim issues that might arise under the contract.

Because various parties to the agreements bring their own agenda to the table, it is not uncommon to see supplements and addenda to these forms that reallocate the risk between the parties different from what was intended by the standard form.

When reviewing the agreements, it is critical that the parties focus on these addenda with their various revisions. If you are having an attorney review the agreement, it is particularly important to provide him with the entire agreement including all the revisions.

6.3.2 Forms Created by Individual Design Professional Firms

Instead of using the standard forms of the AIA or other organizations (that require a royalty for each use of the form), some firms choose to create and use their own forms. If you do this, it is highly recommended that you have your contract form reviewed by an attorney experienced with construction law in your jurisdiction and the locations where your project services will be performed.

You should also have the forms reviewed by insurance professionals such as brokers and insurance company personnel who are familiar with the coverage available under the professional liability policy and how that coverage may be affected by the terms and conditions of your contract.

6.3.3 Forms Created by Project Owners

Contract forms created by project owners may establish risks for the design professional not covered by the professional liability policy. Examples include: (a) highest standard of care; (b) indemnification for damages not caused by the negligence of the design professional; and (c) guarantees and warranties. Exercise extreme caution when executing a contract form that is prepared by the project owner. Get it reviewed by legal counsel and an insurance professional.

Chapter 7

Some Do's and Don'ts of Contract Language

7.1 Use Clear Language

Language that is imprecise, verbose, or unclear may create ambiguity and actually foil the efforts of the parties to communicate with each other. The parties' expectations may be confused and mis-communicated. As a result, the project and the principals may suffer.

Although it is important that the Agreement contain the basic legal requirements of a contract, it doesn't need to be written in legalese. Indeed, if it takes an attorney to understand and interpret the basic provisions of a contract, you can be pretty sure that it is not well written.

When confronted during contract negotiation with language that is convoluted and confusing, don't be bashful about asking to have it clarified and revised into language that is simpler and more to the point. A good Agreement is one that can be understood by the project managers who need to understand their roles and responsibilities under that contract.

Be careful to review the Agreement to be sure that it does not scatter terms pertaining to the same matter into different sections of the contract. An example, is when a contract includes indemnification requirements in six different articles, in addition to the article that was actually titled "Indemnification."

Other contracts have a reasonable Standard of Care clause, but also contain so much warranty and guarantee language elsewhere in the contract that the Standard of Care clause becomes meaningless.

It sometimes seems as if a project owner has intentionally done this to confuse the design professionals and their attorneys who might try to review the contract. Imagine if the design firm gave only the article entitled Indemnification to its attorney for review and then later discovered that the Indemnification article was fine, but it was superseded by the more detailed and particular articles of the contract dealing with specific indemnification for property damage, bodily injury, and other causes.

7.2 Words to Avoid

Certain words create the impression that the design firm has a greater duty or responsibility than required by the generally accepted standard of care and scope of services stated elsewhere in the contract. Some words that risk managers often advise the design firm to avoid using in their contracts to the greatest extent possible include the following:

- supervise contractor's work
- control contractor's work
- direct contractor's work
- guarantee or warrant either your services or the contractor's work
- certify that contractor's work meets the plans and specifications
- inspect contractor's work to assure it meets the plans and specifications.

Chapter 8

Marketing and Promotional Materials

Statements and representations contained in promotional materials, such a brochures and web-sites, may potentially create warranties, guarantees, or promises of highest or expert services. Even the cover letters that transmit a proposal for services may create promises of meeting higher standards of care that go beyond what is stated in the Agreement itself, and which may create liability that is not insured under the professional liability policy.

Some agreements state that they incorporate various materials, including cover letters, proposals, and marketing materials. This makes it even more important that we be aware of what is contained in those incorporated materials.

Even if the materials are not specifically incorporated by reference, project owners might persuade a court to believe that they relied upon such representations and information contained in those materials. Owners may also persuade a court to believe that the design firm made the representations with the intentions for the project owner to act in reliance upon them.

It is important, therefore, that the design firm not include guarantees or over-state representations in the cover letters and marketing materials. Including such things could potentially subject you to liability you did not agree to in the Agreement itself.

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Chapter 9

Insurance

What is Covered by a Professional Liability Policy?

Professional liability insurance is intended to cover you for your negligent acts, errors, and omissions. Breaches of warranty and contract are not covered except to the extent the breaches result from negligent acts, errors, and omissions of the policy holder. Coverage for liability damages caused by anything other than your negligence is expressly excluded by the contractual liability exclusion.

Key exclusions in the policy include the exclusion for express warranties and guarantees and also the exclusion for contractual liability.

Contractual liability is liability that arises out the terms and conditions of the contract that the design professional would not have under the law of the local jurisdiction in the absence of the contract language. For example, if the designer agrees to indemnify its client for all damages on the project regardless of whether caused by someone or something other than the negligence of the designer, this becomes a contractual obligation that exceeds the responsibility the courts would otherwise impose upon the designer.

As explained in the Standard of Care discussion in the contract clause section of this Guide, courts don't impose liability on designers for every error, omission or mistake, but rather only those that are negligent because they fail to meet the standard of care. To the extent the contract imposes liability greater than this on the designer, the insurance policy will exclude that liability pursuant to the contractual liability exclusion of the policy.

A contractual liability exclusion of a typical professional liability policy provides as follows:

> *This Policy does not apply to any DAMAGES, CLAIM or CLAIM EXPENSES based upon or arising out of:*
>
> *liability assumed by YOU under any oral or written contract or agreement, including but not limited to hold harmless and indemnity agreements, agreements to defend others, and liquidated damages clauses, except that this exclusion shall not apply to a CLAIM where legal liability exists in the absence of such contract or agreement and arises from YOUR WRONGFUL ACT or the WRONGFUL ACT of YOUR subconsultants in the rendering of or failure to render PROFESSIONAL SERVICES;*

Indemnification Provisions Affecting Coverage

Indemnification provisions in the Agreement between the design professional and its client (project owner or design-builder) sometimes require that the design professional indemnify the

client for damages arising out of its performance regardless of whether that performance is negligent.

Such indemnity by the design professional is an uninsurable risk since the E&O carrier does not consider costs incurred by the design professional as a result of such indemnification to be damages as defined by the policy. Instead, those costs are excluded from coverage by the contractual liability exclusion and by the language of the Insuring Agreement.

Although a project owner gains no insurance proceeds from such an uninsurable indemnification provision or other contractual liability provision, the provision may offer some legal benefit. This is not sufficient reason for a project owner to insist on these otherwise uninsurable provisions. Insurance carriers routinely advise their insured design professionals against agreeing to such provisions.

Sound risk management principles discourage a design professional from agreeing to assume liability it would not have under common law.

When you see provisions requiring contractual liability, or warranties and guarantees, you should immediately flag them as problem clauses. Some of these clauses are obvious. Others are subtle and harder to spot because they don't use language readily recognized as referring to warranties and guarantees. If, for example, you agree to the highest standard of care instead of the generally accepted standard, you may inadvertently warrant that your services will be the best, and will produce a perfect result.

It may also be prudent to delete a reference in the indemnity clause that would require you to indemnify your client for breach of contract since this is not insurable absent negligence. In any event, your client has adequate legal recourse to sue for breach of contract without any need for a separate indemnity obligation.

Who is Covered?

The professional liability carrier will rarely name an entity other than the design professional as an insured or additional insured under the policy. If the policy has a combination of coverages that include both professional liability and contractor's pollution liability or general liability, it may be possible to name the client as an additional insured on the non-professional liability sections of the policy, but not the professional liability sections.

Reasons for this include the fact that the owner of a project is not a licensed design professional and is not likely to commit a negligent design error for which it will need coverage under the professional liability policy. In addition, the owner is the party most likely to have damages for which it desires to sue the consultant and recover under the consultant's professional policy.

Some policies include language similar to general liability policies, automatically making clients Additional Insureds under the general liability sections of the policy where required by written contract with your client.

A major problem with naming the client as an additional insured is that it creates potential remedies against the consultant that the owner would not otherwise have. For example, consider a typical contractor claim in which the contractor alleges it is entitled to extra compensation as the

result of changes it had to make in its work due to: (1) differing site conditions, (2) failure of the owner to coordinate the work between multiple prime contractors, and (3) faulty plans and specifications.

The owner may very well tender the claim to you and demand that you and your insurance company provide the owner's defense to this contractor claim. With contractors submitting claims using the kitchen sink approach to allegations, it is likely that you, as the consultant, will allegedly be the cause, in whole or in part, for the contractor's damages. You may end up defending the owner against every claim filed by a contractor. If you use up the insurance in defending your client against claims, you may seriously erode or exhaust what is available in the event that you need to defend yourself against claims.

On the exceptional occasion when a carrier issued an additional insured endorsement for one of its significant clients, it included restrictive language so that the endorsement read as follows:

> "The following entity is an additional Insured but only to the extent that the entity is vicariously liable, as a matter of law, for the Named Insured's Wrongful Act as defined in and covered by this policy and only in connection with the projects listed below. The Wrongful Act must be attributable solely to the Named Insured and not due to any actual or alleged independent act, error or omission of said additional Insured."

Chapter 10

Allocating Risks Through Contract Terms & Conditions

The goal when allocating the risk through the contract terms and conditions, as stated in earlier chapters, should be to allocate the risk to the party who has the best ability to manage that risk.

The contract can give ownership of the risk to any party. But if the party that accepts ownership of that risk does not also have the ability to manage that risk literally and legally, serious problems and legal consequences can be the result. Claims and litigation are more likely to occur on a project when a contract is grossly one-sided, shifting risks to a party that cannot reasonably manage those risks.

The format used below is intended to provide a quick summary of issues and concerns arising out of various clauses, along with a discussion of some possible solutions. As will be reiterated throughout this Guide, the comments provided are intended only for insurance risk management educational purposes and are not intended as legal advice to be used in any specific situation or circumstance.

In addition, permission to quote excerpts from standard form contracts of the AIA and EJCDC has been obtained, but in doing so, these excerpts may be taken out of context or may be incomplete and inappropriate for copying into an Agreement that you may be creating. Moreover, further use, copying or reproducing the clauses herein is not authorized by the AIA or EJCDC.

When negotiating any agreement for design professional services, it is advisable to obtain the assistance of legal counsel and insurance professionals knowledgeable with such contracts.

This guide presents examples and discussion concerning the following terms and conditions. There are other clauses impacting risk management that could also have been included but which, for reasons of time and space, have not been addressed.

Americans With Disabilities Act (ADA)

Issue: The Americans with Disabilities Act imposes liability upon the owner of a facility that designs and constructs it in a manner not meeting the accessibility and usability requirements of the ADA. An exception is made if it is structurally impractical to meet such requirements, but that becomes a factual determination often left to a jury to decide during a trial. The ADA also requires that if alterations to existing facilities are made, they must be readily accessible to individuals with disabilities to the maximum extent feasible.

Precisely what must be done to meet the ADA requirements is not clearly set forth in the law. It is necessary, therefore, for the project owner and design professionals to exercise reasonable care in forming their determinations (and professional opinions) as to what is required in the given circumstances of a project.

Although the law appears to focus on project owners, it has also been applied against design firms and contractors who were found to have been in control of the design and construction of the facility. Courts in a few jurisdictions have imposed liability directly upon the design professional for failure to design to the ADA requirements. A number of other courts, however, have held that the ADA does not provide a statutory basis for claims against design professionals.

Although this interpretation will prevent a group of disabled persons from suing the design professional directly, it will not necessarily protect design professionals from loss in the event the project owner is itself found in breach of the ADA and seeks indemnification from the design professional for its damages.

Discussion: In the clause below, the design professional is required to indemnify the project owner against any claim based on the violation of laws or codes regardless of whether the designer met the standard of care:

> *The Architect shall at all times observe and comply with all city, federal and state laws and regulations and shall defend the City against any claim or liability arising from or based on the violations of any law or regulation.*

Even with the exercise of due care, it is possible that the professional opinion of the design firm concerning what is required by the ADA may differ from the opinion of what someone working for the governing agency.

Ordinarily, courts do not reverse a government agency unless it is proved that the agency acted arbitrarily, capriciously, or in violation of the law. That rarely happens. Consequently, if a project owner is required to pay fines and penalties, plus redesign a facility and pay to rip out and replace construction work, you may find yourself contractually liable to reimburse your client for all of these costs if you have signed a contract that committed you to strict compliance with the ADA or strict compliance with all laws, ordinances and regulations.

For the design professional, the insurance ramification of such a contractual liability is that you may be denied coverage on the basis that the costs you pay to your client pursuant to your contractual obligation are not the result of damages caused by negligence in the performance of professional services. They may instead be found to be losses incurred as a result of a breach of warranty or guarantee. They may also be seen as arising out of contractual liability.

Conclusion: Because of the uninsurable liability you will incur by agreeing to strict conformance with the ADA, it is more appropriate to negotiate the contract so it requires the exercise of the ordinary standard of care in complying with similar laws. This will give you (and your insurance carrier) a basis to defend you by proving that although you may have failed to comply with the ADA in the opinion of the government agency, and although fines, penalties and damages may have been incurred by your client as a result, you are not legally liable if it can be demonstrated that you met the generally accepted standard of care in your efforts to comply with the law.

An example of applying the generally accepted standard of care to code compliance instead of committing to an absolute guarantee is exhibited in the following language:

> "Consultant agrees that consistent with the standard of care applicable to this agreement it will identify, interpret and apply the design requirements of applicable laws, regulations and ordinances, including the Americans with Disabilities Act (ADA)."

The AIA B101-2017 deals with code compliance in Section 3.2.1 as follows:

> "The Architect shall review the program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Architect's services."

Note that by agreeing to review the code requirements, it appears that the architect has agreed only to exercise the same standard of care in complying with the code requirements that it applies to all other aspects of its services.

The EJCDC Document E-500 (2014), at Section 6.01 E., provides for code compliance in such a way as to make compliance subject to the general performance standards set forth in the contract. It also goes a step further by protecting the engineer in the event that changes in the requirements become effective after the contract is executed. It provides as follows:

> "E.3. This Agreement is based on Laws and Regulations and Owner-provided written policies and procedures as of the Effective Date. The folloing may be thee basis for modifications to Owner's responsibilities or to Engineers scope of services, times of performance, or compensation:
>
> a. changes after the Effective Date to Laws and Regulations;
>
> b. the receipt by Engineer after the Effective Date of Owner-provided written policies and procedures;
>
> c. changes after the Effective Date to Owner-provided written polices or procedures."

Where design professionals agree by contract to indemnify a project owner for "any damages arising from any act, omission, or willful misconduct", that provision cannot be enforced when the damages at issue arise out of violations of the Americans with Disabilities Act (ADA). In the case involving Mandalay Bay Resort (*Rolf Jensen & Associates v. Eighth Judicial Court of the State of Nevada*, 128 Nev., Advance Opinion 42 (2012)), the court held that permitting indemnification claims would weaken an owner's incentive to prevent violations of the ADA and therefore would conflict with the ADA's purpose and intended effects.

> "Simply put, such claims would allow owners to contractually maneuver themselves into a position where, in essence, they can ignore their nondelegable responsibilities under the ADA." The court further concluded that "if owners were permitted to pursue indemnification for their own ADA violations, Congress's goal of preventing discrimination would be frustrated."

As-Built Drawings

Issue: The term "approval or review of as-builts" or "as-built drawings" suggests that the Contractor has identified what changes have been made to the Contract Documents. If the Design Professional is required to review such drawings, it is critical that the Contractor has specifically identified anything contained in them that deviates from what was required by the original Contract Documents.

Discussion: The term "as-built drawings" may suggest that the Design Professional is assuring the Owner that it has reviewed the drawings provided by the Contractor and observed and measured the construction to determine that the drawings accurately reflect all work performed. Such review and assurance of Contractor's accuracy of drawings is usually beyond the normal and reasonable scope of the services of a Design Professional and is not typically within a Design Professional's ability to perform in any event.

Some Owners may assert that by approving "as-builts," you have warranted that the drawings reflect the correct locations of the items and information portrayed on them, including such things as underground utilities.

Another significant issue is the use of "as-builts" by Design Professionals in the rehabilitation or retrofit of an existing project. To what extent should the Design Professional be able to rely upon the accuracy of the "as-builts" that the Owner provides to it? And what is the responsibility and liability of the Design Professional to the Contractor to whom it provides the "as-builts" for the purpose of preparing the Contractor's bids and how the Contractor will proceed with the work? Answers to the questions should be included in a clause entitling the designer to rely on information provided by the client. (See the "Reliance" section).

Conclusion: Shorthand terminology can increase exposure to the Design Professional because of the erroneous expectations that may be generated. Use language that more accurately reflects the nature of the drawings, who is responsible for them, and to what extent they may be relied upon. Instead of terming the drawings "as-builts," which means different things to different people, title them "record drawings."

If the client's contract refers to "as-built drawings," consider striking that term and replacing it with "record drawings." Support this potential change to the contract by discussing with the Owner the practical reasons why the change is necessary and appropriate. On the drawings that are created based on the information reported by the Contractor, have them marked with the term "record drawings."

The contract and the drawings themselves should indicate that the contractor prepares the drawings, and that the Design Professional has not verified the information. If verification is required it should be a separate service and the scope of this service should be clearly specified.

Rather than calling these "as built" drawings, it may be more accurate to refer to them as "record drawings." EJCDC E-500, Article 7.01 A.25 provides as follows:

> "Record Drawings – Drawings depicting the completed Project, or a specific portion of the completed Project, prepared by Engineer as an Additional Service

and based on Contractor's record copy of all Drawings, Specifications, Addenda, Change Orders, Work Change Directives, Field Orders, and written interpretations and clarifications, as delivered to Engineer and annotated by Contractor to show changes made during construction."

Certifications

Issue: Contract language requiring the design professional to certify that all work was completed by the contractor in conformance with the plans and specifications may create a guarantee or a strict standard of care that is not insured by the professional liability policy, since the liability may arise out of non-negligent performance of services.

Design firm personnel are not constantly on the project site during construction. But even if such individuals were on the site, it is generally far beyond the scope of services for the design professional to inspect or observe every detail of the contractor's work.

Discussion: It should be expected that a design professional will exercise the general standard of care in observing and monitoring the contractor's work, and that any certifications it signs will be consistent with that same standard of care. Design professionals should not be expected to go so far as to warrant or guarantee that which is certified.

A certification clause in one owner-generated contract requires the design firm to certify that all work was performed by the contractor in accordance with all plans, specifications and contract documents. The owner could argue this created a strict assurance or guarantee by the design professional that the contractor met every design detail.

In a contract for land surveying services, an owner-generated contract required a Surveyor's Certificate that created an absolute warranty and guarantee that the surveyor had accurately reported information concerning the site in question, including information that was only available in public records such as easements and rights of way. It isn't reasonable for a surveyor to guarantee results particularly with regard to information that it may only infer from its site observations and review of record documents.

Providing such a warranty would create an uninsurable risk for the surveyor since the professional liability policy covers only negligence in performance and not guarantees and warranties.

Conclusion: The contract itself should explain that the design firm will not be required to sign certificates attesting to anything to which it does not have personal knowledge. To the greatest extent possible, include a provision in the certificates stating they are based on your knowledge, information, and belief, so that it is clear that you are stating a professional opinion and not providing a factual guarantee.

An example of a reasonable clause addressing certificates is the following:

> "Consultant shall not be required to execute certificates, consents or reliance letters that would require knowledge, services or responsibilities beyond the scope of this Agreement, and shall not be required to sign any documents that would result in Consultant having to certify the existence of conditions whose existence the Consultant cannot ascertain. Any certificate will state that it is based on the best of the Consultant's knowledge, information and belief."

AIA B101-2017, Section 10.4, requires the client to provide the architect with the proposed language for certificates for its review at least 14 days prior to the requested dates of execution and provides as follows:

> "The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement."

Section 3.6.3.2 of AIA B101-2017 states:

> "Architect's issuance of the payment certificate is *not* a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum."

This type of language is appropriate because it is consistent with the scope of services and the generally accepted standard of care. It is consistent with the real expectations of the parties as reflected by the Agreement.

Section 6.01 F. of EJCDC E-500 (2014) prevents anyone from demanding that the design professional sign a certification based on anything other than actual personal knowledge of the conditions to which it certifies. This same clause also prevents the project owner from using financial leverage to force the design professional to sign such certifications. It provides as follows:

> "Engineer shall not be required to sign any document, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain. Owner agrees not to make resolution of any dispute with the Engineer or payment of any amount due to the Engineer in any way contingent upon the Engineer signing any such document."

In the section of EJCDC E-500 (2014) that addresses certificates pertaining to completed construction work (Exhibit E, Notice of Acceptability of Work), the language places specific conditions upon the Engineer's determination that the contractor's work is acceptable. It states the following:

> 1. This Notice is given with the skill and care ordinarily used by members of the engineering profession practicing under similar conditions at the same time and in the same locality.
>
> 2. This Notice reflects and is an expression of the Engineer's professional opinion.

3. This Notice is given as to the best of Engineer's knowledge, information, and belief as of the Notice Date.

4. This Notice is based entirely on and expressly limited by the scope of services Engineer has been employed by Owner to perform or furnish during construction of the Project (including observation of the Contractor's work) under Engineer's Agreement with Owner and under the Construction Contract referred to in this Notice, and applies only to facts that are within Engineer's knowledge or could reasonably have been ascertained by Engineer as a result of carrying out the responsibilities specifically assigned to Engineer under such Agreement.

5. This Notice is not a guarantee or warranty of Contractor's performance under the Construction Contract, an acceptance of Work that is not in accordance with the related Contract Documents, including but not limited to defective Work discovered after final inspection, nor an assumption of responsibility for any failure of Contractor to furnish and perform the Work thereunder in accordance with the Construction Contract Documents, or to otherwise comply with the Construction Contract Documents or the terms of any special guarantees specified therein.

6. This Notice does not relieve Contractor of any surviving obligations under the Construction Contract, and is subject to Owner's reservations of rights with respect to completion and final payment."

The bottom line is that all a design firm can realistically do is exercise reasonable care to observe whether the contractor is in general conformance with the plans and specifications. Committing to more than that and executing a certification guaranteeing the quality of contractor's performance may subject the design professional to an uninsurable loss.

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Changes in Design Professional's Services

Issue: Changes to the design professional's services may be required for a variety of reasons, including program changes by the client or budgetary constraints caused by construction costs. Appropriate contract language is needed to manage the change process, including authorization for changes and payment for the changed services.

Discussion: Within reason, the design professional may need the flexibility to perform services differing from those specifically identified in its scope of services. Contracts such as EJCDC E-500 provide this flexibility. There are limits, however, to what either the design professional or the project owner should be able to do in the way of services beyond those identified in the contract.

If contract language permits too much discretion to the owner to direct changes in services without the approval of the design firm, you may find yourself in the position of performing services that are beyond those that you normally accept as within your risk management protocol. It is even possible that these services could be of a type or nature that is not covered by your professional liability policy.

In the clause below, for example, the project owner has unfettered prerogative to order more services and the design firm has no say in what changes it will perform:

> ***"Changes and Claims:*** An Owner may make changes in the Services to be provided, including, changes in specifications and/or drawings, omitting or adding work, changing the schedule, and such other changes as the Owner deems appropriate. To the extent that this results in an increase or decrease in the cost of the Agreement, an equitable adjustment shall be made in accordance with the schedule of fees and costs included in the Agreement."

Several distinct issues regarding changes include: (1) Are the services different from the original scope of services? (2) If the services are different, is mutual agreement needed before the design professional performs them or can a unilateral decision be made? (3) How are the changed services to be documented and will the owner pay for them?

Unless the contract clearly defines the scope of services and includes appropriate language limiting how changes to that specified scope can accomplished, there may be a tendency to see what is sometimes called scope creep as the services gradually grow beyond the original expectations without any formal revision to the contract.

Numerous disputes between owners and design professionals have resulted because the design professional performed services beyond those covered by the basic fee without first obtaining written authorization to include those services as additional services for which the design professional would be paid an additional fee.

Such disputes can be avoided, or at least reduced, by plainly communicating the scope and change expectations of the parties in the contract language and then paying attention to the details of the contractual requirements before proceeding with changes in the services.

Conclusion: Negotiate a clause in your contract similar to that provided at AIA B101-2017, Section 4.2, which provides:

> "4.2 The Architect may provide Additional Services after execution of this Agreement, without invalidating the Agreement. Except for services required due to the fault of the Architect, any Additional Services provided in accordance with this Section 4.2 shall entitle the Architect to compensation pursuant to Section 11.3 and an appropriate adjustment in the Architect's schedule."
>
> 4.2.1 Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner's written authorization:
>
> [A Lengthy List of services follows.]

The provision also provides for compensation to the Architect. This becomes particularly important in light of what appears to be a push by project owners to require design firms to perform additional services at no cost to the owner even when they result from design changes necessitated by construction changes or construction cost overruns not within the control or responsibility of the design professional.

Notice requirements may be included in one or more other provisions of the contract dictating that before the design firm may perform additional services it must first provide written notice to a designated representative of the owner and obtain written authorization for the changes, including agreement upon an additional fee. This provides appropriate protection for the project owner against an unwanted surprise invoice for services that the design professional thinks are additional but which the owner believed were always included within the original scope and basic fee.

By learning in advance that the design professional intends to invoice for an additional fee for the changes, the owner might choose not to make the changes.

