



**NEGOTIATING CONTRACTS:
UNDERSTAND YOUR RISKS**

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AIA/CES
Details

FOR AIA/CES PURPOSES THE PROVIDER OF THIS PROGRAM IS: **VICTOR US**
PROVIDER NUMBER: **K048**

**NEGOTIATING CONTRACTS:
UNDERSTANDING YOUR RISKS**
COURSE NUMBER: **VOS 651-DE (1.5 LU/PDH)**


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OCTOBER 21, 2020

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For CNA policyholders, credits earned on completion of this course will be reported to **AIA CES** for AIA members. Certificates of Completion for both AIA members and non-AIA members who are our policyholders are available upon request. Participants who are members of The American Institute of Architects but not in policyholder firms will be submitted to **AIA CES** by the AIA Trust.

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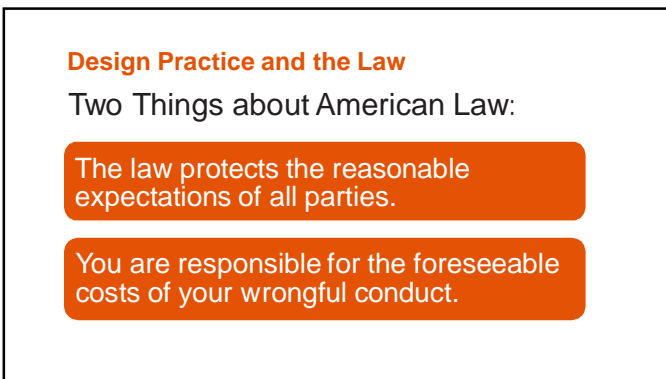
VICTOR

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Understanding the American Legal System and Professional Services



Design Practice and the Law

Two Things about American Law:

- The law protects the reasonable expectations of all parties.
- You are responsible for the foreseeable costs of your wrongful conduct.

Design Practice and the Law

Two Things about Design Practice:

It is all about trade-offs.

The trade-offs construction are about money, time, and quality.

Three Roles of a Design Firm

Providing consulting services

- Analyzing program and design constraints
- Developing design recommendations

Serving in an agency position

- Administering the construction contract
- Managing the Owner-Contractor interaction

Serving as an initial dispute neutral

- Assuming a quasi-judicial capacity
- Reviewing Owner-Contractor conflicts

Determining Fault and Liability

Tort Law: Protection of Negligence Standard

- Legal framework of professional liability
- Based on standard of care

Contract Law: Freedom to Assume Obligations

- "Private Law" changing or creating rights and duties
- Ability to exceed normal legal liability
- Often outside of the scope of insurance coverage



Determining Fault and Liability: Tort Law

Duty → Breach

Negligence is based on the failure to meet the standard of care for the duty owed to the plaintiff.

Determining Fault and Liability: Tort Law

Duty → Breach → Causation → Damage

Negligence is based on the failure to meet the standard of care for the duty owed to the plaintiff.	Tort liability is based on the foreseeable damage proximately caused by the negligence.
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Standard of Care – Jury Instructions*

A professional [doctor, lawyer, architect, dentist, surveyor, health professional] is not negligent if [he] [she] adheres to the standard of care in the field.

You must decide whether the defendant was negligent by deciding whether the defendant failed to perform according to the professional standard of care.

To make this decision you must answer this question: Did the defendant do what a reasonable and prudent professional in [his] [her] field would have done under the circumstances?

*§9.02 General Standard of Care of Professionals, Standardized Civil Jury Instruction for the District of Columbia

Professional Liability – Jury Instructions*

To be entitled to your verdict, the plaintiff must prove by a preponderance of the evidence:

What standard of skill and care do reasonably competent professionals follow when acting under the same or similar conditions;

That the defendant did not follow that standard of skill and care; and

That by not following that standard of skill and care, the defendant's conduct was a proximate cause of injury to the plaintiff.

*§9.03 General Standard of Care of Professionals, Standardized Civil Jury Instruction for the District of Columbia

Understanding Contract and Warranty Law



Elements Needed for Contract Creation


- Mutual assent (offer and acceptance)
- Consideration (exchange of "legal value")
- Legal capacity to contract
- A legally permissible objective

Determining Fault and Liability: Contract Law



Breach of contract is based on the failure to substantially carry out the duty assigned in the contract.

