MANAGING RISK
THROUGH CONTRACT LANGUAGE

VICTOR

Managing Risk Through Contract Language **is one of the many risk management tools available to design professionals insured in the Victor and CNA professional liability program.**

Victor and CNA have developed a unique range of professional liability coverages and risk management services to assist professional service firms of all sizes respond to the needs of their clients and provide services in a manner that meets their particular practice management goals.

For more information about the Victor and CNA programs, please contact your independent insurance broker, or call Victor at 301/961-9800, email us at info.us@victorinsuranceus.com or visit our website at victorinsurance.com.

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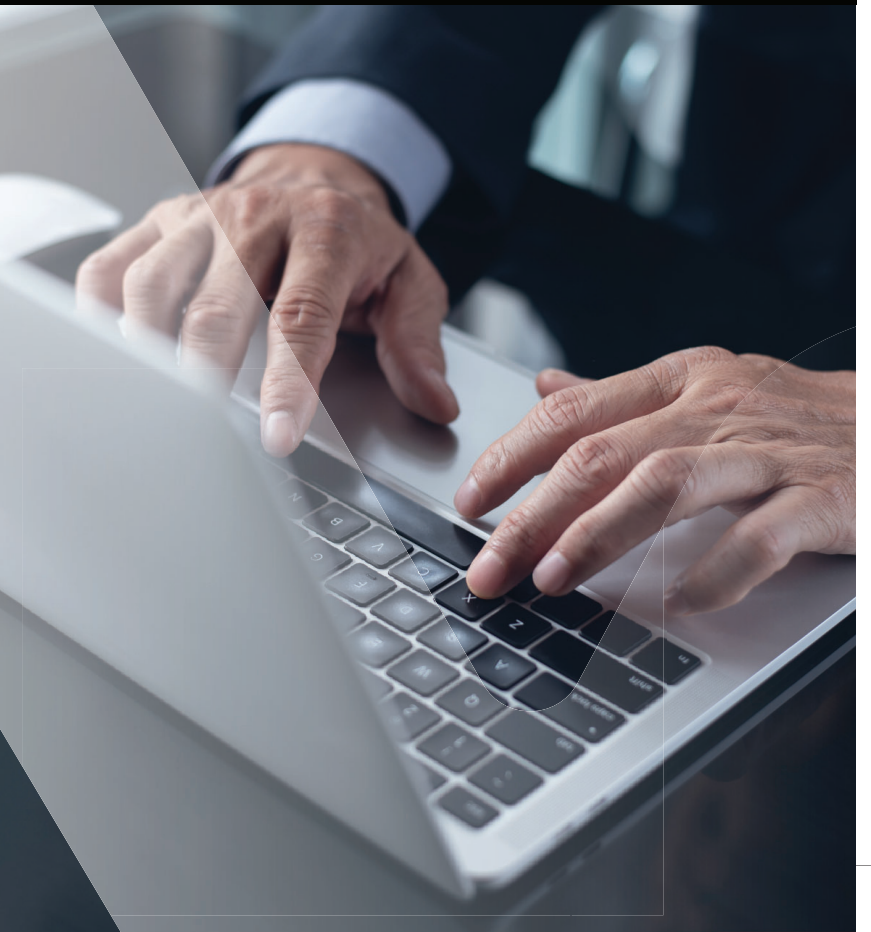

FINDER'S GUIDE

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PREFACE

This edition of Victor's *Managing Risk Through Contract Language* has been designed to serve as an essential risk management guide to the contracting process for design professionals.

Design and construction projects involve a high degree of contracting (i.e., outsourcing) under conditions of high uncertainty. The result is often a complex and confusing web of business and legal relationships among a cast of project players that includes project owners, developers, design professionals, contractors, subcontractors, and material and equipment suppliers, along with a supporting cast of lenders, insurance companies, and lawyers.

All of these relationships create the need to sort out and allocate the respective roles and responsibilities of all of the participants in a coordinated and effective fashion while somehow addressing the uncertainties inherent in the design and construction process. Failure in this regard is a significant source of friction, disputes, and ultimately the use of some outside entity to resolve problems—often at great expense to the various parties.

Notwithstanding the availability of well-drafted families of coordinated standard contract forms, such as those published by The American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC), many of the parties' contracts are poorly coordinated, not only one to another, but internally as well. Nevertheless, their contracts are promises that the law will enforce.

Of course, a further complication to the contracting and project delivery process is the fact that the opinions, reports, and construction documents prepared by design professionals can never include all information, specify all details, or anticipate all contingencies. As a consequence, effective pre-contract risk management must not only evaluate the pros and cons of specific contract forms or contract terms, but also the capacity and willingness of the various parties to work together, collaboratively and in good faith, to bring about a satisfactory project outcome.

Accordingly, *Managing Risk Through Contract Language* has been divided into three parts to provide you with a reasonably comprehensive, but practical understanding of contract law, professional liability, contract types, and contract terms.

Part I: How to use this publication

Provides an overview of contract terminology and contract law, a discussion of how liability arises in contract and in tort, a discussion of some common defenses to professional liability claims, and the importance of relying on legal counsel in negotiating any contract for professional services.

Part II: Reviewing a contract

Provides an overview of contract terminology and contract law, a discussion of how liability arises in contract and in tort, a discussion of some common defenses to professional liability claims, and the importance of relying on legal counsel in negotiating any contract for professional services.

Part III: Listing of issues

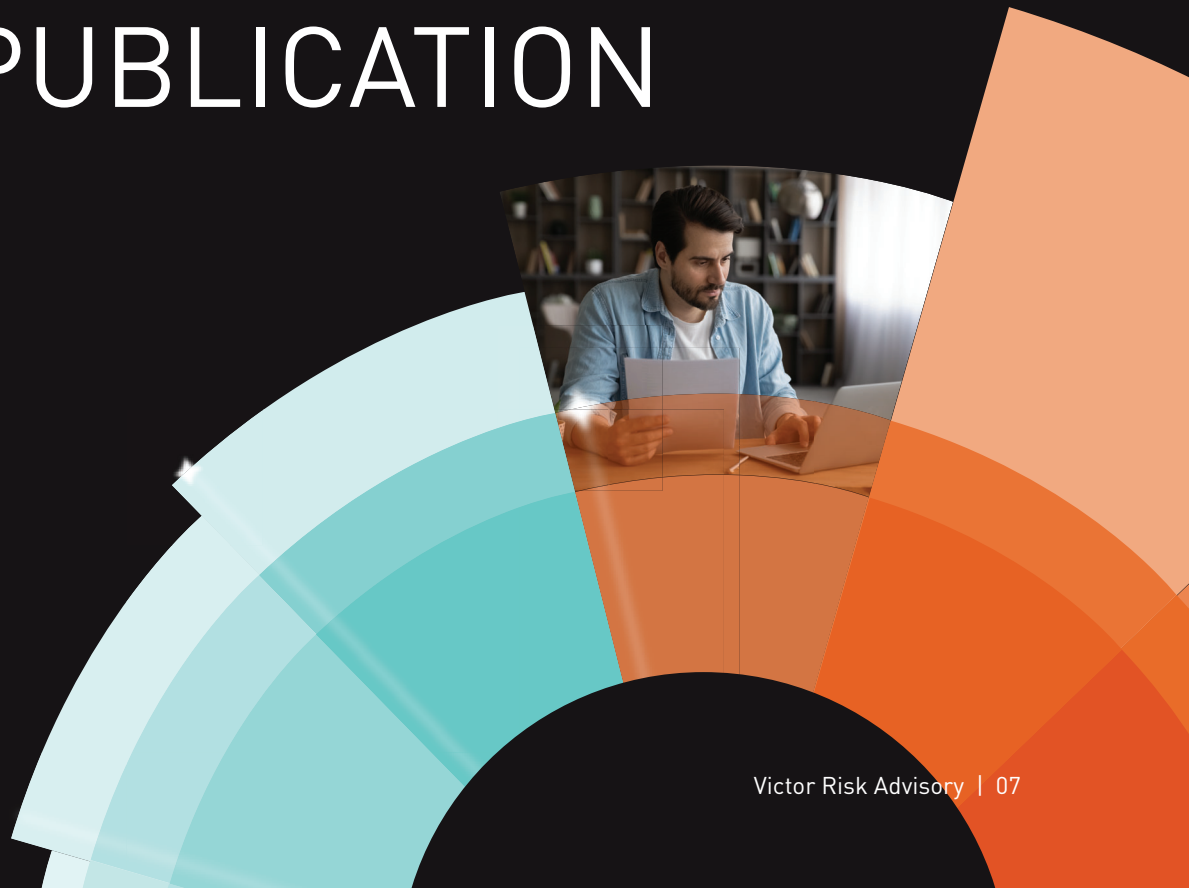
Addresses and categorizes the various issues that determine whether the risk associated with the client, project, and project contract is reasonable and controllable.

Throughout the presentation of this material, where appropriate, reference is made to provisions contained in the standard agreement forms published by the EJCDC and AIA. In particular, the following documents are extensively cited:

- AIA Document B101-2017, *Standard Form of Agreement Between Owner and Architect*
- EJCDC E-500 (2020 edition), *Standard Form of Agreement Between Owner and Engineer for Professional Services*

You are encouraged to become familiar with these industry standard forms and review them in conjunction with the use of this publication. Additionally, you should obtain appropriate legal and insurance advice when negotiating a professional services contract.

PART I
HOW TO USE THIS PUBLICATION



HOW TO USE THIS PUBLICATION

Understanding types of contracts

Design professionals like yourself typically encounter five generic types of professional services contracts:

1. oral agreements;
2. letter agreements;
3. purchase orders;
4. standard form agreements (often with extensive modifications); and
5. custom agreements for private or governmental projects.

Custom agreements drafted by the prospective client and negotiated with you usually present the greatest danger. Development of such agreements typically occurs because of the unique nature of a project or because of events that occur in the normal course of dealing with the client. However, some clients use custom contracts with the intent to establish an unbalanced contractual relationship.

It is important that you keep sight of the need to include certain project-specific and general condition terms in those agreements and strive to limit onerous, unrealistic, or ambiguous terms. In this effort, it is often useful to start by comparing the proposed agreement with the consensus industry documents from The American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC).

Contracts as a productivity tool

The contract negotiation process provides an opportunity to set the client-design professional relationship on a firm and productive course. Both parties must have a full appreciation of the issues involved in the negotiation, including their interrelationships and relative importance. From a risk management perspective, the outcome of the contract negotiation process is successful if it results in a contract that satisfies the following criteria:

- clear articulation and integration of the parties' expectations;
- clear expression of the rights and obligations of the parties;
- fair allocation of risks and rewards;
- allocation of each source of risk to the party in the best position to control or otherwise manage the risk;
- available insurance to support any common law or contractual indemnity obligation;
- mechanisms that can accommodate change during the course of the project; and
- confirmation of mutual understanding of the parties in writing.

A contract establishes the scope of services, overall professional relationship, system of communication, standard of care, and the rights and responsibilities of both parties. The likelihood of misunderstandings, disputes, and litigation decreases significantly if the contract is in writing and clearly represents the agreement of the parties.

Shifting risk to a party incapable of managing the risk is both unreasonable and unproductive.

General rules for creating effective contract language

Although contracts for specific projects may vary considerably, the following principles for structuring reasonable agreements should guide you:

Assign responsibilities to those with the authority to fulfill them

Determine who is in the best position to carry out responsibilities and assign those responsibilities accordingly. Shifting risk to a party incapable of managing the risk is both unreasonable and unproductive.