Where a firm performs additional services without following the notice and authorization provisions of the contract, the owner may assert that the design firm has waived any right to additional compensation. A number of courts have held that an owner is not required to pay a firm for services that were performed without proper notice and authorization resulting in the owner obtaining essentially free services.

Notice requirements, including any time limitations on filing notice of change and documentation of costs, are to be taken seriously. So serious is this matter, in fact, that project principals and managers should be well trained in the terms and conditions of the contract applicable to these requirements, and internal systems should be put in place to assure that the requirements are being met.

EJCDC E-500 (2014), Exhibit A, Section A2.01 A. 3 provides for compensating the engineer for additional services that result from various changes in the project and construction work beyond the engineer's control. It states as follows:

> " Services resulting from significant changes in the scope, extent, or character of the portions of the Project designed or specified by Engineer, or the Project's

> design requirements, including, but not limited to, changes in size, complexity, Owner's schedule, character of construction, or method of financing; and revising previously accepted studies, reports, Drawings, Specifications, or Construction Contract Documents when such revisions are required by changes in Laws and Regulations enacted subsequent to the Effective Date or are due to any other causes beyond Engineer's control."

The EJCDC E-500, Exhibit A, Section A2.02 A.3, also provides for compensation to the engineer for additional services resulting from changes due to material cost escalation. It provides for payment for *Additional Services Not Requiring Owner's Written Authorization*, including "Services resulting from significant delays, changes, or price increases occurring as a direct or indirect result of materials, equipment, or energy shortages."

Change Orders for Construction Work

Issue: It is becoming increasingly common to see contracts in which project owners require design professionals to take responsibility for construction cost overruns, even overruns that don't result from negligent performance by the design professional. Some owners are requiring design firms to assume financial responsibility for costs of change orders exceeding the contingency amount is set aside for changes. If you contractually obligate yourself to pay these costs, your loss will not be covered by your professional liability policy unless the overruns are actually caused by your negligence.

Discussion: A fundamental point owners need to understand and accept is that performance of professional design services is an inexact art rather than an exact science. The owner should expect you to perform within the generally accepted standard of care but should not expect perfection from you.

If you were to create perfect plans, specifications, and documents, it would obviously take much longer, be much more expensive, and seriously impact the owner's ability to get the job done. In addition, it would possibly result in over-design with oversized structural members, redundant systems, and gold-plated designs, all costing the client more during construction.

Even assuming that perfection were possible, owners wouldn't be willing to pay for what it takes to achieve such perfection. Projects are designed and constructed with the understanding that some design changes will be necessary as the work progresses and that contractors will be paid under change orders for the extra costs they incur as a result of the design changes.

Over and over again it must be emphasized that on virtually every project there are design errors and omissions that do not cause legal liability for the design firm. There may be design errors and omissions that must be corrected, with the owner paying the contractor for its associated costs, yet the design firm will not be required by common law to reimburse the owner for those costs unless they rise to the level of being *negligent* errors and omissions.

By requiring the design firm to pay for construction changes not arising out of negligence, the owner makes an end run around the legal precedents applicable to design professional liability, and may even get around the standard of care clause in the contract that would have otherwise limited the design professional's responsibility for such change order costs.

For coverage purposes, it's important for the design professional and owner to understand that these costs are subject to the contractual liability exclusion of the professional liability policy.

Some changes in construction are necessitated by escalation in the costs of materials. There are any number of reasons that the cost of construction could exceed the construction budget. Design firms that are contractually required to redesign (without cost) to revise the project to meet a construction cost budget, or that are required to pay part of the change order costs, may be penalized for circumstances and changes beyond their control, unless the contract provides an exception for changes caused by material cost increases.

Another problem for the design professional who agrees to take responsibility for change order costs is that this may create a vested interest in the design professional to deny change order

requests. This would be contrary to the duty of the design professional to act as an independent decision maker on the merits of change order requests.

Contractors have filed lawsuits against designers, alleging that the rejection of their change order request by the designer was caused by the designer's fraud, misrepresentation, and conflict of interest.

In the clause below, the design professional assumes responsibility for making revisions to the construction documents as a result of a contractor's request for information, as part of its basic services meaning without additional fee.

> *"The Architect will produce a sufficiently complete set of Construction Documents so that a prudent and competent contractor can undertake and complete the Project with only minimal clarification from the Architect and without change orders. To the extent that a prudent contractor is unable to do so due to either insufficient information and/or ambiguities in the Construction Documents, the Architect will take whatever steps are necessary promptly to provide sufficient information and/or clarify ambiguities. Such remedial actions on the part of the Architect will be undertaken as a part of Basic Services but such actions shall not serve to limit the Owner's remedies available under this Agreement or applicable law."*

In another contract, the owner takes an even more aggressive approach to recover costs associated with inaccuracies or discrepancies in the documents, thereby eliminating any defense the consultant may have available to it if the discrepancies are within the standard of care:

> *"The consultant agrees to report promptly any inaccuracies or discrepancies, of all drawings and other information furnished to Contractor. Consultant agrees to accept responsibility for and pay any associated costs resulting from inaccuracies or discrepancies appearing in the drawings and other information furnished to Contractor, whether said inaccuracies or discrepancies are due to Consultant's work or from consultants hired by Consultant."*

What clauses like these do is make the design firm responsible for the implied warranty of design owed by the owner to the contractor. At common law, the owner alone has that duty to the contractor and the designer owes no such duty. But by this contract language, the owner gives the designer full responsibility for costs owed the contractor under the owner's implied warranty even if the discrepancies were not negligent ones.

We are seeing more contracts that are attempting to set certain thresholds on construction change orders deemed reasonable based on a percentage of the construction budget.

Be careful about agreeing to assume responsibility for costs arising out of change orders that exceed a specified percentage of the project budget. By agreeing to accept responsibility for costs that are not caused by your negligence, you are agreeing to bear costs for which you are not insured.

Conclusion: Before signing a contract, be sure you've discussed with the owner the likely need for change orders during construction, and the fact that some clarifications and changes in design will be necessary. It is important that clients appreciate that they are not getting perfect plans and specifications and that there will be a need for changes in the plans as problems are encountered in the field during construction and that they must share reasonably in this risk.

Contractors are entitled to recover for changes if they relied upon the accuracy of the plans and specifications during bidding. There is an implied warranty of specifications from the owner to the contractor. In contrast, the design firm does not give the owner or the contractor any express or implied warranty of specifications. This means that the owner may have to pay the contractor for changes but not be able to recover its costs for those changes from the design professional, even when the changes were necessary because of errors or omissions by the design firm. It is only when the errors and omissions arise out of the design firm's negligence that the owner may recover its increased costs from the design firm. The contract language between the owner and design professional needs to reflect this.

Note: Also see the discussion in the section below pertaining to "Cost Estimates."

Changed Conditions (Differing Site Conditions)

Issue: When conditions are discovered at the site during construction that are different from those represented by the contract (called a Type I differing site condition) or from those reasonably foreseeable by the contractor for the location where the work is being performed (called a Type II differing site condition), the contractor is generally entitled to receive a change order for an equitable adjustment in price and/or time.

To the extent these differing site conditions (DSCs) cause the design professional to have to perform additional services or incur additional time and expense, the owner should be expected to make an equitable adjustment to the design professional accordingly. This may include both time and money.

Discussion: An increasingly persistent problem today is that project owners are listening to bad advice and barring DSC claims by contractors and design professionals. They are including clauses in their construction contracts stating that the bidder/contractor is responsible for doing its own site investigation and may not rely upon any information or site data provided by the client.

Some project owners are also including no damage for delay clauses stating that if the work is delayed for any reason, the most that the contractor can obtain in the way of equitable adjustment is additional time but no money. These provisions make for adversarial working relationships between the parties and do not enhance project cooperation.

Project owners have been encouraging their design professionals to draft similarly onerous language for construction contracts and then manage the construction contracts for the owner in a harsh and unreasonable manner. When this occurs, the design professional makes itself the adversary of the contractor. Sometimes, the design professional just needs to tell the owner that the project will go better if the owner treats the parties with respect and writes contract language accordingly.

Denying the contractor changes for differing site conditions may force him to turn normal DSC claims into claims alleging design flaw and negligence on the part of the design professional. Contractors don't generally give up their effort to be paid an equitable adjustment merely because a contract clause denies them a change order for DSCs. They will often file suit against the project owner and even the design firm, alleging everything from interference with their work, inadequate coordination by the owner, and misrepresentation to fraud, breach of contract, and negligence.

Instead of dealing with a simple DSC, the design professional and owner may find themselves litigating endlessly over allegations that could have been avoided if the contract had been drafted in an appropriate fashion from the beginning.

Conclusion: The design professional should recommend that the project owner include a differing site condition clause in the construction contract and permit the bidders to reasonably rely upon data and information provided by the owner during the bidding process. This would eliminate the need for the contractor to include contingencies in its bid for any unknown conditions it might encounter and for which it might not be paid.

The design professional should also get language in its own contract to compensate it for additional time and costs incurred as a result of the contractor or design professional encountering differing conditions. A sample clause is as follows:

> "Client and Consultant agree that the discovery of unanticipated, changed conditions may require a renegotiation of the scope of services or a termination of services. Client shall rely on Consultant's judgment as to the continued adequacy of this Agreement in light of discoveries that were not anticipated or known. If Consultant determines that renegotiation is necessary, Consultant and Client shall in good faith enter into renegotiation of this Agreement to permit Consultant to continue to meet Client's needs. If renegotiated terms cannot be agreed to, Client agrees that Consultant has the right to terminate this Agreement. If the Agreement is terminated, Client shall pay Consultant for all services conducted and expenses incurred up to and including the date of termination."

Another contract example providing the design professional with compensation for the impact DSCs have on its work is presented in the following clause that also addresses environmental assessments the consultant might perform as a result of the discovery of unknown conditions.

> "**Site Access and Conditions**

> Unless otherwise agreed in Attachment A, the Client will furnish the Consultant with any right of access to the site necessary to provide the Services. If unexpected site conditions or other contingencies develop as the work is in progress, the Consultant will perform additional services with prior authorization from the Client and will provide written confirmation of any additional costs. All costs incurred because of unexpected site conditions, including any delays in authorizing the additional services, will be billed to the Client in addition to the charges authorized in Attachment B. The Consultant's performance of environmental assessments and project surveys are based on site conditions existing at the time the site visit/inspection occurs."

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Choice of Law & Venue

Issue: More than one jurisdiction could have authority to resolve disputes arising under your contract. If you are a Delaware corporation performing services on a project in Florida, for example, it is possible that courts in either state could have jurisdiction over a claim. If you are a Delaware corporation, enter into a contract with an owner that is incorporated in Texas, and then provide services for a project being constructed in Florida, it is possible that courts in all three states could be called upon to resolve disputes between you and the project owner. The jurisdiction where a dispute is resolved is called the venue.

The parties may choose to apply the law of any of the jurisdictions that could have venue, even if the matter is not decided in that particular jurisdiction. Thus, the dispute could be tried in the courts of Florida where the project is, but with the court applying the requirements of Delaware laws to its decisions.

Discussion: Some states of incorporation have laws more favorable to corporations than others do. Indemnity and limitations of liability provisions in contracts, for example, may be enforceable under the laws of one state but found contrary to public policy or statutes in another state.

If you are incorporated in a state with favorable laws, you may find it beneficial to have those laws applied to your contracts wherever they are performed. The attorneys who regularly assist you with contracts and disputes will be better able to provide assistance as you negotiate contracts in other jurisdictions if you are able to apply the law of your own jurisdiction, particularly if you are able to require disputes to be resolved in your own jurisdiction.

Conclusion: Include clauses in the contract specifying which state that will have jurisdiction and also specifying which state's laws will apply to the contract. An example of such a clause is the following:

> "If a dispute arises over the meaning, interpretation or operation of any term, condition, definition or provision of this contract, it is agreed that the substantive law of the State of New York shall apply regardless of the choice of law or conflicts of law principles."

Another example is AIA B101-2017, Section 10.1, which provides:

> "This Agreement shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules. If the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 8.3."

Compliance with Law

Issue: In performing professional services, design professionals are required by common law to meet the generally accepted standard of care. This includes exercising reasonable care to comply with applicable laws, ordinances, and regulations.

Some project owners are, by their contract language, imposing stricter compliance requirements, essentially getting an unconditional guarantee that the design professional will perform services in strict conformance with all laws and regulations. Some contracts go so far as to require strict conformance to not only those laws and codes in effect as of the date of the contract execution, but even those that are issued or changed during the performance of the services, and without additional compensation.

An example of a clause imposing what amounts to a guarantee is the following:

> *"The Architect shall review laws, codes, and regulations applicable to the Architect's services. Architect shall cause all drawings, specifications, documents and other Work required to be performed by Architect to be prepared in accordance with all federal, state, and local statutes and regulations governing the Project and the Work, it being specifically understood that Architect shall be responsible for interpreting applicable regulations so that all aspects of the facility may be utilized for the purposes intended. Should Architect fail to comply with Legal Requirements, or produce a design that complies with Legal Requirements, Architect hereby agrees to bear all resulting costs."*

This clause creates a guarantee or warranty that the design professional will meet all laws, codes, ordinances, and regulations, and that if it is determined that its design does not conform to all such requirements, the Architect shall bear the resulting costs apparently without regard to whether the design professional performed in a manner consistent with the Standard of Care.

Discussion: Instead of promising absolute compliance, agree to exercise the generally accepted standard of care to comply with the applicable laws and codes. If you incur a loss to your client because you didn't meet the strict guarantee of code compliance but your failure to comply didn't result from negligence, you will have no coverage available for that loss. This is because coverage would be excluded under one or more policy exclusions, including the exclusions for warranties, guarantees, and contractual liability.

Problems with this are abundant. First, the question of what is specifically required by laws, ordinances, codes, and regulations is a very subjective one. What one person reasonably believes is necessary may not be what another person (and in particular a government agency employee) may deem to be required.

Generally speaking, courts are deferential to the determinations and opinions of government agencies when it comes to interpreting their own laws and regulations. This means that even if your interpretation was reasonable, a court could conclude that the government agency is entitled to assess penalties against your client, the project owner, based upon your failure to meet the more strict interpretation of the law applied by the government agency.

Courts don't ordinarily reverse a government agency unless it is proved that the agency acted arbitrarily, capriciously, or in violation of the law. That rarely happens. Consequently, if a project owner is required to pay fines and penalties, plus redesign a facility and pay to rip out and replace construction work, you may find yourself contractually liable to reimburse your client for all of the costs if you have signed a contract that committed you to strict compliance with the law.

The insurance ramifications for the design professional are that coverage for these costs may be denied on the basis that they are not the result of damages caused by negligence in the performance of professional services. They may instead be found to be losses incurred as a result of a breach of warranty or guarantee. They may also be seen as arising out of contractual liability. All such costs are excluded as damages under the professional liability policy.

Conclusion: Because of the uninsurable liability you will incur by agreeing to pay all damages your client might incur due to any nonconformance of your services with laws and regulations, it is appropriate to negotiate your contract so it requires you to exercise the ordinary standard of care in complying with laws. This will give you (and your insurance carrier) a basis to defend you by proving that although you may have failed to comply with the laws in the opinion of the government agency, and although fines, penalties, and damages may have been incurred by your client as a result, you are not legally liable.

This example clause avoids a warranty situation by expressly limiting the design professional to the generally accepted standard of care. It also eliminates responsibility for changes in the law after contract execution:

> "Consultant shall exercise the standard of care to comply with requirements of all applicable codes, regulations, and current written interpretation thereof published

> and in effect during the Consultant's services. In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Consultant and which result in a substantive change to the construction documents, the Consultant shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes. The client acknowledges that the requirements of federal, state, and local laws, rules, codes, ordinances, and regulations, including the Americans with Disabilities Act, are subject to various and possible contradictory interpretations. The Consultant will use reasonable professional efforts and judgment to correctly interpret and apply such requirements. Consultant, however, cannot and does not warrant or guarantee that the work will comply with the interpretation of such requirements by others."

When an owner proposes a clause emphatically stating that the design professional shall comply with all laws, codes and regulations, a straight forward way to revise the clause so that it requires only the standard of care be met with regard to code compliance, consider revising the clause to insert the standard of care. For example, "The Consultant will exercise the standard of care to comply with applicable laws, codes and regulations…."

The AIA B101-2017, Section 2.2, establishes the responsibility within the ordinary standard of care for how the Architect will be performing all of its services:

> "The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project (the 'Standard of Care')."

In order to be able to refer back to this generally accepted standard of care throughout the balance of the contract, such as when addressing the duty to comply with law, it is helpful to make this a defined term—"Standard of Care." So the first time the standard of care is set forth in the contract, insert something like the following: (hereinafter the "Standard of Care.") Thereafter it will be possible to constantly refer to this "Standard of Care" instead of setting forth all the lines describing that that standard of care is over and over again.

In summary, explain to your client that it is not realistic to expect you to identify, interpret, and apply every conceivable law, regulation and ordinance in precisely the manner that the governing agency or some other party believes it should be applied. You can commit that you will not act with willful misconduct, or that you will indemnify your client to the extent that the violation of law occurred due to your negligence and thereby caused damages – but that is as far as you should go.

If your client incurs damages because of your incorrect interpretation and application of a law or regulation, you need to be able to defend yourself by presenting expert testimony to show that your interpretation was not negligent even if it was incorrect. If your interpretation was wrong, but not negligent, your policy will not cover you if you have contractually obligated yourself to pay for your client's damages regardless of fault.

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Confidentiality

Issue: An appropriately worded confidentiality clause in the contract will permit you as the design professional to share information concerning services with your subconsultants and with individuals other than your client, as required by law. Some project owners are drafting confidentiality clauses so strict that they would prevent the design professional from divulging information to anyone, including government agency personnel, despite the fact that the design professional is under legal obligation to do so. Consider the following clause:

> *The Architect agrees that all knowledge and information not already considered within the public domain which the Architect may acquire from the Owner by virtue of performing services hereunder, will be regarded as strictly confidential and held in confidence and shall not be disclosed to anyone without the Owner's prior written consent to such disclosure.*

This clause puts the design professional in the untenable position of having to breach its contract with its client in order to comply with the legal requirements of the law to disclose certain information.

Discussion: Information pertaining to public health and safety may be required to be reported pursuant to ethical obligations, such as those promulgated by the National Society of Professional Engineers (NSPE) Code of Ethics. The NSPE Code in turn has been incorporated into state licensing statutes in several states and the failure to comply with the Code could subject the Engineer to a violation of the state licensing law and result in censure or loss of license.

Some state environmental laws and regulations also impose an independent duty upon the design professional to report directly to the state agency about any knowledge it obtains during the performance of its services on land concerning any ongoing release of pollutants. For all these reasons, it is important not to agree to a confidentiality clause that is overly strict.

Conclusion: Negotiate a confidentiality clause that protects the client, but gives you the flexibility to report information as required by law. Consider the following clause:

> "Consultant will not disclose proprietary or confidential information of the client to others or publish it in any form at any time; provided, however, that notwithstanding the foregoing, Consultant may disclose any such information to its Affiliates, employees, and consultants, as well as to any regulatory agencies or instrumentality's when such disclosure is necessary, or otherwise required by law or ethical obligation."

The final phrase, or as required by law, appears to give the design professional discretion to decide when information must be released. Some contracts make this more difficult by stating that the design professional may only release the information when required to do so by court order or subpoena. That is not acceptable because, in many cases, the duty to disclose is required by law even without a court order or subpoena, and the contract language needs to recognize that possibility.

Return to the example of the bad clause in the introduction to this discussion. One potential remedy would be to add a new phrase at the end of the paragraph stating something like the following:

> *provided, however, that the information is not otherwise required to be disclosed by law, regulation or code of ethics, or in the opinion of the A/E required to assure the health or safety of the public.*

In negotiating this change to the contract, you would explain to your client that you cannot avoid your ethical or legal duty to disclose certain confidential information, and that you are sure the client would not want to put you in that position or put itself in the position of causing such a situation.

If the client still is not comfortable with the explanation and the change, you might alleviate some of the client's concern by agreeing to add another sentence to the paragraph stating that when you are required to disclose information, you will first advise the client that you will be making the disclosure. At least this will protect it from surprise.

Another reasonable approach to confidentiality is presented by AIA B101-2017, Clause 10.8:

> "If the Architect or Owner receives information specifically designated as "confidential" or "business proprietary," the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except as set forth in Section 10.8.1. This Section 10.8 shall survive the termination of this Agreement."
>
> "10.8.1. The receiving party may disclose "confidential" or "business proprietary" information after 7 days' notice to the other party, when required by law, arbitrator's order, or court order, including subpoena or other form of compulsory legal process issued by a court or governmental entity, or to the extent such information is reasonably necessary for the receiving party to defend itself in any dispute. The receiving party may also disclose such information to its employees, consultants, or contractors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the disclosure and use of such information as set forth in this Section 10.8."

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Cost Estimates

Issue: In the event that construction bids or costs come in higher than the engineer's estimate, owners are more frequently requiring design professionals to assume the risk (and cost) of revising plans and specifications. In some contracts, the owners are essentially demanding that the design professional warrant that the construction work will be completed for the estimated construction costs.

An example clause from an owner-generated contract is as follows:

> *As part of the Schematic Design Documents, the Consultant shall provide to the University a construction cost estimate, The Probable Construction Cost shall not exceed the Project Construction Cost. In the event that it does, the Consultant, without additional compensation, in conjunction with the Construction Manager and the University, shall re-design the Project as necessary to maintain the Project Construction Cost.*

Discussion: In the contract above, this was just the first of many clauses that would make the design professional responsible for all cost overruns regardless of whether there was negligence by the design professional. Other clauses required the design professional to prepare construction estimates and stated that any re-design needed to get the construction bids down to the estimate would be performed at the design professional's expense.

If the cost model update submitted by the contractor during construction exceeded the project budget, the design professional contract required the following of the design professional:

> *If the Consultant is unable to effect cost reduction revisions in the Construction Documents without deviating from the design and intent of the previously approved documents, the Consultant shall ... await instructions which the University shall issue to the Consultant concerning future action to be taken under the Agreement. The instructions issued by the University at its sole discretion shall include redesign of the Project as necessary in conjunction with the Construction Manager and the University to meet the Project Construction Cost without additional compensation.*

Another example of a clause that puts the design firm in an unfavorable position with regard to cost overruns beyond its control is as follows:

> *In the event that the lowest responsive bid exceeds the Fixed Limit of Construction Cost, the Architect, if directed by Owner, shall redesign the Project with the assistance of the Construction Manager in order to bring the Project within budget. Architect shall not be entitled to additional compensation for this redesign or any services required for the re-bidding of the Project. The Architect shall be responsible for any and all costs incurred by the Owner which are attributable to the redesign or re-bidding of the Project.*

Some contracts make it clear that cost overruns are going to be taken out of the fee otherwise paid to the design firm. One contract states that the owner will hold back $10,000 to be used as

damages in the event that the project does not come in on budget or there are any problems with the design professional's services. Basically, the design professional should understand that this money may never be released to it. This is because it becomes too easy for the owner or Project Team to withhold the money and force the design professional to fight for it.

It is difficult fighting for withheld money. Practically every suit for withheld payment results in a counter-suit that the design professional regrets. Even when the design professional prevails, the legal fees often eat up the amount of the fee in dispute. It is important to note that costs related to fee disputes between project owners and design professionals are not covered by the professional liability policy.

Conclusion: Since the professional liability policy will not cover cost overruns that aren't the result of negligent performance of services, it is important that the client understand he's putting you into a position of paying costs out of your own limited assets, without the benefit of insurance coverage. You should not agree to language guaranteeing a cost estimate.

Because costs can escalate for any number of reasons unrelated to design acts or errors and omissions, there is no reasonable basis for a project owner to put this risk onto the design firm.

Instead of providing a cost estimate and committing to having the project constructed for that estimate, it may more prudent to use language stating that the design professional will provide only an opinion of probable costs. By using this language, it is more obvious that you are offering a professional opinion conditioned upon ordinary due care, and this does not constitute a warranty or guarantee of costs.

If the opinion proves to be incorrect and the owner makes a claim against you for damages, you will be able to defend yourself by presenting expert testimony to show that your opinion, although incorrect, complied with the generally accepted standard of care and you have no liability for negligence.

Contract clauses should clearly state the limitations upon the design professional's responsibility with regard to the accuracy of cost estimates. A reasonable clause is this regard is the following:

> "Notwithstanding any other term of this Agreement, if Consultant has any duty to design the Project within a Construction Budget, its duty shall be limited to responsibilities that are reasonably within its direct control, thereby excluding matters that are beyond the control of Consultant including, but not limited to, unanticipated rises in the cost of labor, materials or equipment, changes in market or negotiating conditions, and errors or omissions in cost estimates prepared by others. Therefore, any such redesign effort required of Consultant necessary to maintain the project within the Construction Budget that is not due specifically to the negligent act error, omission, or willful misconduct on the part of Consultant shall require an increase to the compensation of Consultant."

It is important to state that the cost opinion or estimate is not a guarantee of cost either as to the consultant's fee or to the ultimate construction costs to be paid to others. An example is as follows:

> "Consultant shall prepare an opinion of the probable costs of construction. Consultant has no control, however, over (a) the cost of labor, material, or equipment; (b) the means, methods and procedures of the contractor's work; or (c) the competitive bidding. Consultant's opinion of probable cost shall be based on its experience and qualifications and represent its judgment as a Consultant familiar with the construction industry but shall not be a guarantee that construction costs will not vary from its opinions of probable cost."