Determining Fault and Liability: Contract Law



Breach of contract is based on the failure to substantially carry out the duty assigned in the contract.

Liability in contract is to provide a remedy for harm caused by the failure to meet contractual obligations.

Determining Fault and Liability: Warranty Law



Breach of warranty is based on a “promise” made on which the plaintiff had a right to rely and which proved false.

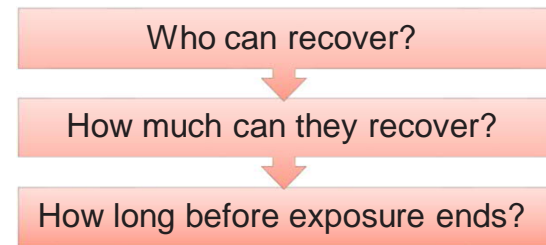
Determining Fault and Liability: Warranty Law



Breach of warranty is based on a “promise” made on which the plaintiff had a right to rely and which proved false.

Liability is for whatever remedy is necessary to compensate for plaintiff’s justifiable reliance on the “promise.”

Extent of Exposure



Other Causes of Action

Professional/Contractual/Business Exposures

- Fraud in the inducement
- Misrepresentation
- Concealment of material fact
- Fiduciary liability
- Consumer protection laws
- Product liability
- Breach of Confidentiality
- Cyber liability
- General liability
 - Personal injury
 - Bodily injury
 - Property damage



Contractual Issues

- Elevated Standard of Care
- Indemnification Obligations
- Insurance Issues
- Warranties and Guarantees
- Contractual Liability Obligation
- Design Defect Clauses
- Ownership of Document Provisions
- Claims and Dispute Resolution
- 3rd party Certifications / Lender Documents / Assignment
- New COVID-related clauses

Elevated Standard of Care: Unmanageable

Consultant will meet the highest standard of care for this project type.

- What did your marketing information state?
- Why is the client demanding this?
 - Aspirational?
 - Targeting?
- Can you define “highest” in follow-up correspondence with your client to keep it from being an absolute?

Elevated Standard of Care: Fiduciary Obligation

Consultant accepts this relationship with Client of utmost trust and confidence.

- Did the language also state that it is a fiduciary relationship?
- Does “trust and confidence” establish a fiduciary duty?
 - How has the language been interpreted under applicable law?
 - What does a fiduciary duty mean in this context?
- Can you define the relationship to your advantage?

AIA Standard of Care Provision

(AIA B101-2017 Example)

§ 2.2 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.

Contractual Defense and Indemnity

Consultant shall defend Client against any claim related to the Project and indemnify Client for all costs, losses, and damages related in any way to Consultant's services.

- Can you pre-empt the tender of a defense obligation by making your client aware that no professional liability policy defends clients?
- Did you attempt to educate the client on the differences between CGL and PL coverages?
- Are you set to manage the exposures beyond insurance coverage?

Contractual Defense and Indemnity

Firms can address such contractually assumed defense and indemnity obligations in a number of ways:

- Charge extra for providing defense coverage for the client.
- Preface the provision with language your legal advisor might suggest such as "To the extent covered by the insurance required by this Agreement"
- Bifurcate the provision by adding a separate obligation such as: "With respect to Claims insured only under Consultant's professional liability policy, this indemnity shall apply only to the extent such claims arise out of or result from the negligent acts, errors, or omissions of Consultant or anyone for whose acts Consultant may be liable in the performance of professional services and the Consultant's defense obligation shall be the reimbursement of Client's reasonable legal expenses recoverable under applicable law in defending against an allegation of harm caused by the Consultant's failure to meet the standard of care for professional services once that failure is determined."

AIA Contractual Indemnity Provision

(AIA B103-2017)

§ 8.1.3 The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect's obligation to indemnify and hold the Owner and the Owner's officers and employees harmless does not include a duty to defend. [The Architect's duty to indemnify the Owner . . . shall be limited to the available proceeds of the insurance coverage required by this Agreement.]

Insurance Issues

Architect shall carry professional liability insurance with limits specifically applicable to this project without including defense costs. Client shall be named as an additional insured on the policy.