Even if a party is in the best position to carry out a responsibility, that party may be incapable of acting unless it is empowered to do so. Having the authority to do what is necessary to meet a contractual obligation is a basic principle of contract formation.

Assign each responsibility to only one party

Clients sometimes assume that giving multiple parties responsibility for a specific duty increases the likelihood of someone fulfilling that obligation. Experience, however, indicates that the opposite is true. Co-responsibility creates a situation in which neither party is fully responsible. Such a situation can only lead to uncertainty and confusion.

Use provisions that create only reasonable and realistic expectations

Confusion or disappointment significantly increases the risk of a dispute. Contracts can establish reasonable and realistic expectations by clearly communicating responsibilities and obligations.

Professional services agreements

The law requires you to exercise a reasonable degree of care, skill, and diligence when providing professional services, even in the absence of contract language. This is the standard of care intrinsic in providing professional services. However, one of the most important factors in determining your liability is the contract. From a professional liability perspective, the scope of services undertaken by contract is a significant source of risk, and the terms and conditions of performance of that scope often create sources of contractual risk that exceed professional exposure. These factors can change the standard of care and the extent of the risk you assume.

There is often a temptation to redefine the traditional professional relationships between owner, design professional, and contractor by creating documents with wording favorable to one party or another. On a customary design and construction project, it is important for each of the three parties involved to understand their respective responsibilities and degrees of authority, and to be able to rely on the agreed-upon division of power and obligations.

The value of a carefully crafted professional services agreement and a coordinated agreement between the client and contractor is the clear communication of contractual roles and responsibilities. Contract negotiations between you and the client, therefore, represent the prime opportunity to communicate with the client. The agreement that results should guide your relationships throughout your collaboration.

Value of AIA and EJCDC agreement forms

Standard forms of agreement use clear language and fairness in allocating duties and responsibilities. The two major sources for standard contract forms are the AIA and the EJCDC. The associations develop their contracts through a consensus effort so they reflect a balance of interests and risks among the parties involved in the design and construction process. (Since our first involvement as an insurance advisor to the contract generating effort in 1963, the Victor and CNA program has continuously supported the efforts of the document programs of the EJCDC—and its predecessor, National Society of Professional Engineers program—and the AIA.)

Of course, every project is unique, and while the AIA and EJCDC forms address a wide variety of professional services, standard contract forms need to be adapted to meet the specific requirements of each project. What is valuable about the standard documents is not that they address every specific need, but that they clearly set forth the services that design professionals are qualified to perform and document a rational expectation of professional performance. The standard documents systematically detail what to expect from all parties and describe a nationally accepted norm for professional services. The careful attention paid in the drafting process to defining the divisions of duties and responsibilities between the parties to the professional services agreements, and in the coordination of the construction contracts and forms with the professional services agreements, makes the documents valuable both in use and for comparison with custom-drafted or client-generated agreements.

Some clients overlook the many merits of the standard professional services agreements. In addition to contractually establishing the accepted standard of care for professional services, the forms attempt to achieve fairness in duties, authorities, and risks. The documents also clarify what risks are outside the scope of services. The use of standard contract forms provides confidence that contractual relationships possess no hidden or disguised risks since they clearly indicate modified provisions.

Standard forms of agreement use clear language and fairness in allocating duties and responsibilities.

Relying on advice of legal counsel

Lawyers and insurance professionals are not qualified to provide design services. Equally, you should not assume that you could provide legal or insurance advice either for your own use or for that of your client. Those qualified to provide each specialty service should perform those services. Therefore, we recommend obtaining appropriate legal advice when negotiating any binding document, including your professional services agreement.

Design professionals often think of lawyers, or insurance companies, as the instruments of their defense in times of trouble. Conversely, most clients have a different view of lawyers and insurance professionals, recognizing the design process as only the first step toward a major capital investment. Therefore, except for the smallest of projects, clients consult lawyers, risk managers, and insurers from the start of the negotiation process for the design of a project. Regrettably, few design professionals have the same understanding of the need for legal and insurance counsel during the negotiation process.

Legal counsel experienced in the design and construction process, however, may not represent a client. The client's attorney may suggest or reject contract terms without an understanding of the peculiarities of the construction industry or an appreciation of the professional nature of design services. The resultant contract, therefore, may not serve as a reliable guide to the rights and duties of the parties. Sharing the information contained in this contract review tool with a client, or the client's attorney, may help educate them and create realistic expectations later documented in the professional services agreement.

This contract review guide addresses certain practice management and professional liability issues that Victor and CNA claims experience has shown to be troublesome to design professionals. The comments in this contract review tool are general in nature and not a substitute for professional advice in specific situations. The matters discussed and suggestions offered are not expressions of legal opinions or recommendations for standards of practice. They are simply suggestions for your consideration and provide information and insight that you can use in your efforts to negotiate fair and reasonable professional services agreements with your clients.

PART II
REVIEWING A CONTRACT

REVIEWING A CONTRACT

Before you negotiate a contract, think about the client

On any project, you first have to make a "go/no go" decision using a comprehensive assessment tool. Even if the project seems to be within your firm's skills set and capacity, you should take one more look at the major risk elements of the project. Clients present the greatest risk on every project, and this often starts with the contractual description of the client.

Who is the client? What is its legal status?

For instance, is it a project-specific developer with a limited life span? If so, any contractual commitments by the client could be worthless for your firm because the client might not exist as an entity from which to collect unpaid fees, fulfill any protections negotiated in the contract, or be the first party sued if a third party has a cause of action.

If the client is a committee, is there someone who has authority to make decisions and modify the contract as needed by the project's circumstances? As an example, if the client asks you to provide additional services, does the person have the authority to request such services? If not, the firm could be a victim of "scope creep" with no compensation for additional services.

With a government client, is the project properly funded? You do not want to provide speculative services on a project that could be canceled at any time for any reason unless there is funding in place to pay for those services. Also, consider what legal protections may not apply when the client is a governmental entity, i.e., the statute of limitation for claims or the statute of repose cutting off all exposure.

If you are providing services to a design-build entity, does that client appreciate the special status of your firm as a design professional? A design-build entity that is essentially a construction contractor no longer has the ability to demand more time or money from the client as it would under the *Spearin* Doctrine, which states that a client provides a warranty in the contract documents. Instead, the design-builder could create contractual liability for your firm. In most cases, professional liability insurance coverage does not cover contractual liability.

Clients have major concerns with the cost and time of putting a capital asset in place.

Is the client providing information on which you can rely?

Is the client intending to make you verify information it provides or otherwise refusing to take responsibility for the information on which you must rely in your design process? If so, your fee would have to be significantly higher to allow you to spend the time necessary to confirm information or to assume the risk that ambiguous and unreliable information presents.

Who is providing construction cost estimating?

Clients have major concerns with the cost and time of putting a capital asset in place. If the client is contractually obligating you to design to a fixed-limit of construction cost, is there budget information on which you can rely? And is there a limitation of your exposure if final bids or negotiated construction costs are far beyond the cost of the work you are given or required to establish?

Should you be concerned with the client's insurance for the project?

If the client asks you to verify the insurance coverages it wants you to carry, can you also confirm if the client has appropriate coverage? Will the client require the construction contractor to carry appropriate coverages? Increasingly, contractors have design liability exposures, and if they do not carry contractor's professional liability insurance coverage, their actions may affect your exposure. To be protected against negligent actions by the contractor, are you being properly named as an additional insured on the contractor's commercial general liability insurance policy as well as being included in the contractor's indemnification commitment?

Does the client understand that problems happen on construction projects and that they need to establish dispute resolution procedures?

Allowing the client to place unilateral blame on you, such as by withholding your fee at the client's discretion, forces you to use a lengthy and costly dispute resolution process. In addition, requiring you to pay the client's legal costs after any legal action are both forms of coercion and are indicative of a client that is less attentive to a reasonable project outcome and more interested in a cost recovery process, even if that process is unfair to your firm.

Evaluate what you know about the proposed client before you work with your legal advisor on redlining a proposed client contract form or preparing defense of your use of a standard AIA or EJCDC contract form or your own standard professional services agreement.

Basic questions to ask when reviewing custom contracts

When reviewing a contract, ask yourself some basic questions, which include the following:

- What does the language say?
- What does it mean?
- Why is this language "better" than the consensus language?
- What problem is this language intended to solve?
- How does the language affect your responsibilities?
- Will the language have an adverse impact on the working relationship between you and your client?

Establishment of business terms—scope, time, and compensation

Design professionals operate as commercial entities, so commercial concerns are something to consider in professional practice. You must enter into contract negotiations with certain commercial and professional expectations. Good business judgment often reflects sound risk management judgment—and sound risk management judgment can result in profitable business transactions.

Business terms in a professional services agreement include the scope and nature of the services, the schedule for providing those services, and the compensation and payment conditions for services and reimbursable expenses. The negotiation of such terms is of primary importance to the success of the project and the financial viability of your firm.

Perhaps the two most important aspects of an agreement are the description of the scope of services and the method for determining your compensation for performing those services. A third, and increasingly important, aspect is the time for the delivery of services.

It is critical to define with reasonable precision within the contract your scope of services. A clear and precise definition of the scope of services is essential for business and payment purposes. An ambiguous or unspecified definition of scope may lead to an obligation to perform more services than contemplated or result in a dispute with the client. Problems could include the shifting of services considered as additional services into the category of basic services and the continuing enlargement of the scope because of unclear expectations or intentional accretion.

Clients bring the most claims against design professionals. Misunderstandings and poor management generate many of the problems leading to disputes and disagreements over compensation amounts. Procedures can also exacerbate the problems, resulting in claims. Professional services agreements should provide for the prompt payment for services, prevent the unreasonable withholding of fees, and require the equitable adjustment or renegotiation of fees for delayed or terminated projects.

Similarly, an agreement should specify the time expectations for the rendering of services and the submission of deliverables. Do not state time parameters as absolute, however; negotiate for adjustments of milestones or deadlines when factors beyond your control cause delays. The timely delivery of services may be a material element of an agreement, but it should not establish a warranty.

In reviewing a contract, you should be alert to the following provisions that either significantly increase risk or create a situation where you may not be able to appropriately manage or insure against the risk.

Onerous transactional and liability terms

Transactional and liability terms that structure contractual relationships accompany the business terms, general conditions, and project-specific terms that define the services, delivery, and compensation of any agreement. Although few contractual provisions are "deal breakers" in that they alone should cause you to reject a contractual relationship, there are provisions that clearly go beyond your ability to manage risk. Since part of that management is the ability to transfer a portion of risk through insurance coverage, these provisions often exceed the scope of professional liability and other insurance coverages.

In reviewing a contract, you should be alert to the following provisions that either significantly increase risk or create a situation where you may not be able to appropriately manage or insure against the risk. We will discuss these topics in greater detail in Part III: Listing of issues.

Indemnification or hold harmless clauses

These clauses shift risks from one party to another, and usually the shift is from a client, such as a developer, to you. Frequently, these clauses demand more of you than the law would otherwise require. Because of that, use caution when negotiating these provisions into a contract.

Defense obligations

Indemnification agreements typically include defense obligations so there is no need to include this separately. While it is reasonable for the client to ask for indemnification of defense costs that result from your negligence, the assumption of defense responsibilities not resulting from your negligence is an entirely different matter. You may find that you alone are responsible for the high costs of a legal defense of your client when there is no allegation of active negligence.