Section 5.01 A. of EJCDC E-500 (2014) provides as follows:

> "Opinions of Probable Construction Cost
>
> "Engineer's opinions (if any) of probable Construction Cost are to be made on the basis of Engineer's experience, qualifications, and general familiarity with the construction industry. However, because Engineer has no control over the cost of labor, materials, equipment, or services furnished by others, or over contractors' methods of determining prices, or over competitive bidding or market conditions, Engineer cannot and does not guarantee that proposals, bids, or actual Construction Cost will not vary from opinions of probable Construction Cost prepared by Engineer. If Owner requires greater assurance as to probable Construction Cost, then Owner agrees to obtain an independent cost estimate."

Where the project owner requires the engineer to design within a specified budget, the EJCDC E-500, Exhibit F5.02.E, *Designing to Construction Cost Limit*, subparagraph F., provides a detailed mechanism for accomplishing this for the owner while at the same time protecting the engineer against uninsurable loss:

> "If the lowest bona fide proposal or Bid exceeds the established Construction Cost limit, Owner shall (1) give written approval to increase such Construction Cost limit, or (2) authorize negotiating or rebidding the Project within a reasonable time, or (3) cooperate in revising the Project's scope, extent, or character to the extent consistent with the Project's requirements and with sound engineering practices. In the case of (3), Engineer shall modify the Construction Contract Documents as necessary to bring the Construction Cost within the Construction Cost Limit. Owner shall pay Engineer's cost to provide such modification services, including the costs of the services of its Consultants, all overhead expenses reasonably related thereto, and Reimbursable Expenses, but without profit to Engineer on account of such services. The providing of such services will be the limit of Engineer's responsibility in this regard and, having done so, Engineer shall be entitled to payment for services and expenses in accordance with this Agreement and will not otherwise be liable for damages attributable to the lowest bona fide proposal or bid exceeding the established Construction Cost limit."

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Damages

Issue: The typical design professional liability policy defines the damages that are covered by the policy. Certain types of losses that you may incur may be excluded from coverage pursuant to either the policy definition of damages or to one or more exclusions to the policy.

Discussion: The Damages that are covered by a professional liability policy of one carrier are defined as follows:

> *DAMAGES means the monetary amounts for which YOU may be held legally liable, including sums paid as judgments, awards, or settlements, but does not include:*
>
> *1. the restitution, return, withdrawal or reduction of fees, profits or charges for services rendered or offered or any other consideration or expenses paid to YOU or by YOU for services or products; or*
>
> *2. judgments or awards deemed uninsurable by law.*

The typical contractual liability exclusion of a design professional policy reads as follows:

> *This Policy does not apply to any DAMAGES, CLAIM or CLAIM EXPENSES based upon or arising out of: liability assumed by YOU under any oral or written contract or agreement, including but not limited to hold harmless and indemnity agreements, agreements to defend others, and liquidated damages clauses, except that this exclusion shall not apply to a CLAIM where legal liability exists in the absence of such contract or agreement and arises from YOUR WRONGFUL ACT or the WRONGFUL ACT of YOUR subconsultants in the rendering of Professional Services.*

If you accept a contractual obligation to pay liquidated damages to your client or to pay specific fines and penalties for which you are not liable at common law, you may incur an uninsured loss.

Liquidated Damages:

Professional liability carriers intend for their policies to cover actual damages. They believe it is possible to evaluate actual damages in most cases involving alleged design error. Furthermore, they believe that liquidated damages are not appropriate for Design Professional contracts. The problem is that project owners who are used to including liquidated damages clauses in their construction contracts sometimes think that the same principles of recovery should apply to design firms.

If you agree to be liable for liquidated damages, the carrier may deny coverage pursuant to the contractual liability exclusion of the policy. This would be particularly problematic if the liquidated damages provision has been coupled with a delay clause whereby you agreed to pay liquidated damages for delay in the completion of your services.

If the owner recovers against you by summary judgment on those contract provisions without having to prove your negligence or the actual damages, you may find yourself with a denial of coverage by the carrier.

When confronted with these types of clauses in contracts, you may be able to persuade your client that it is also in its best interest to delete such uninsurable provisions since it may defeat your client's ability to recover against you if your carrier is likely to contest the coverage of these "damages."

Waiver of Consequential Damages:

Consequential damages are damages that occur because of or as a consequence of your professional services. Economic losses, lost rents, extra expense, loss of production, fines, penalties and consequences of a loss of use of property are examples of consequential damages. Consequential damages are usually best addressed in a specific waiver of consequential damages clause in the contract.

A mutual waiver of consequential damages may also appear in the indemnification clause. A consequential damages waiver might also go into the Limitation of Liability clause in the event you are able to include such a clause in your contract. It is better to include it as a standalone clause, in case the Limitation of Liability clause is ruled invalid and stricken from the contract. Many Owners are willing to mutually waive consequential damages.

A mutual waiver of consequential damages is provided at AIA B101-2017, §8.1.3 as follows:

> "The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7."

A more comprehensive description of what is included in "consequential damages" is set forth in the clause below. Since it may not be entirely clear what is meant by the term "consequential damages," it may be useful to set forth specific examples of the types of damages that are included in this term and thereby avoid the necessity for a court to decide what is included.

> **Mutual Waiver of Consequential Damages**
>
> Consultant and Client waive all consequential or special damages, including, but not limited to, loss of use, profits, revenue, business opportunity, or production, for claims, disputes, or other matters arising out of or relating to the Contract or the services provided by Consultant, regardless of whether such claim or dispute is based upon breach of contract, willful misconduct or negligent act or omission of either of them or their employees, agents, subconsultants, or other legal theory, even if the affected party has knowledge of the possibility of such damages. This mutual waiver shall survive termination or completion of this Contract.

Conclusion: Some professional liability policies define damages differently than the policy quoted above. Instead of denying coverage for judgments or award deemed uninsurable by law, the policy may deny coverage for fines, penalties, and punitive damages. This distinction could become important in determining whether you can recover under your policy for certain losses you may incur, such as those related to alleged violations of the Americans with Disabilities Act and Department of Labor OSHA standards.

Professional liability carriers intend for their policies to cover actual damages. They believe it is possible to evaluate actual damages in most cases involving alleged design error. Furthermore, they believe that liquidated damages are not appropriate for design professional contracts.

The problem is that project owners who are used to including liquidated damages clauses in their construction contracts sometimes think that the same principles of recovery should apply to design firms. As you can see from the above-quoted contractual liability exclusion, however, if you agree to liquidated damages, the carrier may deny coverage pursuant to the contractual liability exclusion of the policy. This would be particularly problematic if the liquidated damages provision has been coupled with a delay clause whereby you agreed to pay liquidated damages for delay in the completion of your services.

If the owner recovers against you by summary judgment on those contract provisions without having to prove your negligence or the actual damages, you may find yourself with a denial of coverage by the carrier.

When confronted with these types of clauses in contracts, you may be able to persuade your client that it is in their best interest as well as your own to delete such uninsurable provisions since it may defeat your client's ability to recover against you if your carrier is going to contest the coverage of these damages.

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Dispute Resolution

Design professionals generally prefer not to think about disagreements turning into formal disputes requiring resolution by third parties. Insurance brokers, insurance companies, and lawyers who represent the design professionals, however, must review every contract and every communication between parties with a keen knowledge that the outcome of an eventual dispute may depend upon the wording of that contract, document, or communication.

Although we may not want to dwell on disputes, it is helpful to the project management and risk management process to plan, execute, and document the services with the view that formal dispute resolution may one day be necessary on your project.

You should review several related issues in this book concerning disputes in order to get a more complete understanding of managing your risks to avoid disputes where possible and to facilitate the most effective and efficient dispute resolution when a dispute can't be avoided.

Several contract clauses, in addition to the disputes clause, can significantly impact dispute resolution. These include the Choice of Law, Time Limitations, Limitation of Liability, Indemnification, Severability, and Survival clauses.

Issue 1: Reporting a Claim Against You

Your insurance policy specifically outlines what you will have to do in the event of a dispute including timely notice to your insurance company, and making no decisions and taking no actions concerning a claim that would prejudice the rights and interests of the insurance company. The policy states your rights and obligations with regard to claim reporting and claim resolution. An example from a design professional policy is quoted below:

> ***Notice of CLAIM***
>
> *In the event of a CLAIM, YOU shall provide to US prompt written notice containing particulars sufficient to identify YOU or any INSURED involved and reasonably obtainable information with respect to time, place and circumstances, and the names and addresses of any injured parties and of available witnesses. YOU further agree to send US copies of all demands or legal documents as soon as possible. All CLAIMS are to be reported to: [Insurance Company] [Insurance Company address].*
>
> *No costs, charges or related CLAIM EXPENSES shall be incurred without OUR written consent which shall not be unreasonably withheld. WE shall have the right and the duty to designate legal counsel for the investigation, defense or settlement of a CLAIM. WE will not settle or compromise any CLAIM without YOUR consent. YOU shall do nothing to prejudice OUR rights under this Policy nor shall YOU admit liability or settle any CLAIM without OUR written consent. If YOU refuse to consent to any settlement or compromise recommended by US involving any part of OUR limits of liability and acceptable to the claimant, and YOU elect to contest the CLAIM, suit or proceeding, then OUR liability shall not exceed the*

> *amount which WE would have paid for DAMAGES and CLAIM EXPENSES at the time the CLAIM or suit or proceeding could have been settled or compromised.*
>
> *YOU shall assist and cooperate with US in the investigation, settlement and defense of all CLAIMS made against YOU and upon OUR request shall authorize the release of records and other information, secure and give evidence, attend hearings and trials and obtain the location of and cooperation of witnesses. Any expenses YOU incur resulting from such cooperation are not considered CLAIMS EXPENSES, and are thus not recoverable under this Policy or chargeable against YOUR Deductible.*

Discussion: Some important points to note from the above-quoted language are the following:

(1) You are to report the claim directly to the insurance company at the address indicated in the policy;

(2) You are not to incur claim defense costs without prior authorization of your insurance carrier; and

(3) You are to do nothing to prejudice the rights of the insurance carrier, nor are you to settle the claim without the carrier's consent; and

(4) If you refuse to consent to any settlement or compromise recommended by the carrier and instead contest the claim, resulting in an award against you greater than what the carrier would have paid to settle the case, the carrier limits its liability to you to the amount it would have paid for the settlement.

This last clause is sometimes referred to as the hammer clause, because the design professional may potentially get hammered if it forces a matter to trial that could have been settled for a lesser amount.

Note that the notice must go directly to the insurance carrier. Design firms often first informally talk to their insurance broker about a claim before submitting a formal notice of claim to the carrier. It is important to understand, however, that pursuant to the terms of the policy, the formal written notice is to go directly from you to the company and address stated in the policy.

Issue 2: Mediation

Disputes are increasingly being resolved through mediation. Mediation, however, can be a precursor to either arbitration or litigation. It produces a non-binding result and is basically a form of settlement discussion. The contract can set forth mediation or other alternative dispute resolution procedures to precede that final binding process. Of course, the mediation can produce a settlement that becomes binding once it is agreed upon by the parties and recorded into a binding agreement.

Mediation has been so efficient and cost-effective at resolving construction and design professional disputes that a number of insurance carriers have provided a credit to the deductible to encourage the use of mediation. As mediation has become the industry standard, however, a number of carriers have ceased offering this. You may want to consult your broker about the availability of such mediation credits.

On complex or lengthy projects, there may be distinct advantages to resolving disputes during the construction process rather than waiting until project completion. This is sometimes done through Dispute Resolution Boards that are established pursuant to terms of the contract.

It is important when establishing a dispute resolution process in the design professional agreement that the parties to the contract consider how disputes between others on the project will be resolved and whether all organizations, at every tier and subtier will be included in a single dispute resolution if they have a stake in the outcome.

Discussion: Include language in the contracts between the owner and design professional, as well as between the owner and the contractors, requiring mediation as a condition precedent to either arbitrating or litigating claims. Specify that if mediation fails to resolve the dispute, the parties then are free to proceed with other binding dispute resolution, including arbitration or litigation, as set forth in the contract agreement.

An example of a mediation clause is the following from AIA B101-2017, Section 8.2.1 that provides in part:

> Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by binding dispute resolution.

EJCDC E-500 (2014) similarly provides for a step process to dispute resolution, beginning with negotiation, and proceeding through mediation or arbitration. Section 6.09 A. provides:

> A. "Owner and Engineer agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice prior to invoking the procedures of Exhibit H or other provisions of this Agreement, or exercising their rights at law.
>
> B. If the parties fail to resolve a dispute through negotiation under Paragraph 6.09.A, then either or both may invoke the procedures of Exhibit H. If Exhibit H is not included, or if no dispute resolution method is specified in Exhibit H, then the parties may exercise their rights at law."

In the next clause, the parties have agreed to include mediation provisions in all agreements with other parties involved with the project. This will avoid the situation where a subcontractor or other party that may have an interest or even causation in the claim is left out of the mediation process and opts to go straight to court instead:

> "In an effort to resolve any conflicts that arise, the Owner and Consultant agree that all disputes between them arising out of or relating to this contract or the Project shall be submitted to non-binding mediation unless the parties mutually agree otherwise. The Owner and Consultant further agree to include a similar mediation provision in all agreements with independent contractors and consultants retained for the Project and to require all independent contractors and

consultants also to include a similar mediation provision in all agreements with their subcontractors, sub-consultants, suppliers and fabricators, thereby providing for mediation as the primary method for dispute resolution between the parties to all those agreements."

Issue 3: Arbitration

Issue: Although conventional wisdom has been that arbitration can be a more cost-effective and efficient means to resolve disputes than litigation, this is not always the case, particularly with complex construction disputes. With complex construction litigation, it is often beneficial to obtain full discovery of the facts through interrogatories and depositions of witnesses and experts.

The abbreviated proceedings in arbitration may not permit the parties to adequately develop and prove their case. Moreover, it may render it difficult for an insurance company to determine the basis for an arbitration decision.

If an arbitration decision is rendered with no factual and legal explanation, and the claim was based on multiple theories of law such as negligence, breach of contract and warranty, it may be impossible for the insurer to ascertain the basis for the arbitration award.

Some carriers may also be concerned that arbitration is not necessarily geared towards a fair allocation of liability based upon law and facts, but may instead split the baby in the middle, thereby penalizing the design professional.

Court Decision Shows Why it can be Dangerous to Agree to Arbitrate

An arbitrator ignored the LoL clause when it awarded damages and attorneys fees. In this dispute, the contractor filed an arbitration claim for $500,000 in unpaid fees. The Owner counterclaimed for $2.3 million. The contract had LoL clause, but also had a prevailing party attorneys fees clause. The arbitrator awarded a decision in favor of the owner, that included Owner damages and prejudgment interest totaling $699K which was the maximum amount allowed under a limitation of liability clause of the contract. But the arbitrator also awarded the Owner almost $1 million in prevailing party attorneys fees. The arbitrator ignored the LoL cap when awarding the attorneys fees because it found those fees were not a "loss" or "damages" subject to LoL clause. The court refused to set aside decision as arbitrary and contrary to law. *Beumer Corp. v. ProEnergy Services, LLC*, No. 17-2862 (8th Cir. Aug. 9, 2018).

Discussion: If the contract calls for arbitration in the event a dispute is not successfully resolved by mediation, it is advisable to require that any arbitration award include a detailed decision containing findings of fact and conclusions of law. This is important so that an insurance carrier may determine from the face of the award decision the basis for the damages.

When arbitration is conducted over a period of many months with the arbitrators meeting only sporadically, it is difficult to understand how they can remember the details of the case and reach a decision as well reasoned as that of a court that conducts a full hearing at one time and place. In addition, with the limitations upon document discovery and testimony and cross-examination, it can be more difficult to ascertain the genuine facts of the matter.

Another shortcoming of arbitration proceedings is the lack of Motions Practice that is available in court proceedings that permit parties to file motions for summary judgment and motions to dismiss. Whereas you might be entitled get out of a court case by filing a motion to dismiss based on the expiration of the time permitted by the statutes of limitations or statues of repose, you might not be able to use those same statutory time limitations to get dismissed out of arbitration proceedings.

Before entering into binding arbitration proceedings, be sure to discuss with your insurance broker and insurance carrier any requirements that the carrier may apply. It is entirely possible that your carrier may prefer litigation of a complex construction matter in order to obtain full discovery of the facts, including production of documents and witnesses for cross-examination. Moreover, on complex cases, it may be more efficient with regard to both time and cost to litigate rather than arbitrate.

The AIA B101-2017 provides as follows:

> § 8.3.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the claim, dispute or other matter in question would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim, dispute or other matter in question.

Other Issues to Consider with Regard to Arbitration

If the contract contains a mandatory arbitration clause, consider revising it to make it a voluntary decision to be mutually agreed upon by both parties when a dispute arises. This can be done by substituting the word may for shall in the language stating that disputes shall be submitted to arbitration.

This will permit the parties to make a more informed decision concerning whether arbitration or litigation is most appropriate for a particular dispute and in their best interest. If arbitration is decided upon at that later date, a more complete arbitration agreement can be agreed upon at that time, including terms such as requiring the arbitrators to issue a detailed decision including facts and law.

Instead of agreeing to arbitrate all disputes, you might revise the contract language to require arbitration only for those disputes less than a certain dollar amount, or only for certain issues such as fee disputes or copyright infringement allegations.

Prevailing Party Attorneys' Fees

Be careful about agreeing to "prevailing party" attorneys' clauses. If a design firm does not "prevail" in arbitration or litigation, and its client (the prevailing party) is entitled to recover its attorneys' fees as a result of a clause in the contract, this may be deemed a "contractual liability."

As such it is excluded from coverage under the professional policy due to the contractual liability exclusion.

Legal fees of the prevailing party could exceed the amount of actual damages recovered by that same party. The prevailing party might prevail on only 10% of its demand amount. Will you be required to pay 100% of that party's attorneys fees when 90% of the claim is rejected? Consider eliminating the prevailing party language altogether, or perhaps in some way limiting the attorneys fees.

The preferred response to a prevailing party clause is to strike it out of the contract during contract negotiation. If that can't be accomplished then at a minimum the term should be objectively defined so that a court has no discretion in determining who is the prevailing party for purposes of awarding attorneys fees as required by a contract. The typical clause merely states that the prevailing party is entitle to recover its attorneys' fees from the other party. Consider, instead defining the term prevailing party such as the following:

> "**Prevailing party** is the party who recovers at least 67% of its total claims in the action or who is required to pay no more than 32% of the other party's total claims in the action when considered in the totality of claims and counterclaims, if any. In claims for monetary damages, the total amount of recoverable attorney's fees and costs shall not exceed the net monetary award of the Prevailing Party."

Issue 4: Joinder of Parties into a Single Dispute Resolution

It is important that all entities with a stake in a claim be made a part of any dispute resolution process, including arbitration or litigation.

Discussion: This is generally accomplished by including in every contract, at every tier, a joinder requirement such as that included in EJCDC E-500, Exhibit H, H6.09 A.5, which provides:

> "If a Dispute in question between Owner and Engineer involves the work of a Contractor, Subcontractor, or consultants to the Owner or Engineer (each a "Joinable Party"), and such Joinable Party has agreed contractually or otherwise to participate in a consolidated arbitration concerning this Project, then either Owner or Engineer may join such Joinable Party as a party to the arbitration between Owner and Engineer hereunder. Nothing in this Paragraph H6.09.A.5 nor in the provision of such contract consenting to joinder shall create any claim, right, or cause of action in favor of the Joinable Party and against Owner or Engineer that does not otherwise exist."

The AIA B101-2017 takes a somewhat different approach:

> 8.3.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party

> sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

Electronic Media/BIM + CADD

Issue: As the use of computer assisted design and drafting (CADD) and transfer of design documentation by electronic media become increasingly common, Owners are requesting that "final" plans and drawings be given to them in electronic format. This may ostensibly be for the purpose of maintenance of the facility for which they were prepared.

Because of the ease of making changes to the electronic documents, however, it is a relatively simple matter for the Owner or others to reuse them for other modifications or additions to the project, or even for the design and construction of a new project. This can subject the Design Professional to the risk of potential liability. This is because since the Design Professional has effectively lost control over the use of its documents and may not know they are being modified and reused in a manner that is not appropriate — given the original project parameters, Scope of Services and fees paid.

Because of this possibility, consider if electronic documents should ever be sealed or electronically signed or whether electronic documents are always drafts and only paper documents should be sealed and signed.

Even if the Owner does nothing inappropriate with the electronic data, that data may become tainted, damaged or unreadable during storage. For various reasons, the shelf life of electronic media is relatively short and the data may become mixed up, misread and generally untrustworthy.

If an Owner or some other party to whom the Owner gives the electronic media relies upon it, that party could suffer from defective design services not because of anything wrong with the original design services, but because of defects in the media as stored and retrieved.

Discussion: To determine whether errors alleged by an Owner were in the original Contract Documents or only in the retrieved electronic data (possibly including unauthorized changes by the Owner or others) it is important that you maintain a set of final Contract Documents by which you can benchmark the electronic media to determine whether the data contained in that media are the same as in the final work product you provided to the Owner.

This may be done by making duplicate hard copy originals (one for the Design Professional and one for the Owner) of all data that is given to the Owner in electronic form, duly stamped at the time the services were rendered, to compare to the electronic media.

To prevent plans and drawings from being printed from the electronic media and given to third parties who might use them in reliance upon the name and seal of the Design Professional appearing on them, some Design Professionals delete their name and seal from the data that are contained on

the electronic media. You may also include a warning statement to the electronic media advising that the document was printed from electronic media, and it is possible the data may have been altered or their integrity impaired due to storage in that media. Consider, for example, a clause like the following:

> "When transferring documents in electronic media format, the transferring party makes no representations as to long-term compatibility, usability, or readability of such documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the documents' creator."

Use of Electronic Documentation per AIA and EJCDC

Use of electronic documents, including Building Information Modeling (BIM), is becoming so prevalent that it may not be realistic to include a broad disclaimer on the use of such documentation. The AIA and EJCDC have developed protocols for use of electronic documents.

The AIA E203-2013 Building Information Modeling and Digital Data Exhibit is made a part of the agreement between the owner and architect pursuant to section 13.2 of AIA B101. It sets forth basic parameters for reliance upon electronic data. AIA Document E203 is not a stand-alone document, but is intended to be attached as an exhibit to an agreement for design services or construction. And it is to be used in conjunction with AIA G201-2013, Project Digital Data Protocol Form and G202-2013, Project Building Information Modeling Protocol Form. Its purpose is to establish the procedures the parties agree to follow with respect to the transmission or exchange of Digital Data for a specific project.

E203 does not create a license agreement for the use of Digital Data. If the Digital Data exchanged includes copyright-protected material, such as the Architect's Instruments of Service, the underlying agreement to which E203 is attached must contain provisions that specifically grant permission to use the copyrighted materials.

AIA Documents B101–2017, Standard Form of Agreement Between Owner and Architect; A201–2017, General Conditions of the Contract for Construction; C101–2017, Standard Form of Agreement Between Architect and Consultant; and other similar AIA agreements for design services or construction, include those provisions. Parties not covered under such agreements should consider executing AIA Document C106–2017, Digital Data Licensing Agreement.

To the extent a BIM model might be an Instrument of Service, the Owner's use would be governed by the license granted in B101. The purpose of Document E203-2013 is to establish the procedures and protocols the parties agree to follow with respect to the development and management of the Model throughout the course of the project. E203–2013 also defines the extent to which Model Users may rely on Model content, clarifies Model ownership, sets forth Model standards and file formats, and provides the scope of responsibility for Model management from the beginning to the end of the project.

The AIA protocol for reliance on Building Information Models, AIA document G202-2013 "Project Building Information Modeling Protocol Form," sets forth Levels of Development to describe the level of completeness to which a Model Element is developed.

Generally, the higher the level of development the greater reliance is allowed to be placed on it. This is explained in G202-2013 as follows:

> **"Article 2 Level of Development**
>
> §2.1 The Level of Development (LOD) descriptions, included in Section 2.2 through Section 2.6 below, identify the specific minimum content requirements and associated Authorized Uses for each Model Element at five progressively detailed levels of completeness….
>
> **3.1 Reliance on Model Elements**
> 3.1.1. At any particular Project milestone, a Project Participant may rely on the accuracy and completeness of a Model Element only to the extent consistent with the minimum data required for the Model Element's LOD for that Project milestone as identified below in the Model Element Table, even if the content of a specific Model Element includes data that exceeds the minimum data required for the identified LOD.

The parties to the AIA contract forms agree pursuant to E203-2013, Article 3.4.2 that: "…if a Party uses Digital Data inconsistent with the Authorized Use identified in the Digital Data protocols, that use shall be at the sole risk of the Party using the Digital Data."

Article 4.7.2 of E203-2013 addresses us the use of BIM models and states that: "A Party may rely o the Model Element only to the extent consistent with the minimum data required for the identified LOD, even if the content of a specified Model Element includes data that exceeds the minimum data required of the identified LOD."