- Can you rely on your practice policy?
- Do defense costs erode the policy's aggregate limit?
- Is it fraudulent to tell your client that it can be an additional insured on your professional liability policy?

Insurance Issues

- Practice policies provide an aggregate limit for claims from all projects during the policy term
 - They do not provide coverage for each and every claim or for only claims from a specific project
 - A project-specific policy or a special additional limit endorsement might be possible
- Most policies include defense costs within the per claim and aggregate limit
- Professional liability insurance policies will not name a client as an additional insured
 - They do not perform the covered service
 - If the client is on the policy, the client cannot recover from the architect

AIA Professional Liability Insurance Requirement

(AIA B101-2017 Example)

§ 2.5.6 Professional Liability covering negligent acts, errors and omissions in the performance of professional services with policy limits of not less than « » (\$ « ») per claim and « » (\$ « ») in the aggregate.

§ 2.5.7 Additional Insured Obligations. To the fullest extent permitted by law, the Architect shall cause the primary and excess or umbrella policies for Commercial General Liability and Automobile Liability to include the Owner as an additional insured for claims caused in whole or in part by the Architect's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's insurance policies and shall apply to both ongoing and completed operations.

Warranties and Guarantees

Consultant's design and plans and specifications shall be fit for the purposes intended. Consultant shall further ensure that the project as constructed shall meet all codes.

- Are you aware that "fit for the purposes intended" is a product liability concept?
- Are you willing to accept a contractual obligation that is never covered by professional liability insurance?
- Unless you are a design-builder, do you have any control over the actual construction in a way that you can guarantee is compliance?

Contractual Liability

Consultant shall specifically insure its requirement to meet the contractual obligations of this Agreement.

- Are you aware that all contractual obligations are excluded from professional liability insurance coverage?
- Contractual liability is a business risk.
- Professional liability insurance covers harm from the failure to meet the standard of care irrespective of the contract.
- Can you convince the client that it is impossible for you to insure contractual liability as a professional?

Exclusion of Contractual Liability

In every professional liability policy there is an exclusion of assumed contractual liability. In the CNA policy it is stated that the policy will not cover:

B. Contractual Liability arising out of:

- 1. the Insured's actual or alleged liability under any oral or written contract or agreement, including but not limited to express warranties or guarantees; or*
- 2. any actual or alleged liability of others that the Insured assumes under any oral or written contract or agreement.*

However, this exclusion shall not apply to the Insured's liability that exists in the absence of such contract or agreement.

Design Defect Clauses

Consultant shall produce accurate construction documents and shall have responsibility for any costs, losses, or damages resulting from any defect in the design.

- Are you taking responsibility for any defect in the design, the workmanship, and/or in the materials or systems used on a project that results in a failure of a component part of a building or structure and causes damage to person or property, usually resulting in financial harm to the owner?
- Does your contractual liability extend beyond your duty to meet the professional standard of care?

Liability for Defects in Construction

(AIA B101-2017 Example)

§3.6.1.2 The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures ..., nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents."

An architect would argue that this provision is exculpatory in nature, *i.e.*, that it relieves the architect from any liability for the contractor's acts or omissions. The language "nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents" could be construed to mean that the architect cannot be responsible for the contractor's failure to perform the work in accordance with the Contract Documents. Some courts have adopted this position, and have dismissed claims by owners suing architects for construction defects.

Liability for Defects in Construction

- An architect's construction phase services will typically consist of periodic observations and evaluations of the progress of the construction work.
- An architect may be charged with observing the work to determine whether or not the building is being constructed in accordance with the contract documents, including the plans the architect has prepared.
- When there are defects in the construction, an owner may attempt to hold the architect liable (usually in addition to the contractor) for said defects, even if there are no errors or omissions in the architect's design or specifications.
- The theory behind such an assertion is typically that, even if the defect was caused by the contractor, the architect was charged with observing the work and should have called out the contractor's defect and seen that it was corrected.

Liability for Defects in Construction

- The AIA agreement may absolve the architect of liability for any negligent acts or omissions of the contractor and subcontractors, but it does not absolve the architect of liability arising out of its own failure to inspect reasonably.
- If the Architect has evaluation duties, the architect cannot disclaim liability for construction defects that even the most perfunctory monitoring would have prevented, or fail to advise the owner of a known failure of the contractor to follow the plans and specifications.
- While the architect is not responsible for the contractor's negligence, the architect is required to perform its construction observation services reasonably, as required under its contract. Further, when the architect actually observes deviations from the contract documents, it is required to report these to the owner.