Express warranties and guarantees

These obligations impose liability in a manner that is neither realistic nor effective. Such language can also appear throughout a contract, cleverly disguised through the addition of only a word or term to an otherwise innocuous statement of service. While you may feel comfortable providing a warranty of facts or situations within your control, such as the existence of proper professional and business licenses in a particular state, providing a warranty of services is irrational. Even more important, guaranteeing the work of others—for instance, the work of the contractor—is irresponsible and inadvisable because you have no control over the contractor's work.

Standard of care

An improper or enlarged definition of the standard of care creates unattainable expectations. The law speaks for itself; without any statement of a standard of care, you must perform services with the usual and customary professional care and in accordance with generally accepted practices in effect at the time of the rendering of services. While the contract can restate or expand that standard based on your firm's competence and qualifications, pay careful attention to such changes. What might appear to be a simple word change could create unexpected and unclear obligations for you.

Cost estimates

You should carefully qualify any cost estimates. Emphasize that estimates are, by necessity, limited in their purpose and based on some conceptual estimating technique. State that you have based your estimates refined throughout the design process on your professional experience and judgment.

Since you have no control over market conditions or bidding procedures, your client should not expect that bids or ultimate construction costs remain consistent with cost estimates.

Site visits

Clearly identify the reason for any site visits. While you can provide a wide range of services for evaluating the work of the contractor, the client must be aware of the scope, cost, and limitation of these services. It is also important that clients understand how often site visits are to occur. You should define site visits as either an agreed-upon number of visits tied to specific construction events or a specific number conducted when deemed appropriate to the stage of construction.

Missing provisions

Missing contractual provisions can cause misunderstandings, and make a dispute difficult to resolve. Some of these provisions can be vital in drawing a "bright-line" separation between your professional services and the work of the contractor. It is important that contracts clearly define duties. Comparing client-generated contracts to the consensus documents can help identify omitted provisions.

Responsibility for the work

A positive statement that the contractor is solely responsible for the means, methods, techniques, sequences, and procedures of the construction work, as well as the final project, should be included in any design contract leading to construction. Unless the client requests construction management or design-build services, the client should understand that while you can evaluate the work of the contractor, that evaluation does not change the contractor's responsibility to accomplish the design.

Worker safety

Because the contractor has control of the site, the contractor alone should be responsible for the safety of construction workers, the client, others on the site, and adjacent property owners. You may create professional liability by assuming responsibility for site safety through imprecise language.

Agency status during construction

Adding an explicit statement that you are acting as the agent of the client can prevent your inclusion in claims brought by a contractor.

Dispute resolution

You and your clients should anticipate the possibility of disputes or claims and include some provision for dispute resolution in your agreements. For example, in the event that direct negotiations fail to resolve a dispute, the agreement may provide for mediation, arbitration, litigation, or some combination of those dispute resolution methods. CNA claims specialists have found that the mediation of disputes is less expensive, less time consuming, and less adversarial than any other form of dispute resolution. While some firms may prefer arbitration because it places the power to resolve a dispute with a third party, a "mediation-first" provision does not preclude another form of dispute resolution should the mediation fail.

Document control and ownership

Agreements should clearly state ownership and proper use of any documents. As a rule, your clients should acknowledge that documents produced by you are instruments of your service and not products. As instruments of service, they should remain your property. Your client may require that you immediately and unequivocally transfer some or all of the instruments of service and project deliverables to the client. There are significant differences between the copyright to and the ownership of documents. This difference should be clarified if you negotiate any transfer of copyright.

Focus on serving the client by managing risk

If you are able to identify and assess the impact of a source of risk, you can develop a strategy for addressing the risk in the contract and during the lifecycle of the project. Obviously, risk left unmanaged or inappropriately managed may cause problems to both parties to the contract and all those involved in the project.

Additional resources

Please do not consider this publication as the only source of risk management information useful in creating a rational balance between risk and reward. You can find additional information and perspectives in Victor's other publications, as noted below, through Victor Risk Advisory.

Contract Sifter

Victor and CNA insureds have access to Contract Sifter, our automated contract review tool that allows you to upload a professional liability contract and, within minutes, receive a list of missing and found insurability and practice management issues along with actionable guidance from Victor experts. Learn more here.

Website publications

Our website includes dozens of articles on various contract issues, including limitation of liability, indemnification, and many others.

Continuing education courses

Through Victor's Risk Advisory, you have access to dozens of risk advisory courses on a wide variety of topics. Contract-specific courses include the following:

- Contracts for professional services
- Dispute prevention and resolution
- Intellectual property—protect yourself and your compensation
- Negotiating contracts with clients

Design professionals of all experience levels are encouraged to enroll in and complete courses to help better understand their contract exposures.

If you already have a Victor website account, you have access to all of the resources noted above and more. If you don't yet have a website account, create one here.

PART III
LISTING OF CONTRACT ISSUES

ADDITIONAL INSURED STATUS

Issue

Your client wants you to name it as an "additional insured" on all of your liability insurance policies, including your professional liability policy.

Concern

A knowledgeable client, or one who is relying on a knowledgeable insurance advisor, understands that there are some insurance policies where being "named as an additional insured" neither makes sense nor is possible. Two such policies are your workers' compensation policy and the professional liability insurance policy. Even more problematic is when a client asks to be "added as a named insured" because the client does not understand that it would be responsible for paying the premium on that policy. A demand for a "blanket" endorsement naming the client as an additional insured is an indication that the client does not understand professional liability insurance and is more likely to create problems for your firm if any disruptions to the design and construction process occur.

Response

With the assistance of your insurance advisor, explain that you cannot name the client, a non-professional, as an additional insured on the professional liability insurance policy. This is true with all professional liability policies; the client cannot be named on its outside legal counsel's policy nor is it possible on the professional liability insurance policy of the accounting firm performing the client's audit.

Some clients think they will have protection against third-party claims by being included as an additional insured on your professional liability policy. This is not an option with professional liability insurance because the design firm's client is usually not performing professional services and therefore does not have the risk that the policy is designed to cover. Also, naming a client as an additional insured on a professional liability insurance policy would cause the standard "Insured vs. Insured" policy exclusion to apply, prohibiting coverage for a client's negligence claim against the insured professional service firm. Unlike other types of insurance policies, the professional liability insurance policy does not make payments to the named insured, but rather pays on behalf of the named insured in the event that the named insured's negligence in rendering professional services causes damage or injury. Educate your client that if you name the client as an insured under your policy, the client would not have defense coverage because it did not perform the services. The client also would not be able to collect damages caused by your negligent performance of professional services since an insured cannot make a claim against itself and recover under a professional liability policy.

Resources

Standard contract forms usually make clear what coverages can be extended on an "additional insured" basis. For example, AIA B101-2017 includes this provision:

> § 2.5.7 Additional Insured Obligations. To the fullest extent permitted by law, the Architect shall cause the primary and excess or umbrella polices 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.

EJCDC E-500 (2020 edition) has this provision:

> 1.01 Insurance
>
> A. Engineer shall procure and maintain insurance as set forth in Exhibit G.
>
> B. Additional Insureds: The Engineer's commercial general liability, automobile liability, and umbrella or excess liability policies, must:
>
> 1. include and list as additional insureds Owner, and any individuals or entities identified as additional insureds in Exhibit G;
>
> 2. include coverage for the respective officers, directors, members, partners, and employees of all such additional insureds;
>
> 3. afford primary coverage to these additional insureds for all claims covered thereby (including as applicable those arising from both ongoing and completed operations); and
>
> 4. not seek contribution from insurance maintained by the additional insured.

Suggest language similar to these provisions in lieu of a client's broadly worded and impracticable language—requirements that state that only the commercial general liability, automobile liability, and excess or umbrella coverages should include the client as an additional insured.

INTRO TO PROFESSIONAL LIABILITY INSURANCE

The insurance requirements of some clients reflect a misunderstanding of the nature and scope of professional liability coverage for architects, engineers, surveyors, and other design professionals. *Intro to Professional Liability Insurance* is intended to help your clients understand some commonly misunderstood features of professional liability insurance, though it is not meant to be exhaustive in its explanations. Clients should also consult an insurance advisor knowledgeable about requirements for professional liability coverage. Please share this resource with them so they can better understand the coverage available to you.

Commentary

Professional liability claims are complex and often involve multiple parties and an absence of clear responsibility. This complexity is one factor that distinguishes the attributes and limitations of professional liability insurance policies from other policies, such as the commercial general liability policy or automobile policy, both of which do allow the naming of additional insureds. In those situations, the harm causing the liability is usually easily traceable to the actions of one negligent party. It makes sense, then, to have the policies also defend other innocent parties named in a lawsuit because of the negligence of the named insured. However, that is not the situation with an allegation of liability in the performance of professional services.

In some situations, a client might have professionals on its staff and seek additional insured status on an independent design firm's policy, assuming that the policy will provide adequate coverage for their in-house design professionals. In those cases, the client should purchase its own policy to cover the activities of in-house design professionals so that it can better manage its risks by obtaining coverage and policy limits that meet the client's specific needs.

AGREEMENT FORMS

Issue

Your prospective client is reluctant to accept your standard contract, or a standard agreement form such as an AIA or EJCDC document, and wants to procure your services "quickly and simply," such as by an oral contract, purchase order, or continuing service agreement.

Concern

Clients often want to use their own contract forms, purchase orders, oral agreements, or continuing service agreements to contract for professional services. Recognize that each of these options presents risks. The relationship between you and the client, the quality of the services you provide, and the level of communication that exists all factor into the determination of risk. The use of a standard professional services agreement can provide protection for both you and your client.

Response

The AIA and EJCDC offer a variety of contract forms that correspond to most modes of project delivery and to varying levels of service. Using these forms is an efficient method of establishing a comprehensive allocation of duties and risks. Educating your client and yourself about these forms will enable you to discuss with your client the rationale for specific provisions in a standard form of agreement.

Use appropriate caution when agreeing to oral contracts or providing services under purchase order arrangements. You and your client can memorialize an oral agreement in a short-form contract.

A purchase order can incorporate by reference the terms and conditions of a professional services agreement that you have negotiated with your client prior to the purchase order. Your negotiated terms will supersede the product liability and warranty language that most purchase orders contain.

Continuing service agreements need details for allowing an adjustment in scope and fee for changed circumstances. This will help prevent the risk from greatly exceeding the fee.

Resources

Both the AIA and EJCDC publish an ever-increasing number of standard agreement forms. The AIA documents include B103-2017, *Standard Form of Agreement Between Owner and Architect for a Complex Project*, B104-2017, *Standard Abbreviated Form of Agreement Between Owner and Architec*t, and B105-2017, *Standard Short Form of Agreement Between Owner and Architect*. The AIA also publishes many other specific service contracts.

Similarly, EJCDC publishes many "families" of documents that can cover services as dissimilar as a preliminary study to a design-build project. Both organizations involve client groups and construction associations in the drafting process so that the documents represent the interests of all parties. In addition, these documents provide a sound basis for drafting a custom agreement beyond the modification of standard forms for a particular project.

Commentary

A detailed written agreement between you and your client can prevent confusion, uncertainty, and dissatisfaction. The contract establishes the relationship, system of communication, standard of care, and rights and responsibilities of both parties. The likelihood of misunderstandings, disputes, and litigation increases significantly if the contract is not in writing or does not clearly represent the agreement of the parties.