Environmental Conditions

Issue: If addressing hazardous materials is not part of your scope of services, the contract can be written to specify who will be responsible in the event such conditions are discovered and what role, if any, the design professional or contractor will have.

Discussion: If your insurance program excludes coverage for pollution releases, you could incur an uninsurable loss if you perform services or work that cause a release of environmental materials.

Conclusion: Negotiate language into the Agreement that will protect you in the event that environmental conditions are encountered. An example of such a clause as follows:

> Consultant shall not arrange or otherwise dispose of Hazardous Substances under this Agreement. Consultant, at Owner's request, may assist Owner in identifying appropriate alternatives for off-site treatments, storage or disposal of the Hazardous Substances, but Consultant shall not make any independent determination relating to the selection of a treatment, storage or disposal facility.

This language has the effect of removing from the contractor much of the risk that might otherwise lead to strict liability under Superfund or other environmental statutes.

Another way to deal with this issue is along the lines presented by AIA, Document B101-2017, Section 10.6, which provides:

> "Unless otherwise provided in this Agreement, the Architect shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site."

Section 6.10 of EJCDC E-500 (2014), provides, in pertinent part, for the same issue in the following way:

> " C. It is acknowledged by both parties that Engineer's scope of services does not include any services related to unknown or undisclosed Constituents of Concern. If Engineer or any other party encounters, uncovers, or reveals an undisclosed Constituent of Concern, then Owner shall promptly determine whether to retain a qualified expert to evaluate such condition or take any necessary corrective action.
>
> D. If investigative or remedial action, or other professional services, are necessary with respect to undisclosed Constituents of Concern, or if investigative or remedial action beyond that reasonably contemplated is needed to address a disclosed or known Constituent of Concern, then Engineer may, at its option and without liability for consequential or any other damages, suspend performance of services on the portion of the Project affected thereby until such portion of the Project is no longer affected.
>
> E. If the presence at the Site of undisclosed Constituents of Concern adversely affects the performance of Engineer's services under this Agreement, then the Engineer shall have the option of (1) accepting an equitable adjustment in its compensation or in the

> time of completion, or both; or (2) terminating this Agreement for cause on seven days notice."

The EJCDC E-500 (2014) also addresses environmental issues by providing indemnification specifically applicable to environmental liability. This is found at Section 6.10 C. as follows:

> "Environmental Indemnification: To the fullest extent permitted by Laws and Regulations, Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Consultants from all claims, costs, losses, damages, actions, and judgments (including reasonable consultants' and attorneys fees and expenses) caused by, arising out of, relating to, or resulting from a Constituent of Concern at, on, or under the Site, provided that (1) any such claim, cost, loss, damages, action, or judgment is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, and (2) nothing in this paragraph shall obligate Owner to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct."

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Green Design

Issue: Project owners such as hospitals, schools, large commercial enterprises, and government agencies are including clauses in their contracts that are adding sustainable design and construction requirements, including specific warranty language for the achievement of LEED certification.

In one contract involving a large and complex new medical center and hospital, the design contract stated that the design firm would design the facility so that LEED Gold certification would be achieved, and that "in the event that LEED certification is not granted, liquidated damages in the amount of $2 million shall be assessed."

What if the Design Professional that designs the project and warrants the LEED Gold certification in the above situation has only minimal construction phase responsibility?

If its scope of service does not call for significant construction administration services, and some other firm, such as a construction management (CM) firm, is going to be performing that function instead, how can the design firm protect itself against decisions being made during construction and commissioning that are inconsistent with achieving Gold Certification?

Discussion: Unlike a supplier that gives an equipment warranty, a Design Professional does not have the same kind of control over the factors that affect a LEED certification warranty when the designer gives such a warranty.

It is unreasonable for a project owner to demand such an uninsurable warranty from a Design Professional.

AIA B101-2007, §3.2.3 added a requirement concerning green design responsibilities. Section 3.2.3 of the 2007 edition required the architect to discuss with the owner environmentally responsible design approaches. It provided:

> "The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, *including the feasibility of incorporating environmentally responsible design approaches*. The Architect shall reach an understanding with the Owner regarding the requirements of the Project."

The italicized sentence concerning environmentally feasible design approaches has been removed in the 2017 edition of the the B101.

AIA B101-2007, §3.2.5.1 required the Architect to consider environmental issues as part of its Basic Services for design. Section 3.2.5.1 stated:

> "The Architect shall consider *environmentally responsible* design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner's program, schedule and budget for the Cost of Work. The Owner may obtain *other environmentally responsible* design services under Article 4."

The requirements of this provision would obligate the Architect to "consider environmentally responsible design alternatives," but the Owner is not obligated to select any such alternatives.

The 2017 edition of the B101 removed the italicized wording in the clause and replaced it with "sustainable" design alternatives and "sustainable" design services to be performed "as a Supplemental Service under Section 4.1.1."

The AIA published AIA Document D503™-2011, Guide for Sustainable Projects, in May 2011. The Guide discusses issues related to sustainable design and construction, and contains model language to amend A101, A201 and B101. It contains model language for an Architect's "Additional Services for Sustainable Projects." The Guide also contains model language addressing the issues discussed below with respect to no guarantees or warranties:

> **Model Language**
> § 12.2 The Owner and Architect acknowledge that LEED® Certification is awarded by the Green Building Certification Institute (GBCI), an independent third party organization, and is dependent on factors beyond the Architect's control, such as the Owner's use and operation of the Project; the Work provided by the Contractor or the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by GBCI. Accordingly, the Architect does not warrant or guarantee that the Project will be granted LEED® Certification by the GBCI.
>
> § 4.4.3.2 The Owner and Architect acknowledge that achieving the Sustainable Objective is dependent on many factors beyond the Architect's control, such as the Owner's use and operation of the Project; the Work provided by the Contractor or the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by a Certifying Authority. Accordingly, the Architect does not warrant or guarantee that the Project will achieve the Sustainable Objective.

A good example of a clause explaining that the Design Professional does not control third parties and cannot, therefore, warrant LEED certification is the following:

> "The Project shall be designed in order to enable it to achieve LEED silver certification (except to the extent that the Owner directs otherwise in writing) and with a possible target of achieving LEED gold certification. The Owner shall render decisions concerning LEED certification prior to the completion of the Design Development Documents. The Owner acknowledges that many of the elements required to achieve any LEED certification are controlled by the Owner or third parties not under the control of Architect, and that the Architect does not warrant or guaranty that the Project will be LEED certified."

Mutual Waiver of Consequential Damages

The standard AIA contract documents contain a mutual waiver of liability clause stating that both the project owner and design firm waive consequential damages that they might claim from each other.

Such consequential damages may include lost profits, lost rents, lost tax incentives, lost financing terms, increased operation and maintenance costs, and other economic losses, such as loss or impairment of the building value due to failure to obtain a specified LEED certification.

This waiver of consequential damages may be an important tool to limit the architect's potential liability arising out of failure to achieve the intended sustainability objectives. Engineers and other Design Professionals should consider adding such a waiver to their contracts as well.

A project owner might not be willing to grant a broad waiver clause, but it might accept such a clause if it is limited to consequential damages related to green design. It is worth pursuing this during contract negotiation.

In drafting such a waiver of consequential damages clause specific to green design, consider delineating the consequential damages items listed in the preceding paragraph, plus any others you might think of, and state that the waiver applies, "but is not limited to," each of those items.

The AIA D503™-2011, Guide for Sustainable Projects, includes model language to address these issues as follows:

> **Model Language**
> § 8.1.3.1 The mutual waiver in this Section 8.1.3 expressly includes those consequential damages resulting from failure of the Project to achieve the Sustainable Objective or one or more Sustainable Measures including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker productivity.

Warranty of Green Design

In addition to not agreeing to any warranties or guarantees concerning green design, it may also be advisable to add a clause affirmatively stating that the Design Professional is making no warranty and giving no guarantee concerning LEED certification because such certification is beyond its ability to control.

It may also be prudent to add a paragraph to the contract stating that any forms or representations that the Design Professional or contractor might provide to the project owner concerning LEED credit submittals do not constitute representations or warranties concerning the ultimate functionality or high performance of the building, but instead are solely for the purpose of satisfying the LEED certification process documentation requirements.

In addition to exercising great caution with the language that goes into the contracts for design and construction, project parties must also give attention to the language of marketing materials, advertisements, websites, and proposals.

Despite language in contracts that has carefully avoided over-promising the quality of the services to be provided or the results to be obtained, it is surprising to see the same company potentially create liability through its marketing materials, websites, and proposals. Among the first things that a plaintiff's counsel will review are the firm's marketing materials and website.

Proposal Language May Create Rules

Proposals are often incorporated by reference or as an attachment to the Design Professional agreement. The representations contained in those proposals can, consequently, become an affirmative part of the contract.

Even if not actually incorporated by reference, the content of the proposals might still be relied upon by a project owner in selecting a Design Professional, contractor, or vendor.

Owners have successfully argued that they were expected and intended to rely upon those proposals when deciding whether or not to award a contract. Complaints have increasingly alleged fraud and negligent misrepresentation in the proposals and marketing materials, in addition to actual negligent performance of the services or work.

Owners find these allegations particularly useful as a means to avoid liability limitations they may have agreed to in the contract. By arguing that they were "fraudulently induced" into the contract, the owners might be able to avoid a summary judgment in favor of the Design Professional to enforce a waiver of consequential damages clause or other limitation of liability clause in the contract.

The point is that it is not safe to think that proposals and marketing materials are merely "puffing" and do not create liability.

Owners who are not satisfied with the result of services may latch onto those materials as one basis for their claim – and that one basis might be the thing that gets them past a motion to dismiss or summary judgment motion.

Incorporation by Reference

Issue: Some contracts contain a clause stating that another contract is incorporated by reference. For example, a design subconsultant's agreement might state that the terms and conditions of the prime architect's agreement with the project owner are incorporated by reference. In the context of a design-build project, a general contractor who is taking the lead role as the design-builder may flow down to its design firm subcontractor, by way of incorporation by reference, the terms and conditions of the owner/contract agreement.

A typical clause might read as follows:

> *The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement*

Another example of incorporation by reference is as follows:

> *It is agreed that the terms and conditions of the contract between Owner and Client are hereby incorporated by reference into this agreement. All such terms and conditions are as fully binding upon the Design Professional as if set forth herein at length, to the same extent that Client is bound by the same to the Owner.*

Discussion: You might see clauses like these if you are providing services as a design professional subcontractor to a general contractor that is taking the lead on a design-build project. It is likely that terms and conditions of the prime contract will be inconsistent with your own design professional contract with the client.

By agreeing that your contract with the client will consist not only of the Agreement itself, but also the Prime Contract and any changes to that Prime Contract, you may inadvertently be agreeing to terms you do not know about in the prime contract. These terms might even supersede or override conflicting terms in your subconsulting agreement.

It is possible, for example, that your client has agreed to a standard of care or indemnification requirement that is contrary to your own risk management principles. It is further possible that if those terms flow down into your contract and are enforced against you, you will incur an uninsurable loss.

Conclusion:

(1) Subconsultant needs to read the Prime Terms that are being incorporated

Don't agree to incorporate by reference the terms of another contract unless you have read that contract and understand those terms. You need to assure yourself that the incorporated terms and conditions do not impose risk and liability on you different from what you are otherwise agreeing to in your Agreement with your client.

(a) Take exception to objectionable terms

If in reviewing the prime agreement language you find terms that conflict with the risk allocation provisions of your subcontract, you could seek to amend the clause by adding an exception to incorporation for specific, identified articles of your subcontract.

(b) Caveat the incorporation with a disclaimer of warranties

At the conclusion of whatever flow down clause the subcontract has (particularly if there is a long prime contract that might contain uninsurable warranties or indemnity obligations, add the following in order to do a disclaimer of warranties and Indemnitees:

> "provided however, that notwithstanding any clause in the Prime Contract or this Agreement to the contrary, Subconsultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Subconsultant performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances ("Standard of Care"), and provided further that Subconsultant shall not provide indemnification of any indemnitee other than to the extent damages arise out of third party claims against the indemnitee and to the extent caused by Subconsultant's willful misconduct or negligence, and provided further that Subconsultant shall not defend any indemnitee against professional liability claims.

(2) Subconsultant seeks to make subcontract terms take precedence

A subconsultant might seek to have the terms of its subcontract take precedence over conflicting clauses in the incorporated prime contract. That is accomplished with the following article from the subconsultant, AIA A C401 - § 1.3:

> "To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the Architect shall assume toward the Consultant all obligations and responsibilities that the Owner assumes toward the Architect, and the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner. Insofar as applicable to this Agreement, the Architect shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the Architect, and the Consultant shall have the benefit of all rights, remedies and redress against the Architect that the Architect, under the Prime Agreement, has against the Owner. Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, this Agreement shall govern."

(3) Where Prime Consultant wants prime contract terms (or the most strict terms) take precedence

A prime consultant may choose do exactly the opposite of what is shown above, and impose the strictest terms of the prime agreement or subcontract agreement as most benefits the prime. An example of such a clause is the following:

> Subcontractor is bound to Prime for the performance of the Work in the same manner as Prime is bound to Owner under Prime's contract with Owner. The pertinent parts of such contract will be made available upon Subcontractor's request. In event of any conflict between these Terms and conditions and a contract between Prime and Owner, the more strict provision in favor of Prime shall govern."

The last sentence of the clause is quite significant. It states that the most stringent of the provisions between the prime and subcontract will be the ones that apply in the event there is any conflict between them.

Indemnification

Issue: Indemnification provisions in contracts may require the design professional to indemnify, hold harmless, and defend its client against claims, damages, and allegations. If you agree to indemnify your client for anything other than damages arising out of your negligence in the performance of professional services, you will be contractually liable for damages that you would not have been liable for under common law.

In other words, the courts would not impose liability on you since you did not violate the standard of care, yet you may be found contractually liable regardless of whether you were negligent, since that is what you agreed to by virtue of the contractual indemnification clause.

Indemnity clauses may include any, or all, of three distinct obligations, including to (1) indemnify, (2) defend, and (3) hold harmless the client. Indemnify means to reimburse your client following a loss.

"Defend" means to pay the client's legal expenses as it defends itself against a third party claim. Hold harmless may have different meanings but most generally is understood to be your agreement to protect the client against harm from suits by either third parties or yourself.

If you agree to defend your client, you may incur your client's defense costs as it defends itself against a third party claim, and you may find that your insurance will not cover those costs.

To the extent your obligation to pay these defense costs is based only on your contractual commitment and not common law, you carrier will likely assert that the contractual liability exclusion of the policy excludes these costs from coverage. This is important to remember.

No matter how innocuous an indemnity clause may appear to you, if it requires you to defend the client for any reason, it may create uninsurable losses for you.

Sample Reasonable Indemnification Clause

> "Consultant shall indemnify and hold harmless the Client, its officers, directors, and employees ("Indemnitees") from and against those damages and costs (including reasonable attorneys fees and cost of defense) that Indemnitee incurs as a result of third party tort claims to the extent caused by the willful misconduct or negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement."

Discussion:

Policy Language: Contractual Liability Exclusion

A typical professional liability policy's contractual liability exclusion bars coverage for your contractually imposed obligation to defend others. An example of a typical policy provision in this regard is the following:

> *Contractual Liability.* This Policy does not apply to any damages, claims, or claim expenses based upon or arising out of liability assumed by You under any oral or written contract or agreement, including but not limited to hold harmless and indemnity agreements, agreements to defend others, and liquidated damages clauses, except that this exclusion shall not apply to a Claim where legal liability exists in the absence of such contract or agreement and arises from Your Wrongful Act or the Wrongful Act of Your subconsultants in the rendering of or failure to render Professional Services.

Indemnity clauses fall into three groupings. These are commonly called broad form, intermediate form, and narrow form.

Broad Form Indemnity, as its name implies, requires the consultant to indemnify its client for all damages arising out of the project whether caused by the consultant, a third party, or even the client. An example of such a clause is:

> *Consultant shall indemnify, defend and save harmless the Client, and its officers, directors, employees and agents, from and against all liability, loss, cost or expense (including attorney's fees) by reason of liability imposed upon the Client, arising out of or related to Consultant's services, whether caused by or contributed to by the Client or any other party indemnified herein, unless caused by the sole negligence of the Client.*

By the terms of this clause, you will indemnify your client for damages arising from your acts regardless of whether those acts and omissions are negligent. By placing the word negligence after the other terms, it does not modify them but rather stands alone as a separate basis for indemnity.

Notice that this clause requires you to defend the owner against claims. This type of defense obligation is barred from coverage pursuant to the contractual liability exclusion of your policy. The language also requires that you indemnify the client for mere allegations without regard to whether or not there is negligence.

To trigger your indemnification obligation pursuant to this clause, there need only be a mere allegation that damages arose from your professional services. Indemnification obligations not related to negligence are not covered by your policy.

Beware that the limited contractual liability coverage afforded by the typical professional liability policy is not intended by the carrier to respond to the kind of contractual obligations imposed upon you by the above-quoted contract language. You should seek to strike language requiring you to provide contractual liability coverage.

If the client will not agree to strike it, then at a minimum the language should be amended to indicate that only limited contractual liability coverage is provided—meaning that your policy will contain an exclusion that provides a limited clarification of the contractual liability exclusion.

Intermediate Form Indemnity also shifts much risk to the consultant but not as drastically as the broad form. It may state, for example, that the consultant will indemnify the client for all damages caused in whole or in part by the consultant. This language can be deceptively subtle.

Many, if not most, courts interpret it to mean that if the consultant even slightly contributed to causing the damages, it will be required to indemnify the client for ALL of the damages, including those caused by the client's negligence.

An example of such a clause is as follows:

> *The Architect shall indemnify and hold harmless the Owner for all damages, losses, or claims that arise as a result, in whole or in part, from the negligence, or error, omissions, or failure to perform by the Architect, his employees, his agents, or his Consultants.*

This is an exceptionally bad clause. It is interpreted by courts to require the design professional to indemnify the owner for 100 percent of the damages incurred by the owner even if caused only in part (e.g., less than 1%) by the design professional. This is an unreasonable term and condition. It creates uninsurable risk for the design professional. Only the damages caused by the negligence of the design professional would be covered by the insurance.

Narrow Form Indemnity requires the consultant to indemnify its client only to the extent that damages are caused by the consultant's negligence. Of the three forms of indemnity, this is obviously the most reasonable. An example is as follows:

> *Consultant shall indemnify the client for damages arising out of the performance of professional services, but only to the extent caused by the negligent acts, errors or omissions of the Consultant.*

Impact on Insurance Coverage

Keep in mind that consultants' professional liability policies are intended to respond only to damages caused by the negligence of the insured design professional. Exclusions in the policy generally bar coverage for contractual liability in which the consultant has assumed liability it would not have had under common law because it performed services negligently.

Beware of owner-generated clauses that initially may appear to provide negligence-based indemnity but in reality go further. Consider, for example, the following clause:

> *Design Professional shall indemnify and hold harmless the Owner from any and all claims, damages, suits, and expenses caused by or arising out of the acts, omissions, errors or negligence of the Design Professional.*

Because negligence is placed at the end of the phrase, it stands alone and does not modify the terms acts, errors, or omissions. As a result, the design professional could be required to indemnify its client for damages arising out of even non-negligent errors and omissions.

To remedy this situation, the clause could be amended to read: arising out of the *negligent* acts, omissions or errors of the Design Professional. The key is to place the adjective negligent in front of the balance of the words.

A similar situation occurs in the following indemnity provision:

> *Design Professional shall indemnify and hold harmless the Owner for all claims and damages arising out of the performance of professional services on this Project.*

This clause could be appropriately revised by inserting the adjective negligent in front of performance. The words "arising out of" need to be deleted and replaced with "to the extent caused by." The revised sentence would read as follows: "to the extent caused by the negligent performance...."

Note on Indemnification in California.

In California, it is not enough to merely avoid including uninsurable "defend" language in the indemnification clause. What might otherwise be considered acceptable language (that only requires you to indemnify your client for damages to extent arising out of your own negligence) is not sufficient to avoid the duty the courts of California will impose on you to defend the indemnitee.

In essence, if a California contract contains an indemnification agreement, the agreement will be interpreted to impose an additional obligation for the indemnitor to defend the proposed indemnitee immediately upon the tendering of the defense. See the California decisions in the case of *Crawford v. Weathershield* and the case of *UDC-Universal Development, L.P. v. CH2M Hill.* See also the California Indemnification statute, Civil Code, Sections 2772-2784.5.

The only way around this, is for the parties to affirmatively state that there is NO duty to defend any claim that is subject to the indemnification provisions. Even with the current **California statute**, it is still advisable to specifically state that the designer accepts no duty to defend against professional liability claims. This is because the statute does not appear to change the case law that holds that where a party commits to indemnifying its client, the indemnity automatically includes a duty to defend. The courts and the code still permit the parties to expressly eliminate that duty to defend by explicitly addressing the issue in the indemnification clause.

Clarify indemnity clauses so they apply only to damages from third party claims.

Historically, indemnification was for general liability claims arising out of bodily injury and property damages. Standard form indemnity clauses used to routinely state that it was BI and PD claims that were indemnified. With owners writing their own contract forms, however, it is more common to see clauses that simply say that the owner or client will be indemnified for all damages and losses of any kind. This could include their own first party damages that occur in the absence of any third party claim against them.

There is no reason to give the owner or client indemnification for their first party damages. They don't need that to be added to indemnity in order to be able to recover those damages from the consultant. They would instead need to make a claim against the consultant for breach of contract and recover after providing their claim.

Revise indemnity articles to expressly state that obligations only apply to "third party tort claims." The typical clause mixes together terms like "claim," "action," and "proceedings" that require a defense with terms such as "damages," "losses," "judgments," and "expenses," that logically required only indemnification.

Make it clear that indemnity is not for first-party losses such as economic losses that the Indemnitte has in the absence of a third party claim against it.
Consider revising the order of the words in the article by moving all words requiring a duty to defend to the beginning of the phrase, followed by words that require only indemnification. Then be sure to state that the only damages to be indemnified are those that arise out of third party claims.

Decisions from different courts around the country demonstrate the importance of putting words into the indemnity clause to state that indemnity is only for damages from third party claims.

Florida courts hold indemnity clauses in contract applies only to damages for claims brought by 3rd parties and not to 1st party damages and claims between the parties. To make indemnity apply to 1st party damages and claims the contract would have to expressly state that intent according to the court in the decision of *Int. Fidelity Ins. Co. v. Americaribe*, 906 F.3d 1329 (11th Cir. U.S., 2018). The clause considered by the court in that decision was the following:

> "Indemnification. To the fullest extent permitted by law, [Subcontractor] shall indemnify and hold harmless [Contractor], its officers, directors or employees and the Owner, from and against all claims, damage, losses and expenses (including, but not limited to attorney's fees) arising out of, in connection with or resulting from the performance of Work under this Subcontract Agreement ...."

Although the clause didn't specifically state that it applied only to third party claims, the court stated this was the intent because the clause didn't expressly state that it applied to first party claims.

A similar result was obtained in a court decision in Washington, D.C. In *Hensel Phelps Construction v. Cooper Carry, Inc.*, 2016 WL 5415621 (U. S. District Ct., District of Columbia, 2016), the court held that the indemnity clause could not be used to make 1st party claims by the contractor to recover its own financial losses. It concluded this was the only way to understand indemnification clauses unless the expressed the opposite intent.

The background on this decision is that Hensel Phelps (the "Contractor") was awarded a Guaranteed Maximum Price (GMP) contract. In preparing its GMP proposal, the contractor relied upon an engineer's "Preliminary Design Documents."
After completing certain work, contractor states it determined designs were flawed, and it had to make corrections for code compliance – causing increased costs. The contractor made a claim against the engineer under the indemnification clause to recover its damages and attorney's fees. Summary judgment was granted to engineer because the court found that a suit based on the indemnification clause of the contract could only seek damages if they resulted from 3rd party claims against the contractor.

A Maryland court decision demonstrates that not all courts around the country will interpret contracts and law in the same way. In *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group, 454 Md. 475, 164 A. 3d 978, (Maryland 2017), the court found that the indemnification obligation included a requirement to pay* 1st Party Attorney's Fees.

The facts of the case were that an easement agreement had been executed between a contractor and adjoining property owner permitting a tower crane to be operated over the neighboring property. During excavation, certain damages occurred to the foundation and structure of

neighboring buildings. The indemnity language in Easement obligated Contractor to "defend and indemnify the property owner from all claims, demands, debts, actions, causes of action, suits, obligations, losses, costs expenses, fees, and liabilities … arising out of … breach of any terms of this Agreement." The court found the clause applied to 1st party claims for the property owner's own losses and damages, including right to recover attorneys' fees.

Indemnity Clause May be Void for Violating Anti-Indemnity Statute

In the case of *The Travelers Indemnity Company of Connecticut v. Lessard Design, Inc*., (U.S. Dist. Ct., E.D. Virginia 2018), the indemnity clause was found to violate the state's anti-indemnity statute applicable to "contractors" performing work on "any contract relating to construction." The clause required indemnity "for any and all losses, liabilities, expenses, claims …. relating to the services performed by the Architect." It made no exception for where Owner's negligence was the sole cause of damages. It required only that liability "relate to" the Architect's services.

The court concluded that this was such a "low bar" that this "could lead [Architect] to indemnify [Owner] for [Owner's] own negligence" [and] Indemnification of a party for that party's own negligence is precisely the situation forbidden by [the statute]."