Disclaimer of Statutory Warranties (Condos)

- The Uniform Condominium Act creates implied warranties of quality, which can be excluded or modified by agreement by a disclaimer as simple as saying "as is", or "with all faults", if the condominium is not for residential use.
- For residential use, a "general disclaimer" of implied warranties is not effective; the seller must specify the defect or failure to comply in a disclaimer.
- In negotiating the contract, the architect could require that this be included in every purchase agreement, with specific identification whenever the developer waives full contract compliance by the contractor, or accepts some defective work for a trade-out credit. The contract could add a clause that requires the developer to indemnify the architect if no disclaimer of known defects (accepted by the developer or are known and not repaired) is made in the purchase agreements.

Ownership of Documents Provision

All documentation produced by Consultant are "works made for hire" or, if not so considered, shall be transferred as soon as created to the Client who will have copyright to and ownership of all such documentation.

- Are you willing to surrender your instruments of professional service?
- Do you have any other leverage to use in fee collection?
- Is the client protecting you against meritless claims that occur because of the client's future reuse?
- Can you substitute a license for the transfer?

Ownership Transfer Issues

- The greatest risk in agreeing to transfer rights is the loss of the ability to use the documentation as leverage to secure payment for the services that produced them.
- Under US copyright law design documents have not been "works made for hire" since 1976. (The term "instruments of service" was developed before the law changed to differentiate them from "works made for hire.")
- Architects have separate copyrights in the design and the documentation and neither is transferred if only the documents are transferred or licensed. The copyright to the documentation has to specifically be transferred.
- B503-2017 has model language on the transfer of ownership.

AIA Language on Ownership and Use

(AIA B101-2017 Example)

§ 7.2 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants.

AIA Language on Ownership and Use

(AIA B101-2017 Example)

§ 7.3 The Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations under this Agreement, including prompt payment of all sums due pursuant to Article 9 and Article 11. - - -The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service, subject to any protocols established pursuant to Section 1.3, solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

AIA Language on Ownership and Use

(AIA B101-2017 Example)

§ 7.3.1 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. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.

Claims and Disputes Clauses

In any dispute between the Consultant and Client, the parties shall immediately arbitrate the dispute using Client's selected arbitrator who shall, in addition to damages award the prevailing party all legal costs.

- Shouldn't you attempt to "meet and confer" or mediate the dispute first?
- If you arbitrate, shouldn't it be a neutral arbitrator?
- Can you afford to pay the client's legal fees that are not considered damages recoverable by law?

AIA Language on Dispute Resolution

(AIA B101-2017 Example)

§ 8.2 Mediation

§ 8.2.1 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.

AIA Language on Dispute Resolution

(AIA B101-2017 Example)

§ 8.3 Arbitration

§ 8.3.1 If the parties have selected arbitration as the method for binding dispute resolution in this Agreement, any claim, dispute or other matter in question arising out of or related to this Agreement subject to, but not resolved by, mediation shall be subject to arbitration, which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement. A demand for arbitration shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the arbitration.

AIA Option on Dispute Resolution

(AIA B503-2017 Example)

Meet and Confer (as a condition precedent to mediation)

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to a meet and confer session as a condition precedent to mediation.

The meet and confer session shall be attended by members of the Owner and Architect's senior management who shall have full authority to bind their respective party with respect to the claim, dispute or other matter in question. The meet and confer session shall take place within __ days after a request by either party, unless the parties mutually agree otherwise.

If the parties reach a mutually acceptable resolution, then they shall prepare appropriate documentation memorializing the resolution. If the parties cannot reach a mutually acceptable resolution, they shall proceed to mediation in accordance with this Agreement.

Certifications/Lender Documents/Assignment

Consultant shall certify to Client, lender, surety and other designated parties that Project has been completed in compliance with the Contract Documents and all codes and standards.

- Are you ready to qualify any certification so that it is recognized as:
 - A fact known to you because of your services?
 - A professional opinion in line with state law?
 - Can you limit the detrimental reliance?