The AIA and EJCDC continually update their forms to represent an equitable balance of duties and risks. The use of AIA and EJCDC forms, either as evidence of the agreement or as a guide to the discussion of the relationships, responsibilities, and rights of the parties will reduce misunderstandings. Should a dispute arise, these forms also provide evidence to refute a professional liability or breach of contract claim. In addition, use of these forms can reduce the time and costs necessary with creating a custom agreement.

All forms of agreement should clearly express the intent of the parties. The parties cannot follow the terms if the contract language is confusing. Terms, if not specifically defined, default to their plain or dictionary meaning and may constitute obligations far different from the meaning you assume.

The characteristics of the following agreement forms present special concerns:

ORAL AGREEMENTS

Many firms have practiced successfully without written agreements, such oral contractual relationships. While usually valid and binding, oral agreements often result in an unclear understanding of the scope of services and inconsistent levels of expectations for each party.

RISKS OF CLIENT-GENERATED FORMS

As seen in the chart to the right, client-generated contracts can lead to high indemnity payments on behalf of design firms. Client forms should be examined closely to determine if they include:

- acceptable standard of care;
- equity in the assignment of duties, authorities, and risks;
- clearly defined scope of services;
- realistic time for services;
- mutually agreed upon method of compensation; and
- language that is unequivocal.

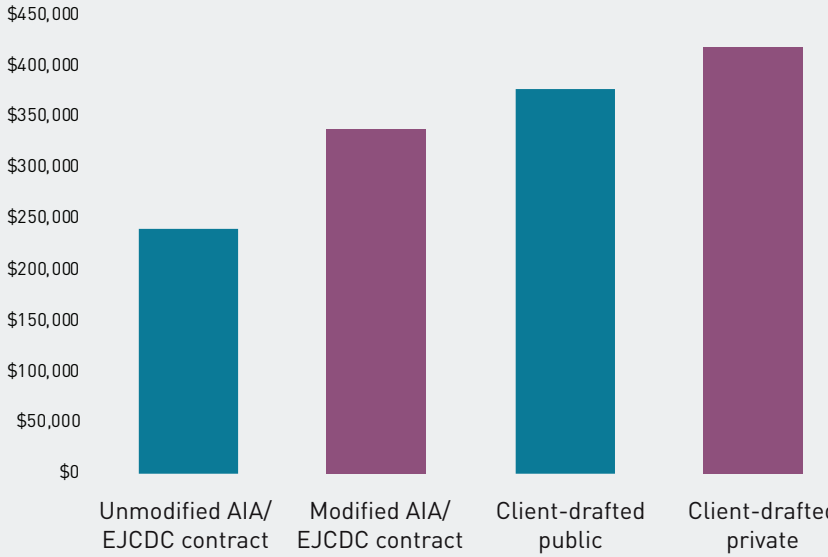
PURCHASE ORDERS

The intent behind most purchase orders is for product procurement, which include product liability or express warranty provisions inappropriate for professional services. Such forms also seldom identify the scope of professional services. It is possible to minimize many of the risks inherent in purchase orders if they are tied to a separate professional services agreement.

CONTINUING SERVICE CONTRACTS

A long-term service arrangement with a client can negate the application of a statute of repose or statute of limitations; create a duty to advise the client of a change in codes or standards; and result in risk that far exceeds the negotiated compensation. In addition, unless the contract takes the form of a master services agreement with appropriate terms and conditions and project-specific service orders stating the precise scope of services, such an arrangement can result in confusion over the scope of the professional effort.

FIGURE 1 **Claims by selected contract type: average indemnity payment (2013 - 2022)**



ASSIGNMENTS/LENDER REQUIREMENTS

Issue

Your client insists on assigning its contractual rights to a lender that requires your consent to the assignment and your certification of project information.

Concern

Most issues confronting you with such assignments are business in nature that have little impact on professional liability risks. From a professional liability perspective, the concerns with an assignment are whether you are extending your liability through your statements to the lender and whether someone uses the instruments of service in an unmanaged situation. Also of concern is whether the assignment contains express warranty or guarantee language. Perhaps most important to you, however, are practice management and legal issues, such as whether you are comfortable with providing services to an unknown client and whether you will be properly compensated for your services after a loan default.

Response

You may have no contractual obligation to consent to an assignment, to provide a certification, or to furnish future services to a lender. Your contract may contain a provision prohibiting such an assignment, or it may be silent on the issue, thus enabling you to negotiate acceptable assignment terms. Your decision to accept an assignment contingent upon a loan default does not mean that you also have to extend your risk by providing a certification to the assignee or otherwise extending rights to the lender that are not envisioned by your contract. Addressing your concerns in the consent to assignment is reasonable.

Prudent practice management would suggest consideration of the following issues:

- Responsibility of the assignee for the payment of fees for past and future services once the assignment occurs and for additional services or costs caused by the assignment;
- Prevention of a future assignment after default without your consent; and
- Recognition that the assignee cannot use your instruments of service without your continued participation or the provision of a release and indemnification agreement, such as that used when you are not providing construction phase services.

Resources

You can read about the issue of assignments and the concern with certifications requested in assignments in the following articles on the Victor website:

- Lenders: Mandated certifications
- Lenders: Requirements for assignments

Also, see the language of Paragraph 6.06 of EJCDC E-500 (2020 edition), and § 10.3 of AIA B101-2017 for language that makes assignments manageable and reasonable.

Commentary

Although the contract language in standard forms of agreement limits the abilities of the parties to a contract to assign the rights and obligations established during contract negotiations, design professionals are increasingly facing demands to consent to contingent assignments to lenders. Such efforts raise the following concerns:

- If a default occurs, can you maintain the integrity of the design and protect your professional reputation by completing services through the construction phase?
- Is the new client (assignee) willing to assume the obligations of the original client?
- Is there any recourse for the payment of uncollected fees and future fees, including any costs generated by the assignment?
- Do you want to provide services to the lender or to a subsequent assignee?
- Is there an extension of the normal legal liability in time or scope?
- Does the consent to assignment create an uninsurable risk by including express warranties or guarantees?

A client and the lender may state that without immediate consent to the assignment and issuance of accompanying certifications by you, they will not issue the loan. This is not a valid reason for you to assume risks you would not normally assume or to forego entirely reasonable protections. In fact, such a sense of urgency adds to, rather than detracts from, your ability to negotiate reasonable assignment terms and conditions. You should take special care when a lender states that the consent to assignment is a condition of the loan because such a statement may be an effort to establish detrimental reliance of the lender on the statements made in the consent to the assignment, thus creating lender rights against you that otherwise would not exist.

Professional liability exposures and uninsurable risks can increase significantly because of the language in a consent to assignment. One of the best protections against such unreasonable risks is to include language similar to that in the AIA or EJCDC documents, such as the following:

> **Neither party may assign, sublet or transfer any rights under or interest in this agreement without the written consent of the other. Unless specifically stated to the contrary in any written consent to assignment, no assignment will release or discharge the assignor from any duty or responsibility under this agreement.**

This clause could be supplemented by a statement requiring that in exchange for your consent to any assignment to a lender, the lender shall assume the client's rights and obligations under the contract. This would include the obligation to cure a default by the client in payments for professional services and reimbursables.

CERTIFICATIONS

Issue

Your client has presented you with a certification form that seems to make you responsible for anything that has to do with the project.

Concern

Carefully examine any request for a certification since it is an assurance by you of the situation in question. Such a statement by you can impose immeasurable and unrealistic expectations, give rights to parties that otherwise would not have a legal relationship with you, and create major insurability issues.

Many certification forms result in additional liability exposure for you, and may involve uninsurable express warranties and guarantees of conditions beyond your knowledge or control. The scope and language of required certifications should be coordinated with the contract documents to provide appropriate safeguards for you while enabling you to fulfill contractual obligations to your client.

Response

You need to help your client gain an appreciation of the contractual, legal, insurance, and ethical constraints on your ability to issue a certification. If your contract requires a certification, it should clearly differentiate between known facts and professional opinions. Certifications should be:

- based on the contractual services;
- identified as to the purpose of the certification;
- indicated as being at a specific time and for a specific entity; and
- limited to a statement of facts directly known by you, or clearly identified as an expression of your professional opinion, such as by including a statement that you have based the certification on your knowledge, information, and belief.

Resources

A more detailed discussion of many of the risk management issues related to certifications is in the Victor article, "Certifications." See, also, § 10.4 of AIA B101-2017 for language that limits certifications to the scope of services and direct knowledge of the design professional. AIA B503-2017 also provides risk management advice on limiting certifications under "Owner Requested Certifications."

EJCDC E-500 (2020 edition) states what should be the standard in every contract through the language of 6.02.H., which is:

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

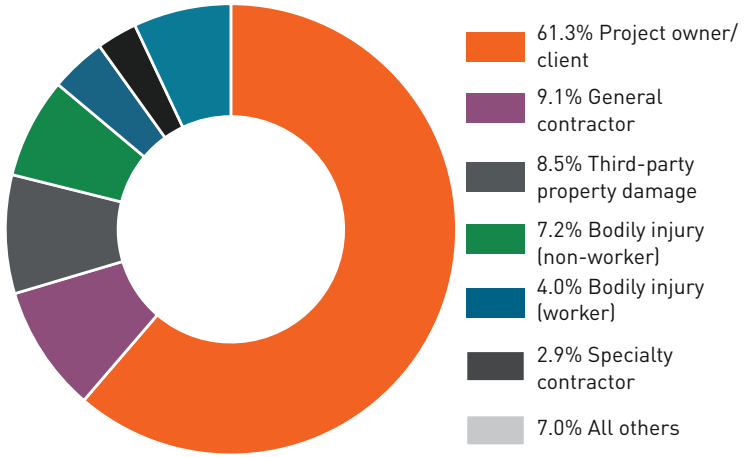
Exhibit E of EJCDC C-626, "Notice of Acceptability of the Work," has certification language recommended for use at final payment.

CLAIMS FROM CLIENTS

As seen in the chart below, claims from clients generate the highest frequency against design professionals. Agreeing to improper certifications can increase the chance of a professional liability claim being filed against you by your client.

FIGURE 2

Frequency of claims by claimant Id (2013 - 2022)



Commentary

Pay careful attention to the language of certifications. Stating the realistic limitations of the certification to a client constitutes a prudent, assertive program of risk management. This allows you to predict more accurately the costs and consequences of practice.

Certifications can present one or more of four general problems:

1. the terms of the form may impose duties and responsibilities that extend or expand those assumed under the contract with the client;
2. the form may involve a questionable delegation of a governmental responsibility to a private entity;
3. there may not be a provision for compensating you for additional services that may be required for you to sign the certification in a professionally responsible manner; and
4. provisions in the certification form may create an unrealistic exposure to liability for you by making you responsible as a guarantor for the contractor's (or another party's) performance.

If you issue a certification form for the benefit of another party, such as to a lending institution, you should be sure that the terms of the certification:

- are consistent with contractual obligations;
- do not require an assumption of responsibility for another party;
- do not create guarantees or express warranties; and
- do not create inequitable or uninsurable liability exposures.

Improper certification language can result in potentially serious and often uninsured exposures to claims. If the certification does not solely state a fact known to be true by you or another certifying design professional, you must use qualifying language. Stating that the certification is "to the best of my knowledge, information and belief," or simply identifying the certification as a "professional opinion," should clarify the certification.

Identifying the certification as made at a specific point in time based on specific information available to you under the scope of services provides a reasonable expectation of the true value of the certification. This is all that other parties should expect from you, and is consistent with the coverage afforded under your firm's professional liability insurance policy.