Conclusion: Carefully review the language of the contract's indemnity provision and remove any requirement that you defend your client in litigation. A requirement that you defend the client creates potentially uninsurable liability.

In contrast to indemnification, which occurs after the fact and reimburses the client for its expenses, defense of the client requires you to expend money during the course of litigation before your liability has been determined.

Revise indemnity provisions to ensure that you indemnify the client *only to the extent* of damages caused by your negligence or the negligence of others for whom you are legally responsible, and only for damages arising out of third party claims. If the indemnity provision contains the language "in whole or in part", negotiate revised language stating that you are liable only to the extent of damages arising from your negligence.

The contractual liability exclusion in the professional liability policy states that there is no coverage for liability that you assume by contract that you would not have had at common law in the absence of the contract language. In other words, if you were negligent, your insurance covers you and the contractual liability is not an issue. If, however, you were not negligent, and the basis for the client's recovery against you is the contractual indemnification obligation, you have no coverage for that loss.

Pursuant to principles of common law, the design professional is legally responsible for its negligence, including a duty to indemnify its client for damages arising out of the design professional's negligence. A project owner, consequently, is adequately protected by common law even in the absence of any contract language specifically adding indemnification provisions.

If you must have an indemnity clause, be sure it allocates risk to the parties in the best position to control and manage the risk. Consider the following:

> "Consultant agrees to indemnify and hold harmless Client from and against any liabilities, damages, and costs arising out of the death or bodily injury to any person or the destruction or damage to any property, to the extent caused, during performance of services under this Agreement, by the negligent acts, errors and omissions of the Consultant or anyone for whom Consultant is legally responsible, subject to the limitations set forth in the Limitation of Liability article of this Agreement."

EJCDC E-500 (2014 Ed.) provides at Section 6.10.E. for mutual indemnification for damages arising out of negligence, and specifically limits the indemnification to the percentage share of the indemnifying party's negligence.

> "Percentage Share of Negligence. To the fullest extent permitted by Laws and Regulations, a party's total liability to the other party and anyone claiming by, through, or under the other party for any cost, loss, or damages caused in part by the negligence of the party and in part by the negligence of the other party or any other negligent entity or individual, shall not exceed the percentage share that the party's negligence bears to the total negligence of Owner, Engineer, and all other negligent entities and individuals."

In summary, educate your client to understand that your insurance will not cover you or provide any benefits to the client for costs you agree to incur that arise out of anything other than your negligence. Attempt to obtain a reasonable indemnification such as the following:

> "Consultant shall indemnify and hold harmless the Client, its officers, directors, and employees ("Indemnitees") from and against those damages and costs (including reasonable attorneys fees and cost of defense) that Indemnitee incurs as a result of third party tort claims to the extent caused by the willful misconduct or negligent act, error or omission of the Consultant or anyone for whom the Consultant is legally responsible, subject to any limitations of liability contained in this Agreement."

Inspection

Issue: Insurance Company risk management professionals routinely advise their insured design professionals to avoid using words in their contract that create a duty to inspect unless that is what is specifically called for by the scope of services. The design professional is not responsible for the contractor's work and cannot assure or guarantee that the contractor will meet all the details of the contract documents.

Unless a design professional is being retained specifically for the purpose of construction management services that entail inspection, the design professional will more typically agree only to observe or review the contractor's work for general conformance with the contract documents. It is not uncommon, however, to see contract language for general design services that transfer to the design professional significant responsibility and risk for inspection even though that is not within the scope of services for which the design professional is being paid.

One such Agreement, for example, included the following language:

> *The Architect shall visit the construction sites as often as is necessary to assure quality of the project . . . to inspect the progress and quality of the Work and to determine if the Work is proceeding in accordance with Contract Documents . . . and shall endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor(s).*

Discussion: The term inspection is sometimes used in contracts generated by owners when the terms "monitoring, reviewing, or observing" might be more appropriate. In describing the Architect's responsibilities as the project is reaching completion, the current AIA B101-2017 uses the term "inspection." Section 3.6.6.1 provides that, "The Architect shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion."

But when performing Evaluations of the Work as it progresses, Section 3.6.2.1. limits the Architect to visiting the site at appropriate intervals to become "*generally*" familiar with the progress and quality of the Work completed and to determine *in general* if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents.

The clause goes on to explain that the Architect is not responsible to make exhaustive or continuous on-site inspections.

When used to describe monitoring of the contractor's work, the term inspections may imply a greater responsibility than the Consultant intends to provide. The client may think that you are committing to police the project and through your inspection ascertain all instances where the contractor's personnel did not comply with the detailed plans and specifications and other contract documents. Some clients may even state in the contract that the purpose of the inspection is to assure the client that all problems are discovered and promptly reported to the client.

An example of a contract with inappropriate language for the scope of services stated:

> *Architect shall inspect the contractor's work, keep the Owner informed of the progress and quality of the Work, and shall protect Owner against defects and deficiencies in the Work of the contractors.*

This should be revised to reflect that the Architect is not inspecting the contractor's work to guarantee that it has no defects. It can only observe the work and exercise reasonable care to determine that the work conforms generally with the contract documents.

This is the industry standard and should be understood by an owner. After all, the Architect is not being compensated for the man-hours it would take to perform the function of watching everything done by the contractor to assure no defects or deficiencies. Moreover, the contractor must be held accountable for those defects and deficiencies rather than the Architect.

Conclusion: Unless you are specifically retained to perform inspection services, try to delete the words inspect or inspection in the contract and substitute them with review, monitor, and observe.

Agreeing to observe whether the contractor's work is in general conformance with the design concept is realistic. This is a manageable risk, whereas inspecting whether the work meets the details of the plans and specifications creates much greater risk.

A reasonable clause with regard to site observation responsibilities is the following:

> "On the basis of the site visits, the Consultant shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work."

AIA Document B101-2017, Section 3.6.2.1, addresses the issue by explaining that the consultant will not be on site every day but will make site visits as appropriate to assess how the work is generally progressing. It states as follows:

> 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work.

Insurance

Go back to Chapter 9 for a more detailed discussion of design professional liability insurance, including what and who is covered by the policy, and how certain exclusions of the policy may impact your coverage for damages you may incur pursuant to the terms and conditions of your contracts with clients.

Issue 1: Limiting Contractual Obligations to What Can be Covered by an E&O Policy

Professional liability insurance is intended to cover you for your negligent acts, errors, and omissions. Breaches of warranty and contract are not covered, except to the extent the breaches result from negligent acts, errors, and omissions of the policy holder. Coverage for liability damages caused by anything other than your negligence is expressly excluded by the contractual liability exclusion.

Discussion: In one contract, the insurance section stated that the design professional would obtain professional liability insurance "protecting from claims resulting from errors and omissions, or negligent acts arising out of the performance of professional services and operations under this Agreement."

The way the above paragraph is written, it appears to expect insurance to cover all errors and omissions regardless of whether they were negligent.

The design professional should clarify to the owner that the professional liability policy, consistent with all such policies by all markets available today, limits coverage to damages caused by the design professional's negligence.

Conclusion: When you see provisions requiring contractual liability, or warranties and guarantees, you should immediately flag them as problem clauses. Some of these clauses are obvious. Others are subtle and harder to spot because they don't use language readily recognized as referring to warranties and guarantees. If, for example, you agree to the highest standard of care instead of the generally accepted standard, you may inadvertently warrant that your services will be the best, and will produce a perfect result.

It may also be prudent to delete a reference in the indemnity clause that would require you to indemnify your client for breach of contract since this is not insurable absent negligence. In any event, your client has adequate legal recourse to sue for breach of contract without any need for a separate indemnity obligation.

Issue 2: Additional Insured Status

The professional liability carrier will almost never name an entity other than the design professional as an insured or additional insured under the professional liability section of the policy. Reasons for this include the fact that the owner of a project is not a licensed design professional and is not likely to commit a negligent design error for which it will need coverage under the professional liability policy.

In addition, the owner is the party most likely to have damages for which it desires to sue the consultant and recover under the consultant's professional policy.

Discussion: A major problem with naming the client as an additional insured is that it creates potential remedies against the consultant that the owner would not otherwise have.

Conclusion: When your client requests to be named as an additional insured on the professional liability part of your insurance program, explain why the insurance carrier will not do this. Obtain a memorandum or letter from your insurance professional confirming this if necessary.

Issue 3: Obtaining Contractual Liability Coverage

If your contract with your client requires you to obtain contractual liability coverage, you may find yourself in breach of the contract if your insurance carrier will not agree to the broad form contractual liability coverage the client intended.

One owner-generated contract required the design professional to procure a professional liability policy with contractual liability coverage for the project owner. The contract provided:

> *The Engineer's contractual liability coverage must, at a minimum, protect the Owner to the extent of the following hold harmless agreement.*

Discussion: The language in the above-quoted Agreement went on to state that the Engineer will indemnify the owner for all expense *caused in whole or in part by any negligent act or omission of the Engineer.....* Courts typically apply such language to mean that the Engineer is responsible for 100% of the damages as long as even only 1% was caused by the negligence of the Engineer. The design professional policy, however, will only pay for the damages to the extent caused by the negligence of design professional or others for whom the design professional is legally responsible.

Contractual liability for anything other than damages caused by the design professional's negligence is excluded from coverage under the standard professional liability policy. Under these circumstances, the insurance company will not agree to provide contractual liability coverage for the liabilities the design professional agreed to in the contract.

Conclusion: The professional liability policy will only cover contractual liability to the extent that the design professional would have been liable for the damages in the absence of the contract language. This means that the policy only covers damages arising out of the design professional's negligence.

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Integrated Written Agreement

Issue: A written contract should be the final word concerning the intent of the parties to the contract. Unfortunately, even the most carefully drafted agreement will not expressly address every possible contingency.

If there are "side letters" or oral agreements that supplement the written contract, or ambiguities in the contract, disputes may arise that require evidence outside of the contract document itself concerning the actual intent of the parties in view of the extra-contractual matters or the ambiguities.

To determine which contract interpretation is correct, the court might permit what is called "parol evidence" to be introduced at trial. This could include oral testimony plus documentation other than the written contract.

Discussion: To avoid uncertainty and confusion concerning the rights and responsibilities of the parties under a contract, the contract itself should state all material representations, terms, conditions, and expectations as clearly as possible and ambiguities should be avoided.

The intent of the parties should be discernible from looking within the "four corners" of the contract. There is no such thing as an artful ambiguity in a contract; ambiguities cause problems, period. Remember, if a dispute arises, a third party will be called upon to decide what the written contract says and the third party will first look at the words in the agreement to determine the intent of the parties. To eliminate the possibility of either party attempting to bring in some other document or evidence that may change or supplement the intent of the language of the contract, even without an ambiguity, in addition to careful drafting of the contract itself, a well-drafted contract usually contains an integration clause. Consider the following:

> "Integrated Written Agreement. This Agreement represents the entire and integrated agreement between the Owner and Design Professional and supersedes all prior communications, negotiations, representations, quotations, offers or agreements, either written or oral between the parties hereto, with respect to the subject matter hereof, and no agreement or understanding varying or extending this Agreement shall be binding upon either Party, other than by a written agreement signed by both the Owner and Design Professional."

Conclusion: You should anticipate that there will be purchase orders, work assignments, work orders, task orders and other types of written instruments directing work to be performed after a services contract has been negotiated and put into place. Some of those written instruments issued by the Owner may have terms and conditions differing from those agreed to in the basic contract. It may, therefore, be prudent to add an additional sentence to the Integrated Written Agreement clause stating that the terms and conditions of the Agreement control and govern over any subsequent form or document assigning work where the language contained therein is inconsistent with the Agreement. An example is as follows:

> "The parties agree that the provisions of the terms and conditions of this Agreement shall control over and govern as to any subsequent form or document signed by the Parties, such as Owner Purchase Orders, Work Orders, etc. and that

> such documents may be issued by Owner to Design Professional as a matter of convenience to the Parties without altering any of the terms or provisions hereof."

The two clauses discussed in this section should usually be employed together. If a subsequent transaction evidenced in a form or document does contain specific contract terms relevant to that transaction alone and the parties intend that provision shall only apply to that one transaction, the subsequent document should specifically state that it is intended to amend a specific portion of the original agreement and be acknowledged and signed by both parties as such. Amendments of a more general nature are better accomplished by a formal written amendment to the original contract.

Limitation of Liability

Issue: An excellent way to limit the amount of liability undertaken by the design professional is the limitation of liability (LoL) clause. By including an LoL clause in your contract, you can better predict the extent of your potential liability and obtain appropriate coverage at a more reasonable cost.

Discussion: The rationale for capping liability for design professionals is that the small fee paid to the design firm does not justify the firm's assumption of all the risk. The project owner benefits from the sharing of risk because it is able to obtain innovative and cost-effective designs.

The profit margin for design firms does not support their taking on unlimited risk for project owners. With today's high insurance premiums, one way to reduce the premiums to everyone's benefit is to include an LoL clause in more contracts. Underwriters generally consider the presence of an LoL clause when underwriting and pricing the risk.

Conclusion: Include a Limitation of Liability Clause in your own standard form contracts. Ask your client to include an LoL clause in its form contracts as well.

Based on the success of many firms at getting these clauses into their contracts, and the further success in enforcing them in litigation, it is wrong to assume that you should not ask for and expect this clause. A clause that provides good protection one that sets the

Cap at the amount of fee or a dollar amount, which ever is greater.

For example:

> **"Limitation of Liability**. To the fullest extent permitted by law, the total liability, in the aggregate, of Consultant and its officers, directors, partners, employees, agents, and subconsultants, to Client, and anyone claiming through or under Client, for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way relating to this Project or Contract, from any cause or causes, including but not limited to tort (including negligence and professional errors and omissions), strict liability, breach of contract, or breach of warranty, shall not exceed the total compensation received by Consultant or $100,000, whichever is greater."

If it is impossible to set the limit at liability at either the fee or a specified dollar amount, then the ultimate fall back position would be to set the cap at:

Insurance proceeds available up to the amount of insurance required by the contract.

For example:

> **Limitation of Liability Option – Limit to Insurance**
>
> "To the fullest extent permitted by law, the total liability, in the aggregate, of Consultant and its officers, directors, partners, employees, agents, and

> subconsultants, to Client, and anyone claiming through or under Client, for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way relating to this Project or Contract, from any cause or causes, including but not limited to tort (including negligence and professional errors and omissions), strict liability, breach of contract, or breach of warranty, shall not exceed the amount of insurance proceeds available up to the amounts of insurance required by this Agreement."

A typical clause may look like the following from EJCDC E-500 (2014), Exhibit I, I.6.11.A.1 (option 1):

> A. *Limitation of Engineer's Liability*
>
> *1. Engineer's Liability Limited to Stated Amount, or Amount of Engineer's Compensation:* To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, members, partners, agents, employees, and Consultants, to Owner and anyone claiming by, through, or under Owner for any and all injuries, claims, losses, expenses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, Engineer's or its Consultants' services. or this Agreement, from any cause or causes whatsoever, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied, of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Consultants, shall not exceed the total amount of $[ ] or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee."

In this clause, various legal causes of action that are included in the limitation are specifically identified. There is a good reason for this. Some cases have held that if the LoL states that it applies to damages arising out of negligence and does not mention breach of contract, an owner might sue for breach of contract and thereby avoid the limitation altogether.

The reason for stating that the LoL will be the contract amount or a specific dollar amount, "whichever is greater," is that in the event the contract fees are small, a court may be more impressed by the fact that you have offered an LoL that is higher than the contract amount – and, therefore, will enforce it as a reasonable amount.

EJCDC E-500 (2014), Exhibit I provides for a limitation of liability based on insurance proceeds, as follows:

> 1. "*Engineer's Liability Limited to Amount of Insurance Proceeds:* Engineer shall procure and maintain insurance as required by and set forth in Exhibit G to this Agreement. Notwithstanding any other provision of this Agreement, and to the fullest extent permitted byLaws and Regulations, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, members, partners, agents, employees, and Consultants to Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever

> arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied, of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Consultants (hereafter "Owner's Claims"), shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer's insurers in settlement or satisfaction of Owner's Claims under the terms and conditions of Engineer's insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal), up to the amount of insurance required under this Agreement. *If no such insurance coverage is provided with respect to Owner's Claims, then the total liability, in the aggregate, of Engineer and Engineer's officers, directors, members, partners, agents, employees, and Consultants to Owner and anyone claiming by, through, or under Owner for any and all such uninsured Owner's Claims shall not exceed $[ ].*

Waiver of Consequential Damages. Even a client who does not want to include an LoL clause in the contract may be willing to include a mutual waiver of consequential damages. The AIA B101-2017, Section 8.1.3, provides:

> "The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7."

Note that if this clause is going to be agreed to in your contract with the owner, you should determine whether the owner is including a similar clause in its construction contract and, if so, request that the owner add language making the waiver of consequential damages by the contractor also applicable to claims against the design professional.

You may otherwise be subject to Contractor Claims for equitable adjustment since the owner has the waiver from the contractor but you do not. As more states are discarding the economic loss rule and allowing contractors to sue design firms with whom they have no contract, it becomes increasingly important to include language in the construction contract to limit the contractor's remedies against the design professional.

In negotiations concerning the waiver of consequential damages clause, one of the parties may ask for a definition of consequential damages. As stated by one court, There are two broad categories of damages *ex contract*: direct (or general) damages and consequential (or special damages). Direct damages are those that arise naturally or ordinarily from a breach of contract; they are damages, which, in the ordinary course of human experience, can be expected to result from a breach.

Consequential damages are those that arise from the intervention of special circumstances not ordinarily predictable. If damages are determined to be direct, they are compensable. If damages are determined to be consequential, they are compensable only if it is determined that the special circumstances were within the contemplation of both contracting parties. Whether damages are

direct or consequential is a question of law. Whether special circumstances were within the contemplation of the parties is a question of fact. (*Roanoke Hospital v. Doyle and Russell*, 215 Va. 796, 801 (1975)).

Although the AIA B101-2017 does not define ”consequential damages,” some of the elements of what AIA deems to be included within that term are set forth in AIA A201-2017, Subparagraph 15.1.6 to include rental expenses, losses of use, income, profit, financing, business and reputation, and loss of management or employee productivity or the services of such persons. It may be advisable to revise the B101 clause concerning waiver of consequential damages to specifically include the same examples used in the A201. A more comprehensive clause would read as follows:

> “Consultant and Client waive all consequential or special damages, including, but not limited to, loss of use, profits, revenue, business opportunity, or production, for claims, disputes, or other matters arising out of or relating to the Contract or the services provided by Consultant, regardless of whether such claim or dispute is based upon breach of contract, willful misconduct or negligent act or omission of either of them or their employees, agents, subconsultants, or other legal theory, even if the affected party has knowledge of the possibility of such damages. This mutual waiver shall survive termination or completion of this Contract.”

Disclaim Personal Liability

In Florida, include this is Font 5 sizes bigger and all caps (Required by Code): "PURSUANT TO FLA.STAT.ANN. § 558.0035, AN INDIVIDUAL EMPLOYEE OR AGENT MAY NOT BE HELD INDIVIDUALLY LIABLE FOR NEGLIGENCE."

In other states that do not have required statutory wording, you could use something like the following:

> **"No Personal Liability.** "No director, officer, shareholder, employee, representative or agent of either party shall have individual liability to the other party."

Court Decisions Enforcing LoL Clauses

Recent court decisions enforcing LoL clauses once again demonstrate the value of including an LoL clause in the contract.

In *Zirkelbach Construction, Inc. v. DOWL, LLC*, 389 Mont. 8 (Montana 2017). A $50,000 LoL clause was enforced for a designer under design-build contract. The $50,000 limitation of liability (LoL) clause was only eight (8) percent of DP's $665,000 fee. Contractor sued its design professional subcontractor claiming that designer's negligence caused the contractor to incur $1,218,197resolving problems caused by the designer's design plans.

The court noted that the LoL clause capped damages without exempting or exculpating the designer from **all** liability. Consequently, it didn't violate state law. The court well explains the principal of freedom of contract and importance of honoring mutually agreed upon terms of contract even if terms turn out to be burdensome or one sided.

With regard to the issue of freedom of contract the court quoted from a number of earlier court opinions as follows:

> "The fundamental tenet of modern contract law is freedom of contract; parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws." (citation omitted). "This tenet presumes that parties are in the best position to make decisions in their own interest." (citation omitted). "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contract, so far as the same is ascertainable and lawful." "To permit the avoidance of a written contract because the terms of the contract now appear burdensome or unreasonable would defeat the very purpose of placing a contract into writing."

In the case of *Taylor Morrison of Colorado, Inc. v. Terracon Consultants, Inc.*, 2017 WL 2180518, 2017 COA 64 (2017), a $9.5 million jury verdict was knocked down to $550,00 due to the court enforcing the LoL clause. In this case, a housing developer won a jury verdict for $9.5 million against a geotechnical engineer.

Terracon asked the court to enforce the LoL clause of the contract. The developer argued it shouldn't be enforced because it alleged that the engineer's conduct was willful and wanton

misconduct. Trial court allowed evidence in that regard, but the jury found the conduct was not willful and wanton. Therefore, the LoL clause withstood the challenge, and was enforced.

Notice Requirements

Issue: Contractually specified time periods by which a design professional is to notify the owner of occurrences, events, circumstances, or changes that may impact the schedule or cost of performance must be taken seriously. It is important that the prescribed time periods be realistic and that the Architect be aware of the time requirements and manage its services so as to meet them.

Discussion: When a contract states that the design professional must give notice of changes or requests for approval of additional services to specific, named individuals on behalf of the owner, the design professional must be aware of that requirement and provide notices to the appropriate individuals who have the exclusive authority to grant changes.

In a number of litigated cases, courts have held that project owners are excused from paying a design professional for additional services where the design professional failed to provide notice to the individual specified in the contract despite the fact that notice had been given to others within the owner entity.

A number of cases have also held that where the specified deadline for submitting notice, including information, data, and costing have not been met, this may deprive the design professional of entitlement to payment for services.

In an apparent effort to expedite their projects and hold design professionals and contractors to strict schedules, some owners are arbitrarily establishing unrealistically short time periods in their contracts. Consider, for example, the following:

> *Architect shall notify the Owner orally within forty-eight (48) hours after becoming aware of the occurrence of any event which will delay completion of the construction of the Project. Within five (5) days after providing oral notification, the Architect shall provide the Owner with a written confirmation, and such writing shall contain a detailed statement as to the event causing the delay, the exact length of the delay, and the steps the Owner should consider to minimize the impact of such event on the cost of construction and the time for completion of the Project.*

A problem with establishing specific time periods for providing initial notice and then the follow-up detailed information is that each situation will be different. It is not possible to guarantee that the time periods can be met with the exercise of reasonable care. It may take the design professional longer than anticipated to analyze a unique and unanticipated situation.

It may also take longer than anticipated to subsequently analyze the length of the delay and the efforts and costs by the contractor and design firm that may be needed to overcome the delay.

Conclusion: The design professional should review all notice and time requirements of the proposed contract and negotiate out those time periods that are mandatory and unreasonably short. Some flexibility for meeting time periods should be built into the contract language to recognize that meeting the professional standard of care may reasonably require that additional time be taken to analyze and report on the matters required.

Once time periods are agreed upon and included in the Agreement, be sure that all project and contract managers responsible for the project are aware of the notice requirements and adhere to them faithfully.

Owner Provided Data

Issue: Project owners should be contractually obligated to provide design firms with information and data in their possessions. Design firms should be contractually permitted to rely upon site information and other information provided to it by the client. This includes reliance when preparing and pricing the initial proposal and also when performing its services.

Discussion: Some project owners, however, are attempting to limit the design professional's reliance on such data. For example, consider this contract clause:

> *Consultant acknowledges that Owner provided documents, if any, including, without limitation, all plans, standards, specifications and drawings (Owner's Documents) are submitted herewith by Owner to Consultant without any warranty whatsoever and are for conceptual and information purposes only. Consultant agrees and understands that it is Consultant's obligation and responsibility to properly engineer and design the subject matter of the Work Product. Consultant expressly assumes all Design and Products liability arising from or attributable directly or indirectly to Owner provided documents utilized by Consultant in the engineering and design of the subject matter of the Work Product....*

This puts all the risk on the consultant, including risks that it is unable to manage and would otherwise be entitled to an equitable adjustment for encountering.

Conclusion: Include a statement that the client intends for you to rely upon the information. An example clause from EJCDC E-500 (2014), Exhibit B, B2.01, is as follows:

> *"In addition to other responsibilities of Owner as set forth in this Agreement, Owner shall at its expense:*
>
> C. Furnish to Engineer any other available information pertinent to the Project including reports and data relative to previous designs, construction, or investigation at or adjacent to the Site.
>
> D. Following Engineer's assessment of initially-available Project information and data and upon Engineer's request, obtain, furnish, or otherwise make available (if necessary through title searches, or retention of specialists or consultants) such additional Project-related information and data as is reasonably required to enable Engineer to complete its Basic and Additional Services. Such additional information or data would generally include the following: ..."

Reliance upon information provided by the client is also set forth in EJCDC E-500 (2014), in the section entitled "Standards of Performance" at 6.01.D, which reads as follows:

> "Subject to the standard of care set forth in Paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards."