Broad-Form Certifications

The certification must be based on knowledge gained from services performed and state a known fact or be qualified by stating that it is a professional opinion made in the exercise of due professional skill and care. In general, the questions that should be asked in every instance are the following:

- Based on your services provided are you capable to make a declaration relating to conditions within the direct knowledge or control of the design professional?
- Do you have to perform additional services or have additional tests conducted to be able to certify a fact?
- Is the language of the certification properly qualified — if the certification is not based on a known fact, is it stated as a professional opinion so that it is clearly an expression of knowledge, information and belief?
- Does the proposed language of the certification constitute an express warranty or guarantee?

AIA Certification Limitation

(AIA B103-2017 Example)

§ 10.4 If the Owner requests the Architect to execute certificates, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution. The Architect shall not be required to execute certificates or consents that would require knowledge, services, or responsibilities beyond the scope of this Agreement.

Lender Certifications and Assignments

- Know and understand the owner's and your rights and obligations under the design contract that was already negotiated.
- If the consent is asking you to grant any right to the lender that the owner would not have had under your original contract, then the lender is asking too much and you should request appropriate revisions to the consent.
- Be especially concerned about obligations related to:
 - Ownership and use of instruments of service
 - Representations and warranties
 - Notice to lender that establishes detrimental reliance

COVID-19 Related Provisions

Design and construction services and schedules shall not be modified without Client's determination of justification for changes or additional Contract Time.

- If there is no *force majeure* provision in your contract, can you clarify that events outside of your control are justifications for increased design time?
- Are you making meeting the schedule a driver of your project management efforts irrespective of your lack of control over COVID-19 constraints?

Force Majeure Provisions

AIA Provision (B101-2017)

§ 2.2 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.

ASLA Provision (Standard Form Contract, 2020 Edition)

Section 8.1 Force Majeure Either party, as applicable, shall be relieved of its obligations hereunder in the event and to the extent that performance hereunder is delayed or prevented by any cause beyond its control and not caused by the party claiming relief hereunder, including, without limitation, acts of God, public enemies, war, insurrection, acts or orders of governmental authorities, fire, flood, explosion, or the recovery from such cause ("Force Majeure"). The parties agree to make all reasonable efforts to mitigate the delays and damages of Force Majeure.

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COVID-19 Related Provisions

It is specifically acknowledged, understood and agreed that the Fee; the Scope of Services; the Project Schedule and the Design Schedule (and all milestone and completion dates contained therein); and Consultant's Key Personnel/staffing plan for the Project and Services reflect and include considerations necessitated by the current COVID pandemic; including, without limitation, governmental and quasi-governmental agencies delays; suspensions and interruptions of work and/or services that are in place or scheduled; as well as the restrictions on the working environment, construction means and methods; and size and proximity of work forces and worker productivity that are expected to follow as a result thereof. Accordingly, in no event shall the COVID pandemic or the impacts thereof result in any increase in the Fee or entitle Consultant or its Subconsultants to any claim for adjusted or additional compensation, general conditions or damages of any nature.

COVID-19 Related Provisions

Defining the Standard of Care in Non-Standard Times

- A design firm's legal responsibilities to clients are examined in light of what a reasonably prudent architect or engineer would have known and done *at the time the services were performed*.
- When presented with a unique challenge such as the ongoing social distancing and travel restriction mandates, the prudent design firm may want to consider gauging how others are addressing the challenges presented by the situation, documenting those discussions in your internal records, and incorporating what is working for others into your approach.

SURVIVING A BAD CONTRACT

You can mitigate the professional liability and business risks of a bad contract through your:

1. Communications efforts
 - Focusing specifically on the client and the project
 - Clarifying vague requirements and refining onerous duties and responsibilities
2. Documentation efforts
 - Creating a record of client decisions and authorizations
 - Establishing conformance with the standard of care

SURVIVING A BAD CONTRACT

3. Quality Control Efforts
 - Refining your project management procedures to address client goals and expectations.
 - Verifying your project concept both internally and with your client and other appropriate stakeholders.
 - Reviewing your design efforts and deliverables for suitability and sound design practices.
 - Conducting an independent internal review of both the design and the deliverables before releasing the design for construction.