CHANGE ORDERS

Issue

Your client expects you to pay the cost of any change order required to allow the contractor to construct the project according to the client's intentions.

Concern

The use of change orders is a basic element of the design and construction process in the US. While you and your client want plans and specifications to be carefully coordinated and unambiguous, the reality of the situation is that it is not cost-effective for a client to pay you for the level of service necessary to achieve a "perfect" set of instruments of service. No matter how extensive design services may be, certain aspects of the design will require modifications to reflect conditions at the construction site. Construction is not manufacturing; there is no ability to refine the project through prototypes, destructive testing, and redesign.

Reasonable practice involves a certain level of flexibility in the development of a project as it moves from final design through the construction process so that change will improve the outcome. The process should identify any need for a change order as quickly as possible. In addition, the change order should be based on a reasonable process to determine time and cost, and the actions should be carried out in a timely manner to prevent delay.

Response

Initiate the effort to establish reasonable expectations and a rational system with your client by agreeing that change orders can disrupt an otherwise orderly construction process and, if not properly implemented, can result in unnecessary and costly disputes. You can educate your client that construction documents are at best an imperfect expression of what the client intends the contractor to construct and that circumstances during construction will make it necessary to revise the drawings and specifications. Your goal is to match the client's expectations with the reality of the process. You need to reach an understanding with your client about the practical limitations on your ability to generate a comprehensive set of plans and specifications.

Your discussion with the client should also address the issue of requests for information generated by the contractor. Explore the interrelationship of change orders and requests for information that identify the need for additional construction work so that the client sees the requests for information and the increase in cost or time as a fundamental attribute, rather than flaw, in the process of design and construction.

Resources

EJCDC E-500 (2020 edition) addresses change orders and "work change directives" in Exhibit A, "Engineer's Services." The issue of change orders and "construction change directives" is addressed in § 3.6.5.1 of AIA B101-2017. In addition, Victor discusses the subject in our article "Change Orders."

Commentary

Clients need to understand that a certain amount of imprecision and incompleteness is to be expected in the design documentation. In the performance of professional services before and during construction, the application of professional judgment is required. The preparation of instruments of service does not mean that all details of a completed project will be covered. The client should anticipate a certain number of errors, omissions, ambiguities, and inconsistencies.

The standard general conditions of construction contracts requires contractors to perform work and furnish materials and equipment that could reasonably be inferred from the contract documents, or from prevailing custom or trade practices, to produce the intended result.

Whether or not you specified all materials and equipment, the client should expect change order requests in such a system. Whether the cause of a change order is professional negligence or simply an imperfection that falls within the expected range of professional standards makes a significant difference. Some clients neither appreciate nor acknowledge such a distinction and attempt to force you to assume contractual responsibility for the costs of all changes. Often, this duty is contained in a provision that establishes a contingency for a certain cost level and then assigns all responsibility for costs beyond that level to you. Providing a contingency budget for a reasonable level of change orders is prudent. It is inappropriate to shift all responsibility above that contingency to you, regardless of whether you were negligent and irrespective of whether the cost is only for the harm caused by the negligence or the change adds value to the project. Such contractual requirements exceed your normal legal liability.

You, your clients, and contractors should understand the change order process and the need to adhere strictly to that process. Under the standard general conditions, you have the obligation to review change order requests objectively and in a timely manner. The contractor has the obligation to provide adequate documentation as required by the general conditions. No change involving any increase in cost or extension of time can happen without written modification of the construction contract evidenced by the change order. Strictly follow a reasonable change order procedure and document the decision process to reduce the potential for a change order to generate unnecessary misunderstandings and conflicts.

CODE COMPLIANCE

Issue

A client–drafted contract states that your services and design will meet all codes and standards and be complete in every way.

Concern

It is impossible to design to multiple conflicting standards, or to design in compliance with codes, standards, laws, and regulations that are unpublished or not in effect at the time you provide design services. In addition, the use of absolute language such as "all" or "complete" may inappropriately raise expectations or be used to show an increase in the standard of care to one of perfection. Regardless of whether a contract includes a compliance obligation, you are liable for not designing a project to conform to the codes and standards as reasonably interpreted by a jurisdiction to apply to the specific project. While failure to design to the standards set by local building codes or applicable national regulations is usually negligence per se (or evidence of negligence), being unable to meet a contractual obligation to design to every code, even if conflicts are apparent, could result in a breach of contract claim.

Response

You should communicate to your prospective client that the problem with such a provision is the absolute language. There are thousands of laws, codes, regulations, and standards that relate to design and construction; all are subject to change, inconsistency, and interpretation. You are in a position of using care and judgment to determine the applicability of the conflicting laws to the unique design parameters of the client's project. Absolute language puts you in the untenable position of needing to comply with differing requirements or in a situation in which, no matter how reasonable your services may be, your client can prove breach of contract based on noncompliance with a specific, but perhaps meaningless, code, standard, rule, or regulation.

Resources

EJCDC E-500 (2020 edition) includes the issue of your duty to design to laws, regulations, and client-mandated standards that are in place at the time of the effective date of the professional services agreement. Provision 6.01.E states that changes subsequent to the effective date of the agreement and during the performance of services may be the basis of contract modifications.

Such a redesign is an additional service requiring authorization in advance. AIA B101-2017 states the normal standard of care in designing to code in § 3.2.1, which reads, "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." It then provides for changes in codes and standards in § 4.2.1, which defines as an "Additional Service" to be authorized by the client for "services necessitated by the enactment or review of codes, laws, or regulations" or by modifications to official interpretations.

Commentary

Even without any specific contractual requirements, professional services need to be consistent with sound professional practices. Your design must incorporate those laws, regulations, codes, and standards that are applicable at the time you perform or furnishes services. Although it is impossible to design in compliance with every law, rule, regulation, ordinance, code, or standard that might affect the design of a project, you have a duty to design in compliance with any identified as being applicable to the project.

Applicability is dependent on both professional judgment and the pronouncements of code officials and other governmental agents. The key is that the determination be made during the design stage; it is appropriate to contractually decide how new laws, reinterpreted codes, or other changed circumstances that occur after design are to be handled.

DESIGN FIRMS SERVING AS CODE EXAMINERS

For a number of reasons, including budgetary cutbacks, lack of skilled workers, and staffing demands caused by disasters or emergency situations, local building code entities sometimes seek to transfer their administrative responsibilities to certify design compliance with codes or construction compliance with design and regulatory requirements to design firms. Learn more about the liability risks this imposes in our article, "Design Firms Serving as Code Examiners."

If your client insists that the professional services agreement restate this duty, anchor such a restatement to the standard of care. One approach is to include a provision such as the following:

> **Design Professional shall review laws, regulations, codes, and standards in effect as of the date of this agreement that are applicable to the Design Professional's services and shall exercise professional care and judgment to design in compliance with requirements imposed by governmental authorities having jurisdiction over the project.**

The contract language should acknowledge that your ability and, therefore, duty is to design the project in accordance with the applicable codes in existence at the time of the agreement. You could modify the requirement to include any changes in adopted and published information or in interpretation that may occur during the time you prepare the design.

You have a duty to be aware of applicable codes, standards, laws, and regulations while providing your services. However, your client should not expect you to remove the client's risks so that after design services are completed, such as during the construction process, some applicable law may be changed and may require a positive decision on the part of the client to bring its facility into compliance with the change.

In the event that applicable laws, regulations, codes, or standards change and you become aware of such change, you have a duty to inform your client. If the contract for professional services does not include the services necessary to accommodate the impact of such a change, you and your client should restructure the service agreement to allow you to meet the client's needs.

CONFIDENTIALITY

Issue

Your client has drafted a contract provision that establishes a broad duty to keep information confidential and to indemnify the client for any damage resulting from your alleged breach of the requirement.

Concern

While many clients are concerned that you may disclose information provided to you or generated by you for a specific project to parties outside of the contract, the wording of confidentiality provisions may force you to breach the contract. In general, you should treat all client information as confidential. However, in the use of that information in the normal course of practice as a licensed design professional or in your defense of a claim, you may unintentionally breach such a broadly worded obligation.

Response

You and your client should address the following concerns when negotiating a confidentiality provision:

- What are the restrictions on the use of the information during the design process and in submissions to governmental entities?
- What happens if there is a conflict between the proposed contractual obligations and the obligations on you as a licensed design professional?
- Does the provision mean that you are transferring rights to your design innovations and instruments of service to your client because they are confidential information for the specific project?
- If a third party brings a claim, can you use the confidential information in your defense?
- Is there an indemnification obligation for damages and costs to the client caused by any release of the information?
- If the level of confidentiality requires you to change your normal practice procedures, office, computer security, or use of specific employees, are you receiving compensation for the extra cost and complexity?

Although your client may have a rational basis for demanding confidentiality, you should be aware that a broadly worded provision might conflict with your duty to the public, limit your ability to provide services or defend yourself against a future claim, and transfer your technical expertise and design details to your client. Your client may also ask you to indemnify them for damages outside of the coverage of your professional liability policy.

Resources

In AIA B101-2017, § 10.8 places a contractual obligation on you to maintain the confidentiality of the client's designated "confidential" or "business proprietary" information and to require any interprofessional consultants to do the same. Modification of this contractual commitment happens if disclosure is "required by law, arbitrator's order, or court order" or "to the extent such information is reasonably necessary for the receiving party to defend itself in a dispute" and the owner receives advance notice. The EJCDC does not include an equivalent provision, but addresses confidentiality in its structuring of an electronic documents protocol.

Commentary

Under common law, you owe the client a duty of trust and confidence in providing services. The goal of licensing design professionals through state registration laws is to protect public health and safety. Thus, there always exists a possible inconsistency between protecting the client's information from disclosure and meeting the mandates of registration laws and the ethics of the design professions. In most cases, when a client wants information to remain confidential, existing practice management techniques or a special awareness is all that is needed to meet the common law obligation or a stricter contractual obligation.

Both you and the client need to recognize, and possibly to negotiate into the contract, a limitation on any confidentiality provision to avoid preventing you from meeting your duty to furnish notices required by law or from complying with governmental mandates to provide information. Further, if the client insists on a strict confidentiality clause to protect trade secrets, the contract should also address your right to use such information in the defense of any suit brought against you.

Clients insisting on a confidentiality provision usually want an indemnification provision for any damages to them caused by breach of the provision. Unlike some professional liability insurance policies, the Victor and CNA policy includes coverage for the unintentional breach of a confidentiality provision. The policy would pay on your behalf for an indemnification obligation to the extent that you directly caused damages suffered by the client through your failure to meet professional responsibilities to keep the client's information confidential. This, of course, is subject to the normal terms and conditions of the policy.

While accepting a confidentiality provision and agreeing to an accompanying indemnification obligation constitutes a business decision on your part, it is reasonable to require that the obligation will operate in two ways:

1. the client should be willing to protect the proprietary information provided by you; or
2. the client should indemnify you for any claims, costs, losses, or damages to you caused by the client's release of such information.

CONSEQUENTIAL DAMAGES

Issue

Your client wants your services for a project and insists that any problem, including negligent errors or omissions on your part, that could result in significant damages to the client beyond those directly caused by you should result in your liability.

Concern

While it is common in commercial contracts to limit consequential damages or other specific types of damages (or to exclude such recovery entirely), many clients see no reason to limit your risk to direct losses caused by your negligence. Direct losses can occur in any design contract, with well-established and objective formulas for measuring damages. Such losses include the cost to cure a problem caused by the responsible party. Direct losses could include:

- the cost of repairing a negligently designed roof;
- the incremental or remedial construction cost of adding an element of a project negligently omitted from the design; or
- the medical expenses of someone injured because of your negligence in design or contract administration.