AIA B101-2017 provides for the architect's reliance on information furnished by the owner. Section 3.1.2 provides in part as follows:

> "The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and the Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information."

Reliance upon client information also becomes important in addressing subsurface conditions and who has ultimate responsibility for them. Consider this clause from a manuscript contract addressing site information particularly as it affects responsibility for subsurface conditions:

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Owner's Responsibilities

Issue: Some contracts go to great lengths concerning the Design Professional's responsibilities, but are silent concerning the corresponding responsibilities of the Owner. A contract between the Design Professional and the Owner should set forth not only the responsibilities of the Design Professional, but also the key responsibilities of the Owner as well.

This will naturally include payment terms, termination notices, site access, rights of way, permits, provision of information, indemnification and other terms. Numerous other Owner responsibilities can also be included, particularly where environmental problems may be encountered and it is appropriate that the Owner assume responsibility for existing contamination, arranging treatment, transportation, and disposal of waste.

It is important that you not overlook an item that needs to be assigned to the responsibility of the Owner.

Discussion: The various responsibilities can be set out in appropriate paragraphs and articles throughout the contract. Many of these have been presented as examples throughout this Risk Management Guide. In addition to establishing specific Owner responsibilities, the contract should require the Owner to promptly review Design Professional's submittals and to provide a decision-maker representative to address issues raised in the submittals.

It may also be appropriate, particularly on environmental projects, to require the Owner to designate an individual to interface with the regulator or governmental agency involved in the project.

Conclusion: One useful way to help assure that key responsibilities will be identified with the Owner is to group them into one single clause titled Owner's Responsibilities. The clause should include a statement that the Design Professional is entitled to act in reasonable reliance upon the information provided by the client.

The AIA addresses Owner Responsibilities in AIA B101, article 5, with an extensive thirteen paragraph description of duties assumed by the owner. Among the responsibilities of the Owner are to do the following:

- 5.1. Provide requirements for and limitations on the Project, including a written program;
- 5.2. Create a budget for the Project and reasonable contingencies;
- 5.3. Identify an Owner's representative with authority to act for the Owner and "render decisions and approve Architect's submittals…."
- 5.4 Furnish surveys to describe physical characteristics and utility locations.
- 5.5 Furnish services of geotechnical engineers as needed.
- 5.6 Provide Supplemental Services designated at Owner's responsibility.
- 5.7 Fulfill Owner responsibilities for meeting Sustainable Objectives identified.

- 5.8 Coordinate services of Owner's consultants with the services of the Architect and Owner is to require its other consultants and its contractors to maintain insurance.
- 5.9 Furnish tests, inspections and reports required by law or Contract documents.
- 5.10 Legal, insurance and accounting services, that may be necessary to meet Owner's needs and interests.
- 5.11 Notice to Architect if Owner learns of any fault or defect in the Project, including errors or inconsistencies in the Architect's Instruments of Service.
- 5.12 Include the Architect in all communications with the Contractor that relate to or affect the Architect's services or professional responsibilities. Owner must also notify Architect of the substance of any direct communications it was with the Contractor that relate to the Project.

- 5.13 Before executing the contract for construction the Owner is to coordinate the Architect's duties and the responsibilities set forth in the Construction contract and is to provide the architect with an executed copy of the Construction contract.

Equipment and Materials Substitutions

One issue that gives design firms cause for concern is a decision by the Owner to accept substitution of equipment- such as "or equal" products instead of the brand name. The AIA B101-2017 document addresses this issue by providing the architect some level of protection at AIA B101, §3.1.4 as follows:

> "The Architect shall not be responsible for an Owner's directive or substitution, or for the Owner's acceptance of non-conforming Work, made or given without the Architect's written approval."

For a more detailed discussion concerning reliance upon documentation and information provided by others, see the section of the book below specifically addressing that subject.

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Ownership and Copyrights of Documents

Issue: Instruments of service produced by the design professional, including plans, specifications, drawings, opinions, reports, and calculations have historically been treated as intellectual property belonging to the design firm that created it. This has been plainly stated in standard form contracts such as those published by the AIA, in Document B101-2017 at Article 7, and EJCDC, in Document E-500 (2014) at 6.03.

Discussion:

Here is an example of language that gives the Client too much ownership over the Instruments of Service and fail to provide adequate protection for the design professional whose documents are reused or misused:

> *Ownership of Plans. Client shall be the sole and exclusive owner of both the physical embodiment and any intangible rights in any and all plans, specifications, drawings, elevations, calculations, data ... and all other documents (in all cases whether preliminary or final) prepared by Consultant, or at Consultant's direction, or supplied by consultant or Client..... Client shall be free to utilize all such material and the contents thereof in any other development or project, provided that any such re-use shall not identify Consultant as the source of any such documents. Consultant may, at its election, retain one copy of such documents for reference purposes only.*

Besides the fact that you are giving your work away for use on other projects without paying you any additional fee, the problem with allowing the owner to reuse your documents is that you lose control over how the documents are interpreted and used. This puts you at significant risk since you will not be able to make the revisions and changes to the documents that may be necessary before they can be used successfully on a new project.

The liability exposure from such reuse should be carefully considered before you agree to permit it. Before agreeing to permit such reuse, it is advisable to negotiate specific disclaimers on the reuse and indemnification from the owner.

Conclusion: Architects, ideally, should maintain the copyright of their documents and give the owner only a limited license to use them for their specific project. It is advisable to provide protection for the design professional by stating that the documents are the property of design professionals -- not to be reused without authorization.

When project owners create their own contract documents, it is critical that the design professional pay close attention to the language pertaining to ownership and use of the design documents. Clients are more frequently demanding that the documents be deemed their property to be reused at their will, without compensation, and without any liability protection afforded to the designer.

The problem with such clauses is that the designer loses the ability to control the use of its work product. Where a client uses some other firm to complete the design, the original architect is at greater risk because he is not on the project and is unable to correct the inevitable design errors

that could be discovered and corrected as construction work progresses. By being on the project, the architect can interpret its drawings and specifications and cooperate with the contractor and owner to correct deficiencies or errors before they turn into problems.

Where the owner terminates the design professional and uses partially completed documents or takes the documents and modifies them for use on some other project, the risk is even greater. With this increased risk, it is prudent to require contract language with specific disclaimers and indemnification obligations on the part of the project owner.

(1) Seek Indemnification from Client for Reuse of Documents

You can do this while at the same time granting your client appropriate use of the documents for the limited purposes of the specific project.

With re-use by the client of the documents on other projects, the design professional is not able to manage the risks that will naturally arise when design documents are used on a project.

If an owner is insistent that it be given ownership rights to the design documents, and you decide as a matter of business judgment that you are willing to grant such rights, you should seek to add an indemnity clause to protect you against claims that might arise out of the reuse of the documents. For example, you might include language like that from the AIA B101-2017, § 7.3.1, that states:

> "In the event the Owner uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the Architect and Architect's consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1."

(2) Preserve and protect your interest in the Instruments of Service

You should also be careful not to give away your own right to your design library or standard form details, or to your ability to reuse your documents on a future project. Consider adding the following clause if it appears that the Owner client has been overbroad in making your documents a "work for hire."

> "Client acknowledges and agrees that the documents and data to be provided by Consultant under the Agreement may contain certain design details, features and concepts from Consultant's own practice detail library, which collectively may form portions of the design for the Project, but which separately, are, and shall remain, the sole and exclusive property of Consultant. Nothing herein shall be construed as a limitation on Consultant's right to re-use such component design details, features and concepts on other projects, in other contexts or for other clients."

(3) Require Payment Before Transferring Copyright

Some of the contracts written by project owners state that upon execution of the contract all ownership and copyright interests to the documents are transferred to the project owner. This can lead to a situation where the designer is terminated for convenience and the project owner then gives the designer's partially completed (but unpaid for) documents to a follow-on designer to complete and finish the project.

It is wise to protect against the owner taking the documents without paying what is due. This can be done by including a short statement in the transfer clause conditioning the transfer upon payment of all amounts owed to the architect. A court considered a similar situation in the case of *Eberhard Architect's v. Bogart Architecture, Inc. et al.,* 314 F.R.D. 567 (U.S. District Court, N.D Ohio). In that case, although the nonexclusive license came into existence "upon execution" of the Agreement before payment was due, the contract expressly provided for "termination" of the license for subsequent non-payment.

The more important point was that the architect had been prudent enough to include language in its contract stating that even if a license was granted at the outset of a project, the license would automatically terminate upon failure of the client to pay the architect's invoices.

Payment

Issue: Getting paid timely and in full is one of the primary keys to success. A surprising number of professional liability claims that are defended by insurance companies begin with the insured Design Professional filing suit against the Owner to recover the balance of its fee.

Generally speaking, the Owner has some argument as to why it did not pay you and is quick to file a countersuit alleging that your negligence caused the project to go over budget or in some way to be otherwise unsatisfactory.

Many disputes likely could be avoided if the Design Professional were more diligent in getting paid for services as the services are performed, and not allowing the project to be completed with significant fees still outstanding. You should also be wary of contracts that condition payment on a laundry list of conditions you must satisfy before you will be paid, including "pay when paid" clauses. The more "hoops," the more likely that you will be required, as a practical matter, to compromise your billings because some condition or another has not been met to the Owner's satisfaction.

Discussion: Some Owners seem to intentionally delay payment to the Design Professional as a way of saving themselves interest payments to their lender on money they would otherwise be drawing down from a construction loan or from bonds. Others have been known to stop paying close to the end of a project figuring the Design Professional will complete the services anyway and argue over payment later.

Later is often too late because the Owner has already received the services it required, and you have no bargaining position to force payment without litigation. A contract clause such as the following could give you better bargaining clout:

> "Payment. Owner agrees to pay Design Professional's invoice within 30 days of receipt. For any payment not received within that time, Owner shall pay a service charge on the past due amount, including interest at the prevailing legal rate [or ____%], and reasonable attorneys fees and expenses if collected through an attorney or collection agency. No deductions shall be made from the Design Professional's compensation on account of liquidated damages or on account of costs of changes in the Work, other than those for which the Design Professional has been finally determined to be liable. Design Professional may suspend services after five days prior written notice to Owner, where payment of any invoiced amount, not reasonably in dispute, is not received by Design Professional within 60 days of receipt of its invoice by Owner."

Withholding Payment for Cause

Withholding of payment by the Owner on the basis that the Owner is dissatisfied with your services, or for any reason believes it should be able to charge back to you the extra costs or expenses paid to a Contractor on change orders, can be a major problem.

The above clause helps reduce the problem by providing a strong disincentive for withholding payment, unless the Owner has already obtained a judgment against you for extra costs. Another challenge may be an Owner that desires to withhold payment if it doesn't receive the loan or grant funds it needs for the project or if the project is not constructed after it is designed.

To avoid ambiguity concerning rights and responsibilities in this regard, some Design Professionals include a clause specifically addressing the issue, such as the following:

> "Payments on invoices submitted by Design Professional for services performed shall not be delayed, postponed or otherwise withheld pending completion or success of construction, or receipt of funding from lending institutions, government grants or other sources. Invoices for payment shall not be offset by any claims for withholding or deductions by Owner unless the Design Professional agrees or has been finally determined liable for such amounts."

A good payment clause that specifies time periods for payment is the following:

> "Payment to the Architect under this Agreement shall be made within thirty-five (35) days of the Owner's approval of the Architect's invoice. The Owner shall have ten (10) business days to approve each invoice. If the Owner objects to all or any part of an invoice, the Owner shall notify the Architect of any objection in writing and nevertheless shall pay any undisputed amounts to the Architect within the time set forth in this Section."

Many jurisdictions provide for liens against the property on which the project is being built to secure a Design Professional's right to be paid for services rendered. Liens that are not paid and satisfied allow the Design Professional the right to foreclose on the property to obtain payment.

These statutory and common law lien rights are specific to the jurisdiction where the project is being constructed. These procedures are highly technical and should be discussed with informed local counsel. Comforting as lien rights may be, availing yourself of them is not without challenges, aggravation and expense.

Getting paid promptly should be a top priority and preserving your legitimate leverage points is an important tactic. This is, after all, how you make your living.

A Clause in AIA B101-2017 addresses withholding of fees as follows:

> "The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to offset sums requested by or paid to contractors for the cost of changes in the Work unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding."

This paragraph prohibits the Owner from withholding a portion of the Architect's fee to offset other losses or damages unless the Architect agrees or has been found to be liable for the sum withheld.

A clause in AIA B101-2017, at §9.1, addresses nonpayment and the right to suspend or terminate services. It provides the following:

> "If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services…."

Subcontract: "Pay-if-paid clauses"

Subcontracts often state that the Prime contractor has no duty to pay the subcontractor until the owner has first paid the prime contractor. Some states have public policy against such pay-if-paid clauses and will automatically deem them to be pay-when-paid clauses, which means that even if the prime never gets paid by the owner it still must pay its subcontractor within a reasonable amount of time.

One way to deal with a pay-if-paid clause as a subcontractor is to add a sentence to the clause to require eventual payment even if the prime has not been paid by its client. An example is the following:

> "Notwithstanding the foregoing, in no event shall Designer be paid the uncontested amount of any invoice later than 90 days from submittal, and provided further that if payment is not made within 60 days of submittal, Designer, shall without further notice be entitled to suspend its services until payment is made."

Conclusion: Require the Owner to pay you promptly throughout the project and give yourself significant contractual rights in the event of non-payment or late payment.

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Permits

Issue: As a design professional, you are responsible for obtaining licenses and permits required for the performance of the services that will be performed under a professional services agreement with your client. This does not mean, however, that you should take on the responsibility for obtaining permits and governmental approvals that are typically obtained by project owners or their construction contractors.

Discussion: In one reported court decision, a design professional signed a contract containing a clause similar to the following:

> *Design Professional shall be responsible for obtaining all permits, licenses, and governmental approvals needed for the performance of this Project and the Design Professional's services.*

After the design firm completed preparing the design documents and the owner awarded construction to a construction contractor, a citizens group filed suit to stop the project. A court granted a restraining order halting the project until an environmental impact study (EIS) was performed as required by the environmental laws of the state.

It seems the project owner failed to obtain such a study prior to design and construction. It is also seems that conducting an EIS was not within the design professional's scope of service. Nevertheless, the court found the above-quoted clause so broad as to implicitly require that the design firm determine whether an EIS was required for the project and obtain a negative declaration from the state or any other environmental approvals necessary in order to construct the project.

Delay attributed to the failure to obtain the required negative declaration and environmental approvals was, according to the court, the financial responsibility of the design professional in this case.

Conclusion: To avoid unintended consequences like these, be sure that the language of your contract does not require you to obtain licenses, permits, and approvals beyond those that are normal to your professional and your scope of services.

Rather than agreeing to obtain permits, it may be wiser to agree only to *assist* the client in their own efforts of obtain permits. Consider the following clause:

> "The Consultant will assist the Client in applying for those permits and approvals typically required by law for completion of the Project. All permit fees payable to an issuing authority shall be paid directly by the Client unless otherwise agreed in Attachment A."

Exhibit B, B2.01 of EJCDC E-500 (2014) provides that the project owner will have responsibility for permits and governmental approvals as follows:

> "In addition to other responsibilities of Owner as set forth in this Agreement, Owner shall at its expense: . . .

> H. Provide reviews, approvals, and permits from all governmental authorities having jurisdiction to approve all phases of the Project designed or specified by Engineer and such reviews, approvals, and consents from others as may be necessary for completion of each phase of the Project."

The risk of site access authorization or permits should typically be the responsibility of the project owner since it may be in the best position to deal with neighbors or adjacent landowners.

Beware of contract language requiring the design professional to obtain such authorization or permits from third party landowners who may in turn require unobtainable insurance requirements or onerous indemnity agreements - that they probably would not do if they were dealing directly with the project owner and being paid by the owner for access.

Redesign Obligations

Issue: Design Professionals are increasingly being required to redesign projects due to construction costs exceeding the owner's budget. Since the Design Professional has no control over material escalation costs or the bids submitted by potential contractors, it is not possible to guarantee that the bids received will not exceed the budget, or that as a result of normal change orders during construction, the payment budget will not be exceeded.

If the Design Professional agrees to Contract language requiring it to redesign, without compensation, to decrease the cost of the project, it may incur substantial risk of an uninsurable loss. This is especially risky in times like these where there is evidence of impending inflationary markets.

The impact of the requirement to redesign the project at no cost to the client can be reduced by making that requirement conditional upon a determination that the cost overrun was caused by the negligence of the design professional.

Discussion:

Sometimes the problem of free design arises out of a clause that is fairly subtle, such as the following:

> "Revisions. Without limiting any other provisions of this Agreement or the Owner's other rights and remedies, the Architect agrees that any and all revisions required to be made to the drawings, specifications and other documents prepared by or on behalf of the Architect for any of the following reasons shall be included as part of Basic Services and shall be performed at the Architect's sole cost and expense:
>
> (a) Drafting errors, conflicts, inconsistencies and other errors or omissions;
>
> (b) Any failure of the Architect or any of the Architect's Design Professional's to follow any written instructions or approvals given by the Owner;
>
> (c) The fault or negligence of the Architect or any of the Architect's Design Professionals;
>
> (d) A Failure by the Architect or any of the Architect's Design Professionals to perform in accordance with the terms of this Agreement; and

(e) A failure by the Architect or any of the Architect's Design Professionals to design within the budget then established by the Owner as provided in xyz."

Note that subparagraph (a) of the above clause requires the Design Professional to revise the documents for all "drafting errors, conflicts, inconsistencies…" at no charge to the client regardless of whether there was negligence or the Design Professional satisfied the standard of care when drafting the plans and specifications. In other words, the Design Professional is required by this clause to draft perfect plans and specifications.

The AIA B-101 form permits the Owner to require free redesign services as well, but limits the architect's liability for cost overruns to only its cost of doing the redesign services.

Pursuant to AIA B101, §6.6 (2017), if the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal, the Owner can choose several courses of action, including: "6.6.4 In consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work."

AIA B101, §6.7 states:

> "If the Owner chooses to proceed under Section 6.6.4, the Architect, without additional compensation, shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. If the Owner requires the Architect to modify the Construction Documents because the lowest bona fide bid or negotiated proposal exceeds the Owner's budget for the Cost of the Work due to market conditions the Architect could not reasonably anticipate, the Owner shall compensate the Architect for the modifications as an Additional Services pursuant to Section 11.3; otherwise the Architect's services for modifying the Construction Documents shall be without additional compensation. In any event, the Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6."

Note that under the AIA document, the architect can be required to redesign the project for no additional fee, even if the cost overrun was not due to its negligence. Performing these services for free, however, is the full extent of the architect's loss.

Conclusion: Revise the redesign clauses of contracts to state that unless the budget was exceeded due to the negligent performance of services by the Design Professional, any additional services for redesign will be compensated.

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Reliance on Information Provided by Others

Issue: The design professional should be able to rely upon site information and other information provided to it by the client when preparing and pricing its proposal, and when performing its services. Some project owners, however, are attempting to limit the design professional's reliance on such data. Consider this contract clause:

> *Consultant acknowledges that Owner provided documents, if any, including, without limitation, all plans, standards, specifications and drawings (Owner's Documents) are submitted herewith by Owner to Consultant without any warranty whatsoever and are for conceptual and information purposes only. Consultant agrees and understands that it is Consultant's obligation and responsibility to properly engineer and design the subject matter of the Work Product. Consultant expressly assumes all Design and Products liability arising from or attributable directly or indirectly to Owner provided documents utilized by Consultant in the engineering and design of the subject matter of the Work Product...*

This puts all the risk on the design professional, including risks that it is unable to manage and for which it would otherwise be entitled to an equitable adjustment.

Owners sometimes go out of their way to shift differing site conditions risks to the designer and/or contractor. One clause provided in part as follows:

> *Field and other investigations shall be thorough and detailed to permit an accurate understanding of existing conditions. The Architect shall also investigate, observe and analyze concealed conditions at the Project site to determine that the Construction Documents reflect accurately the existing conditions at the Project site.*

Discussion: The above clauses severely limit the design professional's ability to rely upon the information and data concerning the site provided by the owner. Moreover, an affirmative duty has been created requiring the design professional to conduct its own detailed site investigations even of concealed conditions.

This is unreasonable and unrealistic, and creates unmanageable risks for the design professional. Owners generally do not expect design professionals to spend the time, money, and resources conducting the type of investigations and studies suggested by the above-quoted clauses, and owners certainly don't expect to pay for such services.

Conclusion: Include a statement that the client intends for you to rely upon the information. An example clause is 3.1.2 of AIA B101-2017, which in part provides:

> "… The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information."

Reliance upon information provided by the client is also set forth in Section 6.01.D of EJCDC E-500 (2014) which provides:

> "*Reliance on Others*: Subject to the standard of care set forth in Paragraph 6.01.A, Engineer and its Consultants may use or rely upon design elements and information ordinarily or customarily furnished by others, including, but not limited to, specialty contractors, manufacturers, suppliers, and the publishers of technical standards.

EJCDC Document E-500, Exhibit B at B2.01 also requires the project owner to do the following:

> "C. Furnish to Engineer any other available information pertinent to the Project including reports and data relative to previous designs, construction, or investigation at or adjacent to the Site.
>
> D. Following Engineer's assessment of initially-available Project information and data and upon Engineer's request, obtain, furnish, or otherwise make available (if necessary through title searches, or retention of specialists or consultants) such additional Project-related information and data as is reasonably required to enable Engineer to complete its Basic and Additional Services. Such additional information or data would generally include the following:…"

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Responsibility for the Services of Others

Issue: A design firm is legally responsible to its client for the acts, errors, and omissions of its subconsultants. Design firms are not responsible for the acts and omissions of contractors and other design professionals that are under contract directly with the project owner.

It is not uncommon, however, for project owners to begin a project by contracting with more than one consultant and to later decide it prefers to have only one prime consultant, with all the others working under subcontract to that prime.

In a number of reported court decisions, the lead design professional on a project accepted assignment by the owner of contracts with other consultants that the owner had previously contracted with for provision of specialized services such as geotechnical, environmental, facility planning, and others.

When this happens, the lead design professional becomes contractually liable for the actions of firms that it did not select and over which it had no control.

Discussion: Some owner-generated contracts give the project owner unfettered discretion to assign its contracts to a single design firm. One contract provided as follows:

> *Owner may assign to Architect, and Architect agrees to accept the assignment of certain design professional contracts entered into by Owner prior to the execution of this Agreement. Pursuant to Article 11, Architect agrees to be responsible for the errors, omissions and negligent acts of such design professionals as though they had been retained by Architect initially.*

Owners have made some significant claims against design firms based on errors in the services provided by the owner's design professional that had been assigned to the Architect.

If you sign a contract containing language like that quoted above, you are taking on contractual responsibility for risks that you would not have been responsible for at common law, and this may subject you to liability that is excluded from coverage under your professional liability policy.

Conclusion: Don't accept assignment of others' contracts without doing serious due diligence and obtaining appropriate assignment of risks. Get the advice of your legal counsel and insurance advisor before agreeing to the assignment of subcontracts. They may be able to provide language you can negotiate into the contract with the owner to state that the Prime Architect accepts an assignment of contracts but with no responsibility for acts, errors, and omissions of those firms that were committed prior to the assignment of the contract. It may also be advisable to draft contract language to limit your liability arising out of the services performed by these other firms.

Schedule
(Timeliness of Performance)

When delays occur in the performance of your services for reasons other than your negligence, you should not be held responsible for those delays. There should be a way for you to be excused for not completing the services by the scheduled completion date if the delay is caused by others.

In some cases, you should be paid additional compensation for the delay, especially when that delay is caused by the owner or the construction contractor over whom you have no responsibility. Some clients, however, seek to make the consultant responsible for all delays and assess costs against the consultant for all delays.

Issue 1: Time of the Essence Clauses

Consultants are sometimes required to perform services under a contract stating time is of the essence. Such a clause may have the unintended effect of putting timeliness ahead of the cautious exercise of due professional care.

Discussion: Consider this problematic clause:

> *Consultant agrees that no charges or claim for damages shall be made by it for any delays or hindrances from any cause whatsoever during the progress of any portion of the services specified in the Agreement. Such delays or hindrances, if any, shall be compensated for by an extension of time for such reasonable period as the Owner may decide. . . .*

This is a classic no damage for delay clause for a construction contract, but rare for a design services contract, yet it is appearing in more design services contracts. Another bad clause is the following:

> *Time is of the essence in performance of the Services described in this Agreement. Unless extended by mutual written agreement of the Parties, Consultant's obligation to perform the Services to be provided under the terms of this Agreement shall commence on the Effective Date and be completed on or before the scheduled termination date.*

This clause fails to allow for unforeseen circumstances or for situations where the exercise of an appropriate standard of care may require additional time for performance.

Conclusion: One way to address the owner's need for completion to be accomplished by a specified date while at the same time giving some reasonable time extension to the design professional when necessary, is to include a clause stating that the Consultant will exercise diligence to complete its services on the schedule established for the project, as may be consistent with the standard of care required for the services. An example is as follows:

> "Consultant agrees to exercise diligence in the performance of its services consistent with the agreed upon project schedule, subject, however, to the exercise of the generally accepted standard of care for performance of such services."

The AIA B101-2017 addresses this issue at Clause 2.2, by providing the following:

> "The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."

