



# Management Advisory

## Protecting Your Firm from the Negligence of Others

When a design professional agrees to provide services for a client, that design professional assumes the same level of responsibility for those services whether the services are performed directly by the design professional or by a consultant. Often, design professionals have to rely on the services of consultants that are not a part of the design team. Firms need to understand their legal responsibilities when they are part of a professional services team and their responsibilities for others. Design professionals can have legal responsibility for the actions of others in much the same way that they have responsibility for the actions of their employees. This is called vicarious liability. The legal concept of vicarious liability is the imposition of liability on one party, in this case the prime design professional, for the conduct of another party, the consultant, based solely on the relationship between the two.

### Establishing Relationships and Determining the Risks

Teaming relationships on projects can be divided into three categories: joint ventures, separate independent contractors, and prime-consultant arrangements.

If firms provide professional services to a client together, they are in essence a joint venture. It does not matter what term the firms use to describe their teaming relationship. If they both sign a contract or indicate to a client that they both have responsibility, they are usually jointly and severally liable for the services provided by either party.

In other instances, independent contractors provide some services on a project. Often, they are hired directly by the client. Or they provide services to the design team that are clearly separate from the services for which the client is paying the design team. In general, when a party hires an independent contractor, that contractor has control over its own activities. The client, or prime, can instruct the independent contractor on what to do but not how to do it. A prime is generally not liable for the tort claims of its independent contractors.

For various reasons, a client may want specific consultants as part of the professional service team. A prudent design professional will either negotiate the use of consultants for whom the prime design professional is willing to take responsibility or require an arrangement for the consultants to contract directly with the client so that the prime design professional is not vicariously liable for their actions.

The latter arrangement may necessitate greater coordination of the independent services of the client-selected consultants. The prime design professional's coordination of the documentation requires careful attention, and this service should be appropriately compensated. Because the prime design professional does not have authority over the independent consultants' services, the prime design professional should not be held responsible for their accuracy. In an arrangement where the client is contracting directly with individual consultants, each of them should be acknowledged as being able to rely on the technical sufficiency and timely delivery of documents and services furnished by the others.

### Managing the Risk of Others

A prime-consultant arrangement usually means that only the prime is contractually liable to the client. This privity of contract establishes broad rights for the client against the prime. The client's rights against consultants are usually limited. At times, they extend no farther than the rights of any other member of society.

When a prime firm is registered in one profession, it must subcontract out a portion of the design to another professional in a different specialty. While the prime cannot instruct the consultant on how to design, it may still be



held responsible for a loss relating solely to the negligence of the consultant. In the case of having separate contracts for different design and engineering disciplines, the client must have a carefully developed multiple prime agreement. In such cases, the independent design professionals or service providers should be required to coordinate their instruments of service through a designated prime consultant. The scope of review by the coordinating entity should be carefully described.

Moreover, it would be appropriate for the client to agree to indemnify the prime design professional for any costs resulting from the negligence of the independent consultants. In addition, it may be prudent to require the client to indemnify and hold the individual consultants harmless from claims, costs, losses, or damages to them resulting from the negligence of the client's other consultants—since they have no independent capability to evaluate the accuracy of the results of the services of the other consultants or the responsibility for such services.

Courts generally presume vicarious liability for a design professional arising out of the negligence of an independent contractor employed as a design consultant. This is due to an overriding responsibility of the prime to protect the health and safety of the public. This presumption is based primarily on traditional contract principles and public policy arguments.

Contracts for professional services create a non-delegable duty on the part of the prime to provide plans that conform to applicable codes, standards, and regulations. Therefore, even if the prime has no authority under state registration laws to control the design activities of a consultant, the prime still has vicarious liability for the consultant's professional services.

A consultant, however, may escape liability if the client requires the prime to use a specific consultant. Even if there is no separate direct relationship between the client and consultant, the consultant may be determined to be an independent contractor and solely responsible for its own actions.

### **Coverage for Vicarious Liability**

CNA's professional liability insurance policy defends policyholders against allegations of their negligence and pays on their behalf if the firm, or its employees, are found to have performed professional services in a negligent manner, which in turn caused harm. Intrinsic in this broad policy is coverage for the negligence of those providing services through the prime design professional. There is coverage for the vicarious liability of the insured firm for the negligence of its consultants.

While the prime's CNA policy will protect it from the negligence of consultants, the policy does not defend or pay on behalf of the consultants. Therefore, if the consultants want protection for their professional services, they must have their own professional liability insurance coverage. Separate coverage not only protects the consultant, it protects the prime design professional since the design professional should be able to look to its consultants to stand financially behind the services they provide.

### **Managing Exposures**

With rare exceptions, a prime design professional is responsible for the negligence of those providing services on behalf of the prime. Therefore, care should be taken in all cases to select interprofessional consultants who are qualified and capable of providing their services. Even if the consultant is selected by the client or could be considered a truly independent contractor, insurance protection should exist.

Some consultants may want to have the prime assume all, or a major share, of the risk that they will perform their services adequately. Consultants who attempt to shift risk to the prime by unreasonably limiting their liability to the prime or a third party through their contract with the prime design professional should be carefully evaluated. Limiting the consultant's risk simply increases the likelihood that the prime will be held liable beyond its share of any harm.



For guidance in assessing vicarious liability and creating contract language, please refer to Schinnerer's Managing Risk Through Contract Language and the Terms and Conditions Review Guide. These contract review tools address specific contract issues and model language and can be found at [www.PlanetRiskManagement.com/contlang.html](http://www.PlanetRiskManagement.com/contlang.html).

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