A claimant could also assert that your actions caused consequential damages—those that go beyond direct losses. Courts usually define consequential damages, and the definitions often vary, but they tend to be damages that are difficult to evaluate. Such damages could also be of great significance to the client and catastrophic to you and your firm. Lost profits caused by delays in completing the project is one example. Should you be responsible for what the client thinks it should be able to recover even though you had no prior knowledge of the extent of the possible loss?

Response

Professional ethics and the risk of being responsible for direct losses provide incentives for you to perform services carefully. When a client obtains your services, that client is providing you with a limited scope of services and limited authority for what is usually a limited fee. That client has a need and is willing to make an investment to address that need. Like any investment, providing professional services gives rise to risk. Waiving consequential damages means that both parties to the agreement are acknowledging known and calculable risks, and recognizing that many unclear and incalculable risks also exist. A mutual waiver of consequential damages is not a completely exculpatory clause for either party, but one that simply limits the liability of each party to a significant, but not catastrophic, amount. Such an apportionment of risk is fair and gets the professional relationship off to a positive start.

A difficulty exists with clients who understand that a mutual waiver of consequential damages is not really an equal trade-off. Your firm rarely has consequential damages from the actions, or inactions, of the project client, but a project client can face significant consequential damages from the business decisions or professional negligence of your firm. Convincing a client to waive its ability to seek damages beyond those directly resulting from your actions or negligence can be difficult.

Resources

Since the 1997 edition of AIA document B101, a mutual waiver of consequential damages has been standard. The current language in B101-2017 states:

> **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....**

A similar waiver with a definition of damages is included in AIA document A201-2017, *General Conditions of the Contract for Construction*. The combination of these waiver provisions should make the risks to both the design professional and contractor more predictable and more easily translated into the costs of providing design and construction services.

EJCDC's E-500 (2020 edition) document includes a more specific provision:

> **To the fullest extent permitted by Laws and Regulations, Owner and Engineer waive against each other, and the other's officers, directors, members, partners, agents, employees, subconsultants, and insurers, any and all claims for or entitlement to special, incidental, indirect, or consequential damages arising out of, resulting from, or in any way related to this Agreement or the Project, from any cause or causes. Such excluded damages include but are not limited to loss of profits or revenue; loss of use or opportunity; loss of good will; cost of substitute facilities, goods, or services; and cost of capital.**

Commentary

Your negligence may entitle the client to sue under either a tort theory for negligence or a contract theory for a breach of contract caused by negligence. When a client proceeds under both tort and contract causes of action, each theory of liability has its own distinct damages and its own distinct statute of limitations. First, a court measures damages recovered under a contract theory differently than damages recovered under a tort theory. Courts only award damages such as lost profits resulting from the interruption of use of a facility when such damages were in the reasonable contemplation of the parties at the time they made the contract.

By contrast, in an action in tort, courts tie the limitation of damages to the idea of proximate causation. For that reason, you should seek to exclude liability for consequential damages by limiting your responsibility to correction of the work caused by defective design or, when that is not economically feasible, to the diminished value of the project. Clauses limiting consequential damages are subject to the same general rules with respect to enforceability as other limitations of liability. Consult legal counsel for an explanation of the distinctions between direct and consequential damages.

COST ESTIMATES

Issue

Your client's major concern is that the cost of the project does not exceed the budget and wants you to estimate the cost of your design and make sure the project's construction cost does not exceed that estimate.

Concern

Construction cost is usually a very important consideration. Victor and CNA claims statistics show that a considerable amount of litigation has resulted from designs exceeding a maximum cost limitation expressed orally or in poorly described contractual terms. Even without a clear understanding that a design needs to meet a cost limitation, liability exposure for cost estimating may result from a court's determination that design plans for use in construction within the client's budgetary requirements was an implied condition of the client's obligation to pay for the design. Courts have also found that a design professional contractually warrants compliance of the design to the budget if the budget is a fixed limit. There is also a cause of action for damages based on the theory of negligence in the preparation of cost estimates or in the monitoring of the design process to keep the design within the client's expectations. The law imposes upon the design professional a general duty to know the client's financial limitations and to reasonably conform to such limitations.

Response

At the outset of the relationship between you and your prospective client, discuss the issue of preparing an estimate, refining the calculations, and designing to an approved budget. Your client should be aware that your estimate is an opinion of probable cost that, although prepared in good faith and with reasonable care, can be no more accurate than the information on which you based the calculation. You should specifically identify the conceptual basis of your estimate or opinion. No matter what term you use to describe the initial evaluation of project construction cost, you should reinforce the client's understanding that your expression of the ultimate cost of the project is quite limited at best.

The main point to communicate to the client is that the tighter the budget, the more latitude and control the client should assign to you in the selection of materials, components, and systems, and even in the adjustment of the project scope. The client's written endorsement or ratification of your suggestions may prevent a subsequent claim that the project does not perform as anticipated.

Resources

The standard documents recognize the concern of the client to establish a budget and have the design professional create a design that the contractor can build within that budget. Both the EJCDC and AIA incorporate provisions to give the client certain rights and limit your risk for consequential damages. In AIA B101-2017, the applicable provision states:

> **If at any time the Architect's estimate of the Cost of the Work exceeds the Owner's budget for the Cost of the Work, the Architect shall make appropriate recommendations to the Owner to adjust the Project's size, quality, or budget for the Cost of the Work, and the Owner shall cooperate with the Architect in making such adjustments.**

The AIA language also gives the owner an option if the lowest bona fide bid or negotiated proposal exceeds the owner's budget for the cost of the work at the conclusion of the construction documents phase. In consultation with the architect, the owner may revise the project as necessary to comply with the budget to the adjusted program, scope, or quality as required to reduce the cost of the work and at that point, the architect is contractually obligated to redesign.

However, B101 states:

> **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 Service.**

Although the provision has not been construed through litigation, it seems reasonable that the architect should know enough about market conditions to anticipate the growth in the cost of materials, systems, and construction labor. In that situation, the architect would provide contractual services without additional compensation, as was the case with the earlier versions of the AIA owner-architect agreement. In any event, there is a limitation of the architect's exposure to claims since the modification of the construction documents "shall be the limit of the architect's responsibility."

The EJCDC's owner-engineer agreement has been consistent for decades and E-500 (2020 edition) states:

> **Engineer's opinions of probable Construction Cost (if any) 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.**

Use of these resources may assist in preventing claims.

Commentary

Given the many variables in the construction market, it is challenging for you to design to a specific budget. The effort involved requires a continual updating of estimated costs and reliance on the professional judgment of your design team. Clients also have to realize that your estimates are not exact and that contingencies and scope refinements belong in the process. Obviously, if your client is greatly concerned about its limited resources, the client can have an independent specialist estimate the construction costs during the design process and adjust the estimate to changing economic conditions.

You can assist your client in determining, to some extent, what a project might cost to build. However, you must base that assistance on historic information and your judgment gained from knowledge and professional experience. No initial determination can be more than a conceptual estimate or an opinion of the probable cost of construction. You should not hold yourself out as providing cost information beyond your ability or imply that the design process and construction market are static factors in determining the cost of a project.

Clients should also realize that there is a significant difference between a contractual obligation to design to a budget and negligence in preparing and refining estimates. One of the most reasonable and effective uses of risk allocation or limitation of liability provisions is when you are required to redesign—a business risk on your part—as the total exposure of your firm. Without this limitation, you may have extensive exposure to claims from your client because the client relied on you to design to the budget. The client may claim significant losses based on the increased construction costs, increased interest charges, or lost income because of the delay necessitated by the redesign or the harm to the client resulting from the abandonment of the project.

Such a limitation of liability provision is reasonable and courts will enforce the agreement with respect to any non-negligent exposure on your part. In the case of negligence, however, a court may find that the parties did not intend the remedy to be exclusive. Therefore, as with all professional services, preparing estimates or opinions of probable construction cost, refining those calculations during the design process, and designing in an effort to stay within the cost constraints should be performed with diligence and care.

DESIGN WITHOUT CONSTRUCTION PHASE SERVICES

Issue

Your client has decided that it wants to administer the construction contract by itself or through another party.

Concern

Because design documentation cannot anticipate every contingency that might arise during construction of the project, your services should include involvement during the construction phase. If the client does not retain you to provide interpretation and clarification of the plans and specifications, there is increased risk because someone else's decision or mistake may lead to problems at the project site. Such problems are likely to lead to disputes that cost both you and your client time and money. The party performing the observation or inspection services, or otherwise administering the construction contract, should assume responsibility for its own actions in interpreting the documents and making decisions at the site.

Response

If you are precluded from providing construction phase services, your design documentation may have to be more extensive. Your client should understand the need for a larger fee and increased time for design services. The client should acknowledge the responsibility that accompanies making changes at the site and interpreting the design documentation. The client can express such acknowledgment through both a waiver of claims and an indemnification provision to pay for any cost to you caused by your lack of authority to perform full services on the project. You face a special problem if your original agreement recognizes your role in evaluating the work, but your client wants to terminate your services before or during construction.

Although you rightfully anticipated that you would have the opportunity to provide clarifications and interpretations of your design, not performing construction phase services denies you the opportunity to protect your design's integrity, your practice, and your client's interests. Your termination agreement should release you from any claims made by your client and protect you from any contractor or other third-party claims for property damage, economic loss, or personal injury.

Resources

EJCDC E-500 (2020 edition) includes two provisions addressing this issue in Paragraph 1.06 of Exhibit A. The EJCDC language states that the engineer:

> **With the exception of such expressly required services, Engineer shall have no design, Submittal (including Shop Drawing) review, or other obligations during construction, and Owner assumes all responsibility for providing or arranging for all other necessary Construction Phase administrative, engineering, and professional services.**

The EJCDC language also states:

> **Owner waives all claims against Engineer and its officers, directors, members, partners, agents, employees, and Subconsultants, and Engineer's Subcontractors, 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. Notwithstanding the foregoing waiver, Engineer shall be responsible for any professional opinions and interpretations provided by Engineer to Owner during the Construction Phase or Post-Construction Phase, including interpretations or clarifications of the Construction Contract Documents.**

Commentary

During any design project leading to construction, all parties to the process share significant risks. A viable risk management technique is to give power to the party best able to manage a specific risk. If the client does not permit you to perform services through the construction phase, you still have the risk of liability associated with being the design-professional-of-record, but you have no ability to mitigate that risk. In fact, design professionals who are capable of, and compensated for, providing more extensive site services (such as through a resident project representative) can better protect their interests and those of their clients by reducing the prospect of a modification to the design from turning into a significant dispute or claim.

If the original agreement does not envision or it severs construction phase services from the contract, the contract should protect you against all claims except to the extent that the cost of those claims is the direct result of your negligence. It is reasonable that if the client is assuming the responsibility for decisions made during the construction phase, the client should also assume the risk. Similarly, the substitution of another design professional or other entity to administer the construction contract should relieve you from the risk associated with those services. Perhaps most effective in managing the risk is both a release from any claims and an indemnification for any costs should changes be made at the site.