In practical terms, this means that the design professional is committed to performing its services on the agreed upon schedule as far as can consistently be done within the generally accepted standard of care for performance of such services.

Under the terms of this clause, if you fail to meet the schedule you will not automatically be liable to your client for damages on a warranty type basis. If the untimely performance results from owner interference or changes, for example, rather than from your negligence, that untimeliness may be an excusable delay if you have included appropriate contract language.

Issue 2: Responsibility for Contractor's Schedule

Some contracts attempt to shift responsibility to the design professional for assuring that the contractor performs its work on schedule. Consider the following clause:

> *In the event the Construction Contractor fails to substantially complete the Project on or before the substantial completion date specified in its agreement with Owner, and the failure to substantially complete is caused in whole or in part by a negligent act, error or omission of the Design Professional, then Design Professional shall pay to Owner its proportional share of any claim or damages to Contractor arising out of the delay.*

The clause goes on to establish liquidated damages for delays in construction that go beyond milestones for different phases of the work. As a result, the Design Professional may be required to pay the liquidated damages that the contractor would otherwise have to pay, in the event that the delay is attributed to the Design Professional's negligence.

Discussion: In another contract, a clause went even further with its assignment of responsibility for the project schedule to the Architect. It provided:

> *In addition to preparing the Project Schedule, Architect shall assist the Contractor to prepare a Critical Path Method (CPM) or other approved Project construction schedule for the construction Project which shall integrate the Architect's services with the Contractor's Work and with the Owner's occupancy requirements for the Project.*

It would appear from this clause that the Architect is assuming responsibility for creating the project schedule and the CPM schedule that the contractor will use. This gives the Architect too much scheduling responsibility and may so insinuate the Architect into the contractor's scheduling responsibility that it will give the contractor a legal excuse for missing deadlines.

This may entitle the contractor to additional time and cost for eventual changes to the schedule for which the contractor alone should have been responsible.

Conclusion: At a minimum, the clause should be revised to state that the contractor is solely responsible for his schedule, including his means, methods, and procedures for obtaining that schedule.

Issue 3: Time Limitations on Design Professional Response to Contractor RFI

Some contracts establish specific time frames for the design professional to review contractor requests for information (RFIs), shop drawings, and change order requests. One contract, for example, reads:

> *Architect shall respond to Contractor's request for information within 48 hours after receipt of a request or such earlier time as is necessary to maintain the Construction Schedule.*

Discussion: This short time frame may create an impossibility. Despite diligent efforts by the design professional, it may be impossible to analyze the situation and respond within such a short time frame.

This could turn into a situation where the contractor knows of its need for information but procrastinates on its request to the point of creating a critical path delay possibly to establish its own right to time and/or cost increase.

Conclusion: At a minimum, when a time frame is specified, an exception should be added to the time requirement to permit additional time as necessary for the Architect to review the matter and act in a manner consistent with the Standard of Care.

Delete language such as time is of the essence. Agree only to complete your services in a timely manner consistent with the exercise of due care.

If the client insists on subjecting you to a time is of the essence clause, and holding you to a strict time deadline, consider including a clause for Suspension, Timeliness of Performance, or Force Majeure that will excuse untimely performance that was caused by delays beyond your control

As stated in the issue portion of this topic, the design professional should seek to add some additional time and flexibility to its turn-around time for responding to RFIs and other requests by contractors.

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Scope of Service

Issue: Lack of clarity in the contract concerning the scope of service, including what is to be performed as basic service and what are additional services, is one of the greatest causes of disputes between owners and their design professionals. This is an area of risk that can be effectively managed by carefully defining the scope of the services to be performed so that there is no misunderstanding or unmet expectations by the parties.

Discussion & Conclusion: Basic Services should be specified in reasonable detail in the contract or as an attachment to the contract. Services that might reasonably be provided for the project but which are excluded from your Basic Services may be listed as Additional Services that are to be paid for as requested by the owner. See, for example, AIA B101-2017, Article 4 SUPPLEMENTAL AND ADDITIONAL SERVICES. Section 4.1.1 states:

> "The services listed below are not included in the Basic Services but may be required for the Project. The Architect shall provide the listed Supplemental Services only if specifically designated in the table below as the Architect's responsibility…."

Section 4.1.2 provides a place for the **Supplemental Services** to be described.

Section 4.2. addresses "**Additional Services**" and states that if the Architect recognizes the need to perform additional services it must notify the Owner promptly and not proceed with such services without written authorization. A list of eleven (11) such additional services that require owner authorization are provided in this section.

Section 4.2.3 allows the parties to put a numerical limit on the scope of architect's responsibility for certain routine services, such as reviews of shop drawings or architect visits to the site during construction. When the limits are exceeded the architect must be compensated accordingly as additional services.

Lastly, Section 4.3.4 indicates that services by the architect provided more than 60 days after Substantial Completion of the Work or the initial date of Substantial Completion identified by the Owner, will be compensated as Additional Services.

Addressing Excluded Services. It may be prudent to list services that will be specifically excluded when you know those services may be needed for the project but the owner has chosen to have them performed by others. Environmental service is a good example of something that is necessary for a particular project but which may be excluded from your scope of service.

To avoid an owner later claiming the design professional should have detected and corrected environmental issues, you may include a clause specifically stating that you are not responsible for environmental services.

Severability & Survival

Issue: If a court finds that a contract provision is contrary to law or public policy, it may find the clause to be unenforceable and apply any applicable statutory or common law to that issue instead. It is even possible in some situations that a court might determine that the entire contract is void because of one clause.

Discussion: Instead of taking the chance that the contract will be voided or changed to provide something other than the original intent of the parties, it is prudent to protect against this by including corrective language in the contract.

Conclusion: Include a clause in the contract stating that in the event that one or more terms of the contract are determined to be invalid or unenforceable, the balance of the contract will nevertheless remain in full force and effect. This is a severability clause.

Another clause that may be used in conjunction with this is a survival clause. It provides that in the event a clause is deemed invalid or unenforceable, it will be revised to be consistent with the law but still reflect the intent of the parties to the greatest extent permitted by law. These two concepts are often merged into a single clause.

An example of a severability clause stating that the invalidity of a clause will not impact the validity of the balance of the contract, and that the offending clause will be reformed to make it enforceable, is the following:

> The various provisions herein shall be deemed to be separate and severable, and the invalidity of any of them shall in no manner affect or impair the validity or enforcement of the remaining provisions. Any provision held to be void or unenforceable shall be reformed to replace the provision with a valid and enforceable provision which expresses the original intention of the parties as closely as possible.

Consider using a clause like EJCDC E-500 (2014), Section 6.13.C:

> "*Severability.* Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Owner and Engineer, which agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision."

Some contract clauses are so important that you will want them to survive the completion or termination of the contract. These might include, for example, indemnification and limitations of liabilities clauses. Section 6.11.C of EJCDC E-500 (2014) provides for survival of certain terms and conditions with the following language:

> "*Survival.* All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason."

Notice that the clause below, in addition to addressing severability of the clause, also includes language dealing with waiver by either party of enforcement of a clause. Some contracts add a separate paragraph to address waiver of conditions, but as seen here, it can also be included in this clause.

> "If any one or more of the provisions contained in this Agreement, for any reason, are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. One or more waivers by either party of any provision, term, condition, or covenant shall not be considered a waiver of any provision, term, condition, or covenant or the subsequent breach of the same by the other party."

Note that the titles to the articles do not necessarily completely describe the content that will follow. Don't assume you know the provisions of a clause just because you've read other clauses with the same title in other contracts. Always read the language to be sure it does what you have been accustomed to seeing it do from past experience.

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Shop Drawings

Issue: Through the shop drawing review process, clients sometimes expect more of a design professional than is reasonable or even within the design professional's scope of service stated elsewhere in the contract. For example, consider this clause:

> *The Design Professional is responsible for keeping the Owner completely apprised of the Project during the Construction Phase.... and shall be responsible for examining and approving shop drawings and correcting shop drawings.*

Discussion: By approving shop drawings, it might be argued by the contractor or the owner that the design professional has considered the details of the drawings and agreed that the contractor's details, measurements, and methods are accurate and satisfactory.

Design Professionals have been advised in a number of training courses to avoid using words like approval of shop drawings. It is noted, however, that the AIA B101-2017 utilizes language whereby the Architect approves shop drawings.

But under the AIA documents, contractors remain responsible for correcting shop drawings after rejection by the Design Professional. The Design Professional does not correct the contractor's shop drawings.

By assuring contractor compliance with the plans and specifications or by taking on responsibility to correct shop drawings, the design professional may unintentionally accept legal responsibility for risks and responsibilities that more appropriately belong to the construction contractor.

If possible, some clarifying language in the contract is useful to establish that regardless of what language is used to describe what the design professional does during its review of shop drawings, it remains the exclusive responsibility of the contractor to satisfy the details of the design.

Conclusion: Include language in the contract to limit your role in reviewing shop drawings. Exhibit A, A1.05.A.17 of the EJCDC E-500 (2014) provides reasonable language, as does the AIA B101-2017, Paragraph 3.6.4.2, which provides:

> "The Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component."

In addition to getting reasonable language in the contract, you should also take care that your shop drawing stamp contains language that manages your risk. Include disclaimers that clearly define what is meant by the review and that expressly state that the contractor remains fully responsible for meeting all requirements of the contract and using its own means, methods, and procedures and remains responsible for assuring the accuracy of all measurements, etc.

It is important that your stamp makes it clear that you are reviewing only whether the information in the drawings conforms generally with the design.

EJCDC E-500, Exhibit A, at A1.05.A.17 provides:

> *"Shop Drawings, Samples and Other Submittals:* Review and approve or take other appropriate action with respect to Shop Drawings, Samples, and other required Contractor submittals, but only for conformance with the information given in the Construction Contract Documents and compatibility with the design concept of the completed Project as a functioning whole as indicated by the Construction Contract Documents. Such reviews and approvals or other action will not extend to means, methods, techniques, sequences, or procedures of construction or to safety precautions and programs incident thereto. Engineer shall meet any Contractor's submittal schedule that Engineer has accepted."

EJCDC also provides for the situation where the design firm's role is limited to design phase services and the designer will have no role during the construction phase. In order to advise the owner of the risks inherent in proceeding in this manner, and to limit the designer's liability that may arise out of the use of its documents during construction, it includes the following clause at 6.02, A:

> "Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A, Paragraph A1.05. With the exception of such expressly required services, Engineer shall have no design, Shop Drawing review, or other obligations during construction, and Owner assumes all responsibility for the application and interpretation of the Construction Contract Documents, review and response to Contractor claims, Construction Contract administration, processing of Change Orders and submittals, revisions to the Construction Contract Documents during construction, construction observation and review, review of Contractor's payment applications, and all other necessary Construction Phase administrative, engineering, and professional services. Owner waives all claims against the Engineer that may be connected in any way to Construction Phase administrative, engineering, or professional services except for those services that are expressly required of Engineer in Exhibit A."

Site Safety

Issue: Site safety is generally the responsibility of the contractors on the project. The contractor is best able to perform this function because it has direct responsibility for the work at the site. The contractor's injured workers sometimes seek to recover damages (in excess of what is available from their employer's worker's compensation) from the design professional.

They may argue that by virtue of the design professional's contract language or its actions in the field, the design professional controlled the work site and is, therefore, liable for the construction worker's injuries. Workers sometimes argue that the consultant knew of a danger and failed to do anything to prevent the plaintiff from sustaining injury.

Injured workers may also argue that the consultant knew of dangerous conditions and took various actions to correct the problem such as communicating directives to the general contractor and that this demonstrates the consultant had the authority to control or actually did control the work at the jobsite.

The case law in this area has become confusing and varies from state to state. In addition to suits by workers, the U.S. Department of Labor has also weighed in by bringing actions against consultants arguing that they are liable for worker injuries under the OSHA requirements.

Discussion:

The extent to which design professionals have responsibility and liability for job site safety continues to be debated in courts around the country, with widely divergent results. This makes it difficult to provide uniform advice or counsel to design professionals.

Risk management consultants and attorneys are generally quick to advise design professionals to obtain legal advice specific to the law of their individual state, rather than rely upon general educational information that may be provided in risk management workshops and nationally distributed books such as this one.

You should obtain the advice of local counsel and not rely upon the general principles presented herein. Having provided that caveat and disclaimer, this safety discussion will provide an overview of recent case decisions, as well as some generic risk management ideas for design professionals concerned about their potential responsibility for the safety of individuals other than their own employees.

Site safety is primarily the responsibility of the construction contractor. Prosecuting the work to meet the specifications and maintain a safe job site is within the contractor's means, methods, and procedures of performing the work. Construction contracts such as standard AIA contract forms expressly state that the contractor has responsibility for site safety.

The design professional contract form typically states that the design professional is not responsible for site safety, and that the construction contractor has sole responsibility for it.

In such circumstances, a contractor that is told by the design professional to perform its work in a manner different than the contractor intended may have a basis for alleging entitlement to a

change order for extra costs incurred in making the change, plus any delay and impact costs that might be caused by the change.

In addition, where the design professional has involved itself in site safety decisions and exercised control over the work or workers' safety, some courts have looked beyond the written language of the contract and held the design professional to be responsible for site safety based on its actions in the field that created implied authority to control the work despite the contract language to the contrary.

Several court decisions have held that once a design professional has insinuated itself into site safety responsibility by actions such as instructing laborers to get out of un-shored trenches, the design professional has a continuing obligation to stay involved in site safety. It cannot subsequently ignore safety problems and assert that they are the exclusive responsibility of the contractor.

In other words, if a design professional saved the life of a worker by ordering him out of an unsafe trench, and a few days later that individual died in the trench that was still unsafe, courts have held the design professional responsible.

Partly as a reaction to such decisions, some (or perhaps many) design professionals have adopted a position that they will not see or report safety problems that they observe. The idea is that if you don't say anything to anyone about safety, you can't inadvertently create legal responsibility that goes beyond your contract requirements.

In the case of *Carvalho v. Toll Brothers and Developers*, 675 A.2d 209 (N.J. 1996), however, the court held that when an engineer observes work and inferably has actual knowledge of a dangerous condition, the engineer has a duty to exercise reasonable care to the worker.

Although the contract in *Carvalho* did not give the engineer responsibility for site safety, the court stated that, the engineer's responsibilities for ensuring compliance with the plans and the rate of work progress, including the proper handling of utilities that crossed the trench, implicated safety concerns.

The court in *Carvalho* further stated that the engineer had authority to halt work that was not in compliance with the specifications, and that this gave the engineer sufficient control to halt work until adequate safety measures were taken.

What this decision appears to mean for engineers in New Jersey is that if they have actual knowledge of dangerous job site conditions that could foreseeably cause harm to workers, they have a duty to exercise reasonable care to avert harm to the workers, regardless of what their contract might say to the contrary.

In contrast, a Pennsylvania court in the case of *Herczeg v. Hampton Township Municipal Authority and Bankson Engineers*, 766 A.2d 866 (2001), declined to impose liability on an engineer in similar circumstances. A construction worker (Steven Wagner) died while working in an unshored trench. The complaint alleged that the engineer (Bankson) was the project representative for the owner, and had actual knowledge that Wagner was working in a dangerously unsafe trench, in that the trench had no shoring or bracing in violation of Bankson's own specifications, federal law and industry practices.

It was further claimed that the risk of serious injury or death was reasonably foreseeable and that *Bankson's* representative took no steps to warn the workers or to correct the situation. Under those alleged conditions, the plaintiff asserted that the engineer breached a duty owed to the decedent and was liable for his resultant death.

In its answer to the complaint, the engineer asserted that it had no knowledge of an unsafe condition and no duty regarding the allegations. It also alleged that it had no authority to control the contractor's work and never assumed by contract or conduct any responsibility for job site safety.

The trial court granted the engineer's motion to dismiss the complaint for failure to state a cause of action. On appeal, the appellate court affirmed the dismissal, stating,

> "The courts in this Commonwealth have consistently refused to impose a duty on design professionals to protect workers from hazards on a construction site unless there was an undertaking, either by contract or course of conduct to supervise or control the construction and/or maintain safe conditions on the site."

In this particular case, the court further explained the plaintiff's theory of liability as follows:

> "Appellant argues the traditional principles of negligence law should impose a duty on an engineer to exercise reasonable care for the safety of the general contractor's workers when the engineer has actual knowledge of dangerous working conditions that create foreseeable risk of serious injury to those workers. She submits this is true even where the contract places the responsibility for safety on the general contractor and the engineer's plans and specifications did not create the dangerous conditions. We cannot agree."

With regard to the applicability of *Carvalho*, the Pennsylvania court stated,

> "We are not persuaded that the rationale expressed in these cases warrants the establishment of a new rule of law fastening liability based strictly upon an

> assertion of actual knowledge of unsafe work site conditions…. We reject any notion that a duty arises based solely upon an engineer's actual knowledge of dangerous conditions. If someone is under no legal duty to act, it matters not whether that person is actually aware of a dangerous condition. Conversely, if someone by contract or course of conduct has undertaken the responsibility for worker safety that person may still be liable even in the absence of actual knowledge of the dangerous condition if they should have known of the condition."

This decision by the Pennsylvania court provides a well-reasoned discussion of the different legal theories that may apply, depending upon the jurisdiction where the project is located.

Practical Ideas: Expressly state in the contract any limitations upon your responsibilities with regard to jobsite safety. Include a provision stating that the general contractor is responsible for overall site safety, including the safety of its own employees.

Affirmatively state in the contract that you are not responsible for the safety program and procedures of the general contractor or of the project site. State also that *to the extent you observe and review contractor's work* it is only for the purpose of confirming the contractor's general conformance with the contract documents and not for the purpose of reviewing its safety procedures.

Require your client to include a provision in its construction contract requiring the contractor to indemnify you for any claim arising out of injuries or death of an employee of the contractor. Consider the following example:

> "The Consultant will be responsible only for its activity and that of its employees and subconsultants at the job site. Neither the professional activities of the Consultant, nor the presence of the consultant or its employees and sub-consultants at a work site, shall relieve the Client or its contractor(s) of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. The Consultant and its personnel have no authority to exercise any control over any construction contractor or its employees in connection with their work or any health or safety programs or procedures; however, the Consultant reserves the right to report to the Client any unsafe condition observed at the site without altering the foregoing. The Client agrees that the General Contractor shall be solely responsible for job site safety, and warrants that this intent shall be carried out in the Client's contracts with the General Contractor by which the Consultant and sub-consultants shall be indemnified by the General Contractor and shall be made additional insureds under the General Contractor's policies of general liability insurance."

Another example is as follows:

> "The Consultant will be responsible only for its activity and that of its employees and subcontractors at the job site. Neither the professional activities of the Consultant, nor the presence of the Consultant or its employees or sub-consultants

> at a work site, shall relieve the Client or its contractor(s) of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence techniques or procedures necessary for performing, superintending and coordinating the contractor's work in accordance with its applicable contract documents and any health and safety requirements of the Client and regulatory agencies. The Consultant and its personnel have no authority to exercise any control over the Client, its contractors(s) or their employees or subcontractors in connection with their work or any health and safety programs or procedures; however, the Consultant reserves the right to report to the Client any unsafe condition observed at the site without altering the foregoing."

Beware that despite the contract language, the courts in some states may impose liability upon the design professional that has actual knowledge of dangerous conditions and does nothing to prevent injury to workers.

EJCDC E-500 (2014), Section 6.01, provides:

> "H. Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor shall Engineer have authority over or be responsible for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, or the safety precautions and programs incident thereto, for security or safety at the Site, nor for any failure of a Constructor to comply with Laws and Regulations applicable to that Constructor's furnishing and performing of its work. Engineer shall not be responsible for the acts or omissions of any Constructor."

Further, in Exhibit D, D1.01.B, in describing additional services that the design profession may perform states:

> "Through RPR's observations of the Work, including field checks of materials and installed equipment, Engineer shall endeavor to provide further protection for Owner against defects and deficiencies in the Work. However, Engineer shall not, as a result of such RPR observations of the Work, supervise, direct, or have control over the Work, nor shall Engineer (including the RPR) have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any Constructor, for security or safety at the Site, for safety precautions and programs incident to the Work or any Constructor's work in progress, for the coordination of the Constructors' work or schedules, or for any failure of any Constructor to comply with Laws and Regulations applicable to the performing and furnishing of its work. The Engineer (including RPR) neither guarantees the performances of any Constructor nor assumes responsibility for any Constructor's failure to furnish and perform the Work, or any portion of the Work, in accordance with the Construction Contract Documents. In addition, the specific terms set forth in Exhibit A, Paragraph A1.05, of this Agreement are applicable."

Exhibit D1.01.D of EJCDC E-500 further provides:

> "Resident Project Representative shall not:. . .
>
> 5. Advise on, issue directions regarding, or assume control over safety practices, precautions, and programs in connection with the activities or operations of Owner or Contractor."

Conclusions: In some jurisdictions, a design professional contract stating that the design professional has no responsibility for site safety will provide a legal defense against most suits by non-employees alleging site safety responsibility. But in many jurisdictions, courts have looked beyond the terms of the contract to scrutinize the design professional's actions to determine whether the DP assumed responsibility and exercised authority for site safety that was not expressly given to it by contract.

For this reason, it is important that the consultant exercise caution in its communications with the contractor with regard to safety concerns or other matters impacting the means, methods, and procedures of the work.

The written and oral communication should clearly maintain that the consultant does not have independent authority to make decisions concerning safety, and that only the contractor and the project owner can make decisions regarding it.

As a practical matter, the consultant's contract should expressly state the limitations upon the consultant's authority concerning jobsite safety responsibility and any authority to stop work. This should include a provision stating that the consultant is not responsible for the safety program and procedures of the general contractor or of the project site.

It may be advisable to have the owner include a provision in its contract with the general contractor requiring the contractor to indemnify the consultant for any claim arising out of injuries or death of an employee of the contractor.

As explained in the recent Pennsylvania case, *Herczeg v. Hampton Township and Bankson Engineers*, (quoting from another Pennsylvania case),

> "The great weight of authority supports the rule that an [engineer] does not, by reason of his supervisory authority over construction, assume responsibility for the day-to-day methods utilized by the contractor to complete the construction. The [engineer's] basic duty is to see that his employer gets a finished product which is structurally sound and which conforms to the specifications and standards. Any duty that the [engineer] may have involving safety procedures of the contract must have been specifically assumed by the contract or must have arisen by actions outside the contract. In determining whether the [engineer's] contractual duty to supervise the construction includes the safety practices on the jobsite, the [engineer] may intentionally, or impliedly by his actions, bring the responsibility for safety within his duty of supervision. The factors which would appear to be relevant in any case where an attempt is made to expand the [engineer's] liability beyond the specific provisions of the employment contract are set forth [as follows]:

(1) actual supervision and control of the work;
(2) retention of the right to supervise and control;
(3) constant participation in ongoing activities at the construction site;
(4) supervision and coordination of subcontractors;
(5) assumption of responsibility for safety practices;
(6) authority to issue change orders; and
(7) the right to stop the work."

This list of factors provides a tool with which a design professional may evaluate whether he is assuming responsibilities for site safety either by contract language or by actions in the field.

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Standard of Care

Issue: The standard of care required of a design professional is the care and skill ordinarily used by members of his profession practicing under similar circumstances at the same time and in the same locality. Unless the contract between the design professional and client states otherwise, the design professional is not held to a standard of perfection by the courts. Only if you breach this normal standard of care are you deemed to be negligent.

Discussion: On almost any construction project, there will be some errors and omissions in plans and specifications. Some of these errors and omissions may cause the owner or the contractor to incur additional costs in completing the job. That does not necessarily mean the owner can recover these extra costs from the design professional.

Not every mistake, error, or omission is a negligent one. It is possible, consequently, that the owner may incur additional costs due to your error (e.g., change order costs paid to the contractor), and not be entitled to recover those costs from you. Unless the mistake resulted from your negligence, you will not be legally responsible to your client for the increased costs it paid to the contractor.

Expert witness testimony is typically required before a design professional can be found negligent. The expert must testify as to the applicable standard of care, and to how you breached that standard and caused the client to suffer damages. The client may not prevail against you unless the jury (or judge in the event there is no jury) decides, based on the expert testimony, that you were negligent.

Where a contract contains an article holding the design professional to the highest professional standards for the profession of architects and attaining compliance with applicable local, state and federal law…, this may constitute a warranty or guarantee.

It also may create contractual liability for damages that do not arise out of the negligent performance of the insured design professional. Such damages are expressly excluded pursuant to the exclusion section of the insurance policy.

An example from one contract reads as follows:

> *Architect agrees to perform its services in the best and most sound way and in an expeditious and economical manner consistent with the best interests of the Owner. Upon completion of the Project in accordance with the drawings and specifications, Architect represents that the Project will be a fully functional and integrated facility within the parameters of the Owner's budget for Owner's intended use.*

This language demands services be performed in the best way rather than the generally accepted way. Yet, it simultaneously demands that these services be performed expeditiously and in an economical manner.

Realistically, it may be impossible to be fast, economical, and the best. Moreover, the owner has included language requiring a fully functional, integrated facility meeting the Owner's intended

use. This language could be interpreted to require a uniform commercial code (UCC) type warranty of fitness for intended purpose. In multiple ways, the clause has created uninsurable risk for the design professional.