Often, the risk to you is not liability, but the significant defense costs of fighting meritless claims. The protection from this harm—a release and an indemnification—might be a contractual statement such as the following:

> **The Design Professional and the Client agree that because the Design Professional's services shall not include Construction Phase services, the Client shall be solely responsible for interpreting the Contract Documents and observing the Work of the Contractor to discover, correct or mitigate errors, inconsistencies or omissions. If the Client authorizes deviations, recorded or unrecorded, from the documents prepared by the Design Professional, the Client shall not bring any claim against the Design Professional and shall indemnify and hold the Design Professional, its agents and employees harmless from and against claims, losses, damages and expenses, including but not limited to defense costs and the time of the Design Professional, to the extent such claim, loss, damage or expense arises out of or results in whole or in part from such deviations, regardless of whether or not such claim, loss, damage or expense is caused in part by a party indemnified under this provision.**

Case study

Victor has more than 50 claims and benchmarking studies available to insureds. These studies are divided into the following categories: project type, discipline, service type, problem area, and miscellaneous. Below is a case study from our residential claims study that briefly highlights some of the issues discussed above relating to providing design services without construction phase services.

> **An architect was retained to provide design and shop drawing review for an upscale high-rise condo building. No other construction phase services were to be provided. Soon after completion, water started to intrude, primarily through windows and balcony doors. (Water intrusion is one of the most common claims on condo projects.) Experts retained by the condo association identified a number of design and construction deficiencies and estimated damages at $30 to $45 million. The allegations against the architect included approval of EIFS, balcony slope issues, and negligent approval of shop drawings. The architect's exposure was significant in view of the size of the claim and the low policy limits of several codefendants. The claim settled after several mediations. The architect contributed $1.7 million and expenses exceeded $450,000.**

All of our claims and benchmarking studies are on the Victor website. As an insured, you have access to our individual claims studies as well as our more comprehensive benchmarking studies.

DISPUTE AVOIDANCE/DISPUTE RESOLUTION

Issue

Your client presents a contract that neither addresses dispute avoidance nor establishes a dispute resolution mechanism.

Concern

The desire to reduce transaction costs of disputes has led to a variety of methods to resolve disagreements quickly and with a minimum of expense. Some methods follow the path of dispute review boards in setting up a system that provides an early, neutral "expert" analysis that persuades one party to abandon its position and thus avoid the need to actually resolve the dispute. Other methods attempt to limit access to the court system or pare down the legal process to reduce the timeframe and lower the cost of solving a problem by adjudication.

For decades, the consensus documents of the AIA and EJCDC had relied on mandatory and binding arbitration for dispute resolution. Arbitration (a form of adjudication) replaces the judicial system with a party or panel empowered to determine fault and make an award to the deserving party. However, arbitration of design disputes is often a lengthy process and usually consolidated with arbitration of construction disputes. The option preferred by many firms, and one always examined by CNA claims specialists for recommendation to insured firms, is mediation. Although mediation is a facilitated settlement negotiation that often resolves disputes quickly and with little animosity, many design professionals and some clients reject mediation as creating an arbitrary accord without proper regard to culpability. Mediation, however, has proven effective in limiting the risk of design professionals by keeping a recognized problem from becoming a conflict that only adjudication can terminate.

Response

When you and your client acknowledge that disputes will occur, you are taking a major step in communication that will help make disputes less disruptive to your relationship and to the design and construction process. You can explore options for avoiding disputes and resolving those that do occur. Just as there is no one perfect design solution, there is no perfect form of preventing disagreements or solving problems. If your contract remains silent on the method of resolution, you do not have to resort to litigation; dispute resolution options can be explored once a dispute arises.

Resources

EJCDC document E-500 (2020 edition) includes paragraph 6.07 on dispute resolution that provides for a good faith negotiation period that becomes a mediated negotiation if no resolution is successful within 30 days, and Exhibit H, which provides commentary and other options as an alternative to litigation. AIA document B101-2017 requires an attempt to mediate any dispute or claim as a condition precedent to either arbitration or litigation; the default is litigation. Unlike adjudication by arbitration, litigation allows further negotiation of a settlement. In addition, AIA document B503, *Guide for Amendments to AIA Owner-Architect Agreements*, provides "meet and confer" language, which is a more structured good faith negotiation effort, as the first step before mediation. The importance of avoiding disputes and resolving any that do occur efficiently is basic to a viable professional practice.

Commentary

It is clear that if you and your client can reduce adversarial attitudes and disputes, everyone on your design and construction projects benefit. The process of dispute resolution has its beginning in the structuring of a dispute avoidance mentality and course of conduct. Realistically allocating the risks on a project by contract; promoting teamwork rather than adversarial relationships; establishing the techniques for resolving issues before they become disagreements; and developing a rational method of managing disagreements before they become disputes all reduce the threat of damage and cost of litigation. Any disagreement or dispute has an impact on the financial operation, morale, and reputation of your firm, but there are options to explore to mitigate the damage that disputes and claims can cause.

PARTNERING

In partnering, the parties anticipate problems and structure an approach to resolving issues before a dispute arises. The focus is on creative cooperation and avoiding confrontation by enabling problem solving by the parties at the lowest staff level possible.

DISPUTE REVIEW BOARDS/ STANDING NEUTRALS

At the inception of the construction phase of a project, the parties approve one or more independent construction industry experts to evaluate problems that may occur and suggest a resolution for agreement.

CERTIFICATE OF MERIT BY LAW OR CONTRACT

Similar to screening panels that evaluate the likelihood of fault being determined, a certificate of merit requirement controls access to the court system by mandating the early determination by an expert witness that harm could have been the fault of the defendant.

MEDIATION

Good faith negotiation can take many forms. The "meet and confer" sessions involving top-level representatives of you and your client can be an effective first step. When negotiations are assisted by a facilitator, you are engaged in the voluntary mediation process. Mediators in design and construction disputes are usually attorneys, but others can also facilitate mediations.

UNDERSTANDING THE CLAIM PROCESS

Clients and other parties filing claims against you is an unfortunate part of professional practice. To help make the process less stressful for you, we developed Understanding the Claims Process.

Professionals who have had a lawsuit filed against them say that they would have been less anxious if they had known more about what to expect during the claim handling process. By familiarizing yourself with the sequence of events in a typical claim, you can reduce the common feeling of being caught in a confusing process. This will help you obtain a greater sense of control, and reduce the stress of a claim and its impact on your professional life.

ARBITRATION

Adjudication of a dispute by a selected neutral rather than through litigation is the basis of arbitration. Increasingly, arbitration proceedings allow consolidation and joinder so that one arbitration involves all parties to a dispute. This can be detrimental to the interests of design professionals.

ATTORNEY FEES

Some firms contractually agree to give the prevailing party in a dispute the right to collect legal fees as well as any judgment or award in an effort to decrease litigation. While such provisions may have a "chilling effect" on meritless claims from disputes between the parties, there can be problems with such a provision. Often, a "prevailing party" is not identified. In many cases, such provisions place the party with greater financial strength in control and often force a settlement regardless of merit. In addition, a professional liability insurer may view such an arrangement as a contractual commitment outside of the scope of professional liability insurance coverage.

DOCUMENT OWNERSHIP AND CONTROL

Issue

Your client has requested your production of "works for hire" design documentation that it can convert into a facilities management program and use for future changes and additions to the project.

Concern

Clients do not retain design professionals to produce documents such as plans and specifications; design professionals perform services expressed through instruments of service such as reports, studies, plans, and specifications. This is an important distinction and one that often confuses both design professionals and their clients.

You can protect your client and yourself through a careful transfer of any or all of your rights, rather than blindly transferring all of the rights, title, or use of your documents by referring to such instruments of service as "works for hire." The concept that anything you produce for a client automatically transfers under copyright law has not applied to plans and specification since the law changed in 1976. Under the standard AIA and EJCDC documents, you retain the design and ownership of the documents, and the right to use the information contained in the instruments of service. The client has the right to retain copies for information and reference purposes in connection with the use and occupancy of the project, but the standard documents clearly state that the client or others cannot reuse the documents for modifications to the project or on any other project.

Response

It is important to understand your ownership rights regarding your instruments of service, to control their use and copying, and to be able to reuse the details expressed in the documents. You can transfer all of these rights, but carefully negotiate any transfer so that the interests of all the parties are recognized and accommodated. One of these interests is the liability exposure to you that might occur from the misapplication of the instruments of service. A contractual provision can protect you and your client by reserving your right to reuse information contained in the drawings and specifications and disclaiming any warranties that might exist if the plans are considered a product.

The provision should also commit the client to take sole responsibility for any future use of the documents and to indemnify you for any claims, costs, losses, or damages resulting from any future use.

Resources

The "Copyrights and Licenses" section in Article 7 of AIA document B101-2017 affirms ownership of the documents by you and your consultants, but provides a "nonexclusive license" for the client's use of the documents "for purposes of constructing, using and maintaining, altering and adding to the Project." Any uses without the involvement of the architect and the architect's consultants results in the owner releasing them from any claims or causes of action arising from such use. AIA document B503-2017, *Guide for Amendments to AIA Owner-Architect Agreements*, provides alternatives if the client wants additional rights.

Similar language preventing reuse of the documents is in Paragraph 6.02 of EJCDC E-500 (2020 edition). The provision provides two options: in the first option (6.02.A), the engineer retains ownership with a limited, but broad license to the owner for the owner's project and project-related purposes. In the second option (6.02.B), the owner acquires ownership with the engineer retaining certain rights to the documents. The EJCDC language provides additional detail about the reliance on both client and design professional-provided information, and on the use and transfer of electronic information.

Commentary

The Copyright Act of 1976 and the Architectural Works Copyright Protection Act of 1990 recognize that design professionals like you have more than one interest in the instruments of service created during the performance of design services for a client. Take care not to inadvertently transfer or extinguish these rights. In most situations, the eradication or conveyance of these rights has the most significant impact on compensation or reputation, but some professional liability issues also arise.

Under copyright law, "works for hire" arrangements transfer the rights of the originator of the documents to the party paying for the services that create those documents. While this makes sense in an employee-employer relationship, it can jeopardize your ability to function when applied to the relationship between you and your client. The standard documents indicate that all of the rights in the design and design documentation belong to you, but the contracts authorize the client to retain a copy of the information and to use the licensed information in its normal activities. Therefore, you own the design and the instruments of service that express that design as well as the legal right to control the use of those instruments of service in all instances except the case of the limited license assigned to the client. With architectural designs, copyrights exist separately for the actual design and accompanying documentation.

If the client requests a transfer of both the ownership of the instruments of service and the copyrights for the documents and design, it could expose you to claims from future use of the instruments of service or from "patent or latent defects" in the design. Perhaps of even greater concern is that transferring your rights may impede you from future use of derivatives of those instruments of service on subsequent projects for other clients. Design professionals, clients, and even third parties, such as contractors, have specific interests in and the need to use the documents and the information contained in those documents. The standard documents establish a system of ownership and licensing that accommodates these interests. Calling the instruments of service "works for hire," however, could be argued by a client as transferring your rights and may result in unintended financial or liability difficulties.

In most cases, clients use plans and specifications for maintenance or facility management purposes and do not attempt to use them inappropriately for other projects or for changes to the original project without appropriate modifications. Still, it is prudent for you to indicate clearly the ownership and appropriate use of plans, specifications, and other documents in the professional services agreement, and to transfer only those rights that are clearly identified in exchange for appropriate compensation and legal protection.

ELECTRONIC INFORMATION TRANSFER

Issue

Your client does not care about how you use digital design tools, but wants you to provide construction contractors with electronic files to save the client money and to provide a final set of all project information in a digital format that the client can later reuse.