An additional problem with the "highest" standard of care is that it is confusing and ambiguous. No one can know what the highest standard of care is. The insured design professional has agreed to perform beyond the generally accepted standard of care. This means that he will be unable to defend himself with expert testimony to prove he was not negligent.

Such expert testimony, even if successful in proving the design professional was not negligent, would not necessarily prevail against the breach of contract cause of action brought by the client based on the design professional's failure to perform to the highest standard. Thus the design professional could be found liable and not have the benefit of insurance to cover its liability.

Beware that project owners, in an apparent effort to obtain their project for the initial budget, are increasingly seeking to make the design firm responsible for contractors' change order costs. To do this, the owner may seek to eliminate your defense that you met the standard of care. Here is an example from a contract:

> *If errors and omissions in the project are detected in the plans and specifications, the costs of any re-design required to incorporate the item or feature omitted or correct the error shall be borne by the Architect/Engineer. It is generally recognized that the standard of care requires the A/E to be accountable for excessive errors and/or omissions. Therefore, Owner and A/E shall keep a record of costs incurred resulting from A/E's errors and omissions. For each Project, if the accumulation cost of A/E's errors and omissions should exceed the percent of the Cost of the Work agreed and stipulated in the Letter of Engagement, Owner may require the A/E to participate financially to help defray all or some of the excess costs.*

In the next example, a project owner begins the standard of care clause with language that looks fairly benign. The clause, however, concludes with language that contradicts the normal standard and makes the design firm responsible for each and every redesign or corrective work, even if the designer was not negligent. The clause reads as follows:

> *The Architect agrees to exercise the generally accepted standard of care to complete the Project. While the Architect shall be liable for its negligence and the negligence of its Subconsultants, the Architect shall perform all redesign or corrective work, at the Architect's own expense, to correct any and all errors, omissions, inconsistencies, or ambiguities (negligent or otherwise) in its design or other Services.*

Some project owners may change the standard of care without even mentioning the words standard of care. This may enable them to hide deep inside a contract some language that completely changes the standard.

If you aren't paying attention to this fact, you might mistakenly ask your lawyer or insurance agent to review the risk allocation sections of your contract for insurability and completely miss

the key clause they need to review. Consider the following clause that was hidden in the article of the contract titled Miscellaneous:

> *The Official reserves the right, should proof of Defective Services be discovered after final payments, to claim and recover from the Architect and the Architect's professional liability insurer, or either of them, sufficient sums to cover any and all damages, losses or expenses, whether direct, indirect or consequential, arising out of, relating to or in any way connected with the Defective Services.*

Another clause of the same contract defined Defective Services as follows: Services that, in the sole discretion of the Official (a) are, or when completed will be, in error, unsatisfactory, deficient or lacking.

The combination of the above two clauses gives the Owner unfettered discretion to say in its sole opinion that something about the designer's services is unsatisfactory. There is no requirement that the services be negligent in order for them to be deemed unsatisfactory. Any arbitrary reason will do.

While the Owner may be able to recover these types of costs from the design firm pursuant to this contractual liability provision, the design firm's insurance carrier is not obligated to pay these costs. A design firm that signs this contract may be found to be in breach of contract for promising insurance coverage that its carrier declines to provide.

Conclusion: Explain to your clients that when they change the standard of care, they create uninsurable risks for you and problems for themselves in trying to recover under your policy. Clients generally understand that they are dependent upon the design professional's insurance policy since design professionals don't have substantial assets. Since the language of this clause creates an uninsurable risk, the client has gained nothing by it. The clause may instead cause an unnecessary dispute over coverage.

A more reasonable clause establishing the standard of care is the following:

> "The consultant will perform its services using that degree of care and skill ordinarily exercised under similar conditions by professional consultants practicing in the same field at the same time in the same or similar locality (hereinafter the "Standard of Care")."

Another sentence can be added to the end of the above-quoted paragraph to further limit the extent of potential liability:

> "No warranty, express or implied, is made or intended related to the professional services provided."

EJCDC Standard of Care clause

The EJCDC E-500 (2014), Section 6.01 A, establishes the standard of care for the engineer and expressly disclaims any express or implied warranties. It provides as follows:

> "*Standard of Care:* The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing

> under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer."

AIA Standard of Care clause

The AIA B101-2017 addresses the issue of exercising reasonable care in Section 2.2 as follows:

> "The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."

What to do if contract seems to have a number of hidden warranties

Some contracts contain words such as "assure" this or "ensure" that. Or they may emphatically state that the design professional "shall comply with all laws, codes…." Certain time of the essence clauses may also imply a warranty. And there are some cost estimating clauses that can render the professional liable for cost overruns even when the designer performed consistent with the standard of care. We try to address each of those when we see them in the contract. A safeguard approach, however, is to add a clause something like this:

> "Notwithstanding any clause in this Agreement to the contrary, Consultant expressly disclaims all express or implied warranties and guarantees with respect to the quality of performance of professional services, and it is agreed that the quality of such services shall be judged solely as to whether Consultant performed its services consistent with the professional skill and care ordinarily provided by firms practicing in the same or similar locality under the same or similar circumstances (hereinafter the "Standard of Care").

Lesson Learned from Court Decision:

In the case of *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC,* 2015 IL App (1st) 123452, a Condo association filed suit against a number of the parties involved in the design and construction of the condo complex, alleging breach of implied warranty of habitability. The Association attributed air and water infiltration to latent defects in the design that were not discovered until 2007. The trial court dismissed suit against designer, and appellate court affirmed dismissal.

The appellate court cited the principle that an architect does not warrant or guarantee perfection in his or her plans and specifications is long standing the court found any implied warranty should be limited to subcontractors who were involved with the physical construction or the construction-sale of the property.

The court rejected the condo association's argument that DPs have an implied obligation to perform their tasks in a "workmanlike" manner. Citing to Black's Law Dictionary, the court noted that a "workman" is a person who is "employed in manual labor, skilled or unskilled." The court concluded:

> "Thus the term "workmen" does not include professional persons such as design

> professionals, and design professionals are not obligated to perform their professional services in a workmanlike manner."

The Contract Lesson from this case: Architects and engineers should be careful not to agree to contract provisions that require them to perform their services in a "good and workmanlike manner." While the phrase is seemingly innocuous, a court could find that it imposes a higher standard than the professional standard of care.

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Suspension of Services

Issue: If a Design Professional's services on a project are suspended by the Owner or the Design Professional for reasons beyond the control of either the Owner or the Design Professional or if a Design Professional exercises its rights to suspend services because of nonperformance by the Owner, and services are resumed at a later date, the Design Professional generally should be compensated for the additional costs the Design Professional incurred during or as a result of the delay.

If the suspension is very lengthy, as it can be if a governmental agency is slow in issuing a necessary permit or if a citizen's group succeeds in having a court temporarily stop the project, the additional costs for the Design Professional could be substantial. It is possible, for example, that the pay grades of key personnel for the project will have increased by the time the services resume. These are merely examples of some of the types of additional costs that should be borne by the Owner.

Unfortunately, many contracts fail to specifically address this situation and how the Design Professional will be paid. Some contracts turn the issue on its head and call for the Design Professional to make payments to the Owner on account of the delay.

Discussion: Consider a clause that sets forth the responsibility of the Owner to pay you the additional compensation incurred because of delays in the performance of your services that are not within your control. AIA B101-2017 Article 9.1 addresses the issue as follows:

> "If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted."

Pay-if-Paid clauses and Suspension of Services

Many subcontracts contain a pay-if-paid, or a pay-when-paid clause that conditions payment to the subcontractor or subconsultant upon payment first being made by the project owner to the prime consultant. Suggestions for addressing such clauses have been provided in another section of this Guide. But one protection against working without compensation is to provide for suspension or termination in the event the Prime fails to pay the subconsultant due to the Owner's failure to pay the Prime. And example is as follows:

> "If prime A/E fails to make payment of undisputed amounts properly due Consultant for services or expenses within forty-five (45) days of submission of

> Consultant's invoice, Consultant shall provide Prime A/E with a written notice to cure. If Prime A/E fails to make payment of such sums to Consultant within ten (10) days of receipt of such written notice, Consultant may suspend performance and services under this Agreement until payment of such undisputed amounts is made by Architect."

Another example is as follows:

> "If client fails to make payments of the Subconsultant's fee or reimburse expenses when due, other than in connection with a good faith dispute of the amount owing or by reason of the breach of this Agreement by Subconsultant, Subconsultant may suspend performance of services hereunder if such failure to pay continues for seven (7) days following notice to client of such breach."

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Termination

Issue: There will generally be a clause providing for termination of your services both for cause and for the convenience of the owner. When these clauses are drafted by project owners they are not always reciprocal, however, and may not provide the design professional with equal rights to terminate the contract, with appropriate compensation for the costs and loss caused by the termination, or adequate protection against reuse of any documentation the design firm may have provided the owner prior to the termination.

Discussion: Design professionals sometimes fail to pay adequate attention to the termination provisions of the agreement perhaps thinking this is not a key area of risk management. They consequently fail to have their risk managers, insurance brokers and attorneys evaluate whether onerous conditions in these clauses will create unreasonable risks.

If the client desires the right to terminate the design firm for default, the contract needs to specify a notice requirement as well as a reasonable time to respond to the default notice. Default termination provisions should permit each party to terminate the contract for the other party's default. Termination for convenience, on the other hand, may be a right given only to the owner and not to the design professionalCdepending upon the nature of the agreement.

Where the agreement is a master services agreement under which the design firm has a long-term contract with its client but only performs services as assigned under work orders, it may be appropriate to permit the designer as well as the owner to terminate the master services agreement if services will not be impacted on existing work orders. An example of such a clause is as follows:

> This Agreement may be terminated for convenience by either party upon 30 days written notice to the other party, provided that if Consulting Firm has not yet fully discharged its obligations under this Agreement with respect to any pending Services initiated via a Work Order under this Agreement, then such termination shall not occur until all of such obligations have been discharged to the satisfaction of [Insurance Carrier]. Upon termination, the Consulting Firm shall submit its final invoice for all reasonable and approved professional fees and reimbursable expenses.

One significant issue arising out of terminated services is what happens to an Instruments of Service the design firm may have given the owner prior to termination. In some instances, owners have even demanded as part of the termination process that the design professional provide them with interim drawings and documents. For a discussion of concerns with reuse of documents, see the section of this book entitled Ownership and Use of Documents.

Review owner-generated termination clauses carefully to be sure they don't require you to give your client ownership of your documents. It is likewise important to be sure the client is not entitled by the language to get your draft or interim plans and use those plans with another design professional to complete the project. There needs to be limitations upon use of documents and protection of the terminated design professional.

Conclusion: Include language in your contract similar to that of the AIA and EJCDC documents, providing that either party may terminate for cause, and providing for appropriate financial consideration for the design firm in event of termination.

The EJCDC E-500 (2014), Paragraph 6.06.B, provides in part as follows:

> The obligation to provide further services under this Agreement may be terminated:
>
> 1. For cause,
>
> a. by either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party.
>
> b. by Engineer:
>
> 1) upon seven days written notice if Owner demands that Engineer furnish or perform services contrary to Engineer's responsibilities as a licensed professional; or
>
> 2) upon seven days written notice if the Engineer's services for the Project are delayed or suspended for more than 90 days for reasons beyond Engineer's control….
>
> 3) Engineer shall have no liability to Owner on account of such termination.

Section 6.05.D.1 of EJCDC E-500 also provides for payments upon termination as follows:

> In the event of any termination under Paragraph 6.06, Engineer will be entitled to invoice Owner and to receive full payment for all services performed or furnished in accordance with this Agreement and all Reimbursable Expenses incurred through the effective date of termination. Upon making such payment, Owner shall have the limited right to the use of Documents, at Owner's sole risk, subject to the provisions of Paragraph 6.03.

Subparagraph (2) of this section states that where the owner terminates the Engineer for convenience, the Engineer is entitled to payment of a reasonable amount for services and expenses directly attributable to termination, "both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer's Consultants, and other related close-out costs."

Language like that of the EJCDC document is appropriate to protect the design professional against risks that may be otherwise unmanageable and uninsurable.

Third-Party Beneficiaries

Issue: Claims by individuals or corporations against Design Professionals with whom they have no contract are becoming more common. Construction Contractors, for example, sue project architects and engineers, alleging that their design errors, delays in reviewing shop drawings, rejection of equipment, interference with construction progress, and other issues have caused them to suffer damages from delay or impact.

Many states limit these suits based on a theory called the "economic loss doctrine." The doctrine usually applies so that a party (such as a Contractor) who has no contract with a Design Professional has no standing to sue for money damages. The suit must instead be filed by the Contractor against its own Client, the Owner, who is legally responsible for its agent's (the Design Professional's) acts and omissions.

Other parties that have been filing suits against Design Professionals include lending institutions that have loaned construction money to a project Owner in reliance upon a Design Professional's report (or certification) concerning site conditions, the completion of construction and the like.

Property buyers who purchase property in reliance upon site assessment reports (such as mechanical equipment reports, roof reports, home inspection reports, and environmental site assessment reports) also have been suing the professionals who prepared the reports for some other party, such as the property seller or some previous buyer from whom the current purchaser/owner bought the property.

Discussion: The risk management issue here is that under various legal theories, the Design Professional may be found to have liability to the individuals or entities that were not parties to the contract between the Design Professional and the Owner. These "third-party" claims have become more than a nuisance. In some cases they have resulted in significant damages being awarded against a Design Professional.

Usually the Design Professional has received no additional fees to compensate it for the increased risk associated with another party benefiting from the Design Professional's services.

Conclusion: Try to allocate the risk of third party claims to the party who introduces the third party to fact pattern. Subjecting yourself to third-party liability that you did not, and reasonably should not have, originally contemplated is not, generally speaking, in your or the Owner's best interest. In some jurisdictions you may be shielded from such liability, but good risk management calls for a proactive approach to limiting your exposure.

Because of the greater risk for you, higher fees are justified for your services to compensate you for the increased risk. Even though the Owner does not want to pay you higher fees to compensate you for the increased risk, the Owner may want or need its lender to rely upon your report.

It may also intend for some future property purchaser to be able to review your instruments of service. If so, the Owner should be presented with your need to include risk transfer language to limit your liability to third parties before your work is shared with them.

AIA B101-2017, §10.5 addresses third party reliance as follows:

> "Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect."

Some firms also consider placing a "no third-party beneficiary" disclaimer statement at the top of every report where a concern related to third party reliance exists.

Court Decisions Showing Importance of Addressing Third Party Beneficiaries in the Contract Language

The Owner on design-build project sued design-builder as well as subcontracted DP firm and two of its employees. Summary Judgment was granted for engineers because of lack of privity of contract with the owner. This was affirmed on appeal because there was no contract between engineers and Owner, and no "functional equivalent to privity" of contract. The court noted that there was no evidence of "linking conduct" of the design firm such as "words or actions that link the professional to the non-client." *Stapleton v. Barrett Crane Design & Engineering. United States Court of Appeals, Second Circuit (2018).*

In another case (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.,* 2018 NY Slip Op 01115 Decided on February 15, 2018), New York City claimed it was an intended 3rd party beneficiary of an engineer's contract with New York Dormitory Authority. The court held that summary judgment must be granted to design firm because the City failed to demonstrate it could be found to be 3rd beneficiary under the language of the contract. The court explained:

> "We have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third party 'to enforce [a promisee's] contract with another.'" "In the absence of express language, '[s]uch third parties are generally considered mere incidental beneficiaries'.
>
> "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts"
>
> "We have previously sanctioned a third party's right to enforce a contract in two situations: when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was "an intent to permit enforcement by the third party."

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Time Limitations on Litigation

Issue: Statutes of limitations and repose may limit the amount of time an injured party has to file suit against a design professional. There is much uncertainty, however, under these statutes regarding when a suit can be filed even if many years have passed since design and construction were completed.

Discussion: To better manage and price the risks associated with design services, design professionals often include language in their contracts establishing a specific limitation on how long a client can wait before filing suit against the design professional for damages arising out of the professional services.

In one case, an appellate court in Maryland affirmed the lower court decision to grant summary judgment because even though the Maryland courts apply the discovery rule, the parties to a contract are free to negotiate a specific time period for filing suit. The court stated its reluctance to strike down voluntary bargains on public policy grounds. In fact, the court stated that this would be done only in those cases where the challenged agreement is patently offensive to the public good.

As further explained by the court, "In light of this established judicial commitment to protecting individuals' efforts to structure their own affairs through contract, we cannot conclude that the Maryland Court of Appeals would decline to allow parties to contract around the state's default rule establishing the date on which a relevant statute of limitations begins to run."

Conclusion: By establishing a definite cut-off time for your client to sue you, you can limit your risk to a specific period of time. On construction projects where plaintiffs have sought recovery 25 years or more after project completion, this relief is important.

This type of time limitation may reduce your insurance costs since you may not need professional liability insurance coverage for as many years after a project is completed. For design professionals maintaining practice policies with retroactive insurance coverage dates going back many years, this may reduce the premium charged by the carrier.

AIA B101-2017, Section 8.1.1, provides:

> The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1

This AIA language would prevent a party from suing an Architect 25 years after a project was completed even if that party did not discover its damages until that late date.

Similar to AIA B101-2017, EJCDC E-500 (2014) provides that the date of Substantial Completion will start the clock running for any statutory time periods. It provides as follows at Section 6.13.E:

> "Accrual of Claims. To the fullest extent permitted by law, all causes of action arising under this Agreement shall be deemed to have accrued, and all statutory periods of limitation shall commence, no later than the date of Substantial Completion."

Another approach is to establish in the Agreement a specified period of time for filing suit against the design professional. Such a provision goes beyond setting Substantial Completion as the date for calculating when the time periods begin to run. An example is the following:

> "All actions against the Consultant arising out of negligence, breach of contract, breach of warranty or any other cause however denominated, shall be barred two (2) years from the time claimant knew or should have known of its claim, provided, however, that in no event shall any action be brought more than four years following Substantial Completion of Consultant's services."

Beware that some states may have laws prohibiting you from contractually shortening the time periods set by statue. Check with legal counsel in the appropriate state to determine what is permitted and how best to state it in your contract so as to be enforceable.

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Waiver of Subrogation

Issue: Insurance companies vary in how they treat a waiver of subrogation. The typical policy states something like the following:

> *Subrogation*
>
> *In the event of any payment under this Policy, WE shall be subrogated to all YOUR rights of recovery against any person or organization and YOU shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. YOU shall do nothing to prejudice such rights.*

Discussion: Some policies, however, add an exception to this prohibition against waving subrogation stating that if you are required by your contract to waive subrogation, the carrier will agree to that. Such an exception is provided by the following language:

> *WE shall not exercise any such right against any persons, firms or corporations included in the definition of an INSURED or against YOUR clients if prior to the CLAIM, a waiver of subrogation was so required and accepted under a specific contractual undertaking by YOU.*

Conclusion: Review your policy to determine what is required of you with regard to waiver of subrogation. If your carrier does not permit it, you should advise your client that the waiver is not available. In the alternative, if your policy does not automatically include the waiver of subrogation when it is required by your contracts, you may be able to obtain an endorsement to the policy on a client-by-client or project-by-project basis.

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Warranties and Guarantees

Issue: By agreeing to warrant that your professional services will produce an error-free design, you may be contractually liable based on breach of warranty even though you were not negligent in your performance. Professional liability insurance is intended to cover only those damages that arise out of your negligent performance. It does not cover express warranties and guarantees.

Discussion: Some clients are including clauses in their form contracts treating design professionals more like construction contractors than design professionals. Consider this language, for example:

> *Architect warrants and represents that it will take total responsibility for errors and omissions on its documentation and will rectify all such instances at no additional cost to Owner.*

The architect, pursuant to the above warranty, agrees to a higher standard of care than the normal negligence standard. The firm is agreeing to perfection. But no one is perfect. There will be some errors and omissions on any project. As explained in other sections of this book, the owner is expected to pay for such matters in the absence of negligence on the part of the Architect. That is standard industry practice.

In an owner-generated contract for engineering services, the engineer was to agree not only to the highest standard of care but also that the services would be fit for the purposes intended by the client. The clause provided the following:

> *Engineer warrants that the Services shall be performed in accordance with the terms of this Contract and all applicable federal, state and local laws, ordinances and governmental rules and regulations; and the highest standards of professional engineers performing similar services; and that the project of the Services shall be fit for the purposes intended by Client. If, during performance of the Services or within one (1) year after completion of the Services or termination of this Contract or the applicable Request for Services, any portion of the Services or its performance fails to conform to the requirements of the sentence above, Engineer shall promptly correct, at Engineer's own expense, such a nonconformance after receipt of a written notice from Client which shall be given within thirty (30) days. With respect to such corrections, the requirements of the first sentence of this article shall continue for an additional one (1) year period.*

Another contract contained a clause that would create Uniform Commercial Code (UCC) type warranties of the professional services. Consider this clause:

> *Design Professional warrants that its Services shall result in a design that will allow for the successful operation of the Facility, including the suitability of the Project for the use for which the Project is intended.*

This creates a warranty of fitness for intended purpose, much like a UCC warranty. This is very dangerous.

A significant problem with giving a warranty may be that it has the potential to extend the statute of limitations period by which the owner may sue the design professional. A tort action based in negligence must typically be filed within two years (varies by state) whereas a breach of contract (e.g., warranty) may typically be filed for up to six years. For this reason, even when the warranty language does not directly impact the extent of the liability, it is still good risk management practice to eliminate such language from contracts.

Conclusion:

Carefully read the contract language provided by your client so that you don't inadvertently agree to warranties and guarantees. Remember that there is an exclusion in the policy for express warranties and guarantees.

Some clauses have the same impact as a warranty or guarantee even though they don't expressly contain warranty and guarantee language. If, for example, you agree to the highest standard of care instead of the generally accepted standard, you may have agreed to a hidden warranty that your services will be the best and will produce a perfect result.

Even if you prove at trial that you weren't negligent, you might still be liable for breaching your contractual obligation to meet the highest standard of care. The professional liability policy will not cover you for that type of breach of contract damages.

A project owner needs to understand that it does not need to obtain a warranty from you and that, in fact, it may have better results recovering insurance proceeds for damages if it doesn't have a warranty provision.

If a client sues you for breach of warranty without also suing for negligence, there probably is no insurance company duty to defend. Likewise, if your client recovers from you based on breach of warranty and there is no negligence on your party, the insurance will not cover that recovery. The warranty exclusion of the policy excludes coverage for such losses.

Other clauses that may create warranties by their subtle (or not so subtle language) include those pertaining to Compliance with Law, which requires you in absolute terms to comply with every law and regulation.

If your client incurs damages because you incorrectly interpret and apply a law or regulation, you will be liable for those damages even though your interpretation (although incorrect) was a reasonable one. Only if your interpretation was negligent will your professional policy cover the damages.

Explain this to your client and seek to add language to the clause stating that you will exercise reasonable care to comply with the applicable laws and regulations.

A clause addressing Cost Estimates can also create a potential warranty situation. Agree only to exercise reasonable care in preparing the cost estimates.

A clause that requires you to certify that the construction contractor completed all the work in conformance with the plans and specifications also creates uninsurable warranties. It might constitute a warranty-type assurance to the client that the contractor has completed the work in a satisfactory manner, and this may create liability for you if it is later determined that the contractor did not perform in complete accordance with all the plans and specifications.

EJCDC Document E-500, Section 6.01 A, provides:

> "The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. *Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services*."

When it comes to warranties and guarantees, design firms need to explain to their clients that the warranty exclusion of the professional liability policy will deny them coverage for costs related to such warranties and guarantees.

Having warranties in your contract might so confuse the question of liability that it could adversely impact the insurance company's ability to defend a claim and analyze whether any coverage for negligence might be applicable to the matter. With that in mind, a project owner may want to reconsider the wisdom of including warranties and guarantees in its design professional contracts.

Idea for Corrective Wording If Client Insists of Warranty Language

Where we can't get rid of the warranty language, we could use the following language to state that "warranty" only means meeting the standard of care.

> "Any term or condition purporting to require Designer to provide an express or implied warranty or guarantee relative to its provision of professional services shall be interpreted as limiting Designer's professional services obligation to compliance with the Standard of Care stated herein."

Explaining Warranties are limited to goods and equipment – not to the quality of professional services

Option (a) Where the contract has contractor type warranties consider agreeing to those warranties but only as to materials and equipment.

> "Contractor warrants and guarantees that all Materials and equipment furnished under the Contract Documents shall be new unless otherwise specified, and that all construction work it performs will be of the specified quality, free from faults or defects in Materials or workmanship."

Option (b) If there is a warranty of completeness of Documents, consider adding:

> "Consultant agrees that all Drawings and Specifications and other documents prepared by Consultant for the Project that are utilized by Owner and/or Owner's contractor or contractors, shall be reasonably accurate and complete to the extent as is customary for typical construction documents."

Option (c) Warranties and guarantees set forth in this Agreement are only as to the quality of materials, equipment, goods, and construction work, with it understood that there shall be no warranty or guarantee as to the quality of professional services.

Example of A Design-Builder's Warranty.

When reviewing a contract for a design-builder, pay attention to the warranty provisions to avoid having the warranty apply to design services as well as materials, equipment and construction work. Consider using a clause like the following:

> "Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship."

Questions?
Or for more information:

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For additional sample contract clauses including a template of reasonable design professional contract clauses,

visit: www.Construction*Risk*.com

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