Concern

While professional service firms like yours see BIM or even CADD as tools to enhance the design process, better coordinate interprofessional services, and minimize design conflicts, your clients often see such tools simply as a means of producing project information that is faster, cheaper, more accurate, and reusable. Unrealistic client expectations have always been a problem; a misunderstanding of how you use digital design tools seems to exacerbate this and other difficulties and provides a whole new area of unknown risks.

The incorporation of digital design tools into the daily operations of your firm presents organizational challenges. The transfer of information in digital form—whether as a form of modeling or digital information instead of hard copy design documents—complicates the practice management considerations of your firm that wants to both protect its intellectual property and manage its professional liability risks.

Response

The issue of the transfer of information by electronic media necessitates contractual protection whenever you share the intellectual property created for a project. Currently, BIM models or other digital files are supplemental information and are not part of the contract documents. If they are provided, they are only for the contractor's convenience and do not create detrimental reliance on such information.

One method to reduce the risk of meritless claims during the electronic transfer of information is by stating that a hard copy retains control over the introduction of any variances or changes. This, however, becomes less practical as the industry increasingly moves to the sharing of information in digital form. Stating that the controlling version of the instruments of service is the hard copy is worthwhile because no one can be sure how the digital information will render under a different system, how others may introduce unintended or intentional changes beyond your control, or how the digital information might degenerate over time.

Technological safeguards for file security provide little real protection. For the most part, once you release the information, control over it is impossible. Some firms, however, look beyond technological protections to legal remedies. Firms often demand digital sharing protocols at the beginning of a project that state the allowable uses and limitations of files, and prohibit the use of files for anything other than the project. The protocols or separate agreements should clearly state ownership of the files, copyright to those files and the design, and require indemnification for the time and cost to you involved in a controversy over digitally shared information.

Resources

With the ever-increasing evolution and expansion of digital design documentation, control over the design documents has become increasingly elusive. The ease of transfer and replication of information, along with the client's misunderstanding in thinking that the transfer bestows all design documents in any form to them means that you have to be constantly concerned about control over your intellectual property. While the sharing and use of digital information is rapidly changing, including using some form of models for construction estimating, scheduling, sequencing, and the creation of a "digital twin" of the project for future management of the capital asset, the law is still conservative. The traditional approach in using hard copies still makes sense, and the language of AIA B101-2017 can serve as a model. Its provision states that the design firm retains all ownership of its design and design documentation and the client receives a license to use the design for the construction and maintenance of the capital asset.

EJCDC E-500 (2020 edition) requires the engineer to deliver to the project owner at least one complete electronic copy of drawings and specifications, signed and sealed according to applicable laws and regulations, and one complete printed copy, duly signed and sealed. Unless delineated in an electronic documents protocol, the contract states that the transmitting party makes no representations as to long-term compatibility, usability, or readability of the electronic documents resulting from the recipient's use of software application packages, operating systems, or computer hardware differing from those used in the drafting or transmittal of the electronic documents, or from those established in applicable protocols.

It may also be necessary to include disclaimer language to prevent the possibility of the application of product warranties or guarantees.

Commentary

There are five major issues to address on each project so that claims involving the transfer of electronic information should not become a factor in the management of a professional practice. These issues are the following:

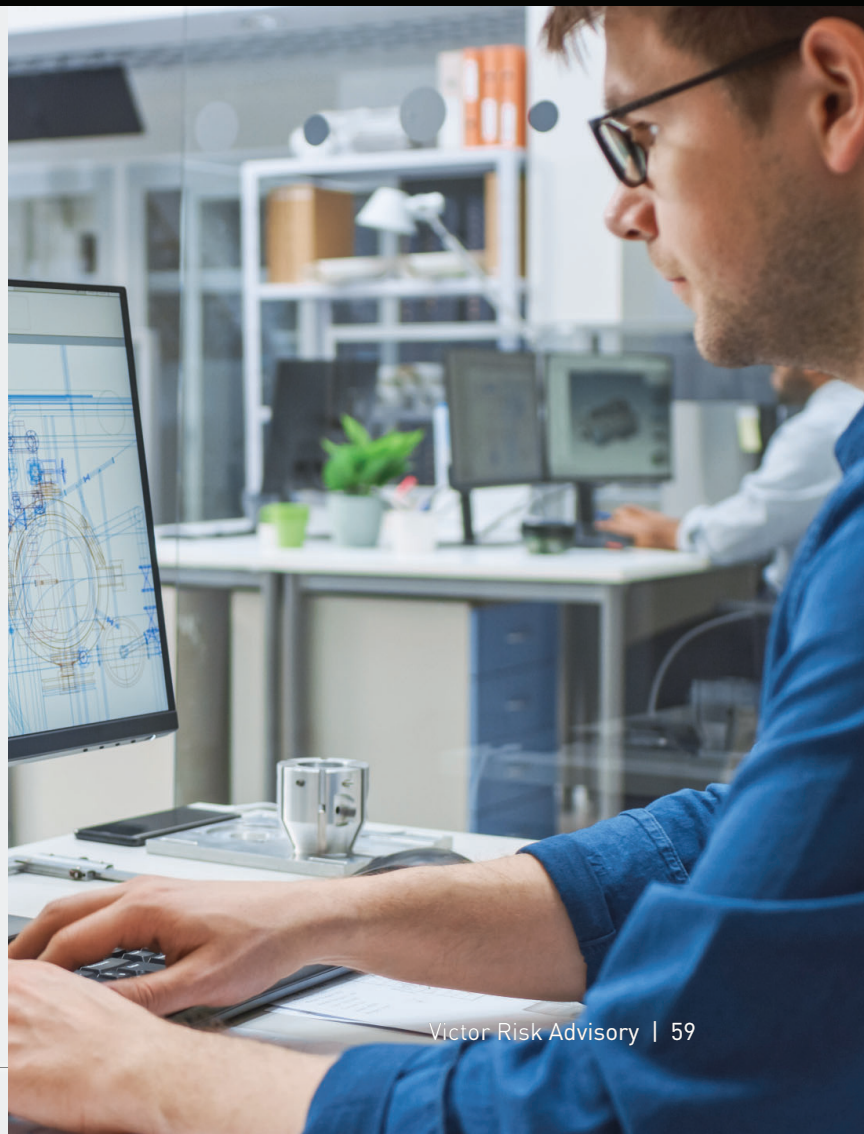
1. The information contained in the signed and sealed documents is correct and superior to electronic information.
2. Electronic information is a component of the instruments of service and is only for the client's benefit on the specific project and for a specific use.
3. There is no representation of the suitability of the electronic information for other purposes, of the durability of the information, or the medium through which the information is furnished.
4. Any use for a purpose other than that for which the sender intends shall be at the receiver's risk. Therefore, the receiver shall protect and indemnify the sender from any claims, costs, losses, or damages.
5. Transfer of the information does not transfer any license to use the underlying software or extinguish the rights of the sender to reuse the information in the general course of a professional practice.

There are other issues involved in allowing a client to reuse documents, such as establishing that the documents, as instruments of your service, are not products. Therefore, it may also be necessary to include disclaimer language to prevent the possibility of the application of product warranties or guarantees. In addition, if other design professionals use the documents as the basis for other projects, the subsequent design professional may be in a position where they breach both professional ethics and registration law constraints.

The transfer of electronic information to contractors or subcontractors raises many additional questions. For instance:

- For whose benefit are the files being shared or transferred?
- Do you have the legal right to transfer such information since the client may own the information through contract or operation of law?
- How are changes to the electronic files communicated to all appropriate recipients?
- Does the contractor have direct rights generated by a transfer agreement or the argument of detrimental reliance should the information in the electronic file be incorrect or inadequate for the contractor's purposes?

Usually, the delivery of a drawing in electronic format is for the benefit of the client for whom you perform design services. Therefore, clearly state in the contract that nothing in the transfer provides any right of the contractor to rely on the information provided or that the use of the electronic information implies the review and approval by you of any drawing based on the information. It is also reasonable to express a professional opinion that the electronic information provides design information current as of the date of its release, but that the user is responsible for updating the information to reflect any changes in the design following the preparation date of the transferred information.



ENVIRONMENTAL HAZARDS

Issue

Your client wants you to provide design services on a site that contains, or potentially could contain, asbestos, lead, or some other existing pollutant that could generate claims.

Concern

Asbestos, lead, and other pollutants can pose unique liability risks to you because your presence on a project can generate claims against you, and coverage under your professional liability policy for claims tied to these exposures may be limited. In some cases, you are involved on the project to provide services to the client to assist in correcting the situation. In other cases, the very existence of such environmental hazards is unknown to you. In either situation, you are generally not in a position to manage the risks generated by the release, discharge, or dispersal of the hazardous material during the construction or reconstruction process, or by the actual removal, transportation, or disposal of the material. The existence of the material and any necessary abatement is the client's responsibility. If the client hires a contractor for abatement services, it is the contractor's duty to handle and dispose of the material in an appropriate manner to protect its workers, the site, and those who may be harmed by the contractor's efforts.

Response

Your client should recognize that you require special protections for your services on a project whenever environmental hazards exist. If there is asbestos, lead, or any other material that may generate claims by third parties against you, the client should be willing to consider one or more of the following:

- providing protection and defense for you against any claims arising out of the release of any asbestos, existing pollutant, or other environmental hazard;
- providing adequate compensation for the increased level of service and risk encountered on such a project; and
- contractually allocating much of the risk to the contractor who is responsible for removal, can manage the risk, and can obtain insurance against such exposures.

Resources

While AIA B101-2017 disclaims any responsibility for you for the discovery or presence of hazardous materials on the site, A201-2017 protects you from harm. Subparagraph 10.3.3 of A201 requires that the client indemnify you, along with those performing work on the site, for claims, damages, losses, and expenses resulting from materials or substances that present the risk of bodily injury or death.

Paragraph 6.10 of EJCDC E-500 (2020 edition) also requires indemnification of you by the client for any claims or costs experienced by you based on a "Constituent of Concern." That includes the presence of specific materials at the site in such quantities or circumstances that may present a substantial danger to persons or property exposed in connection with the work.

Commentary

You need not avoid projects where exposures to environmental hazards may be present. However, you should exercise care in identifying the potential for these risks and in assessing the probability and potential magnitude of claims. You can then make informed decisions as to whether or not to accept projects with such risks and how to manage those risks.

If you are providing design services in an asbestos or lead abatement situation, although the likelihood of culpability is quite low, the threat of third-party suits is very real. Your firm's costs in defending itself against environmental claims could be significant in terms of expenditures of time and money. Your firm's best preparation would be to allocate equitably the risks and costs of any such claims to the parties that control the abatement process.

ENVIRONMENTAL HAZARDS

One of the most challenging constraints is the presence of toxic or hazardous substances on a site. Referred to as "brownfields," such properties pose serious liability risks to project owners, managers, and contractors under federal and state laws. Though most design professionals typically face less exposure than these other stakeholders, landscape architects should be aware of a number of peculiar circumstances that are specific to this type of project, circumstances that may present more serious risks than landscape architects may be accustomed to or willing to accept. However, brownfields sites may still present attractive opportunities to qualified professionals. In recent years, as sustainable development practices have gained more attention, many involved in real estate, planning, and design have recognized the environmental and economic benefits associated with developing new facilities on these sites. Download a copy of Restoring Neglected Assets: Brownfields Reuse and Related Risks to learn more.

There are two major variations in protecting a firm from claims and costs resulting from the contractor's actions. The preferred one is a release and indemnification agreement from the client for any claims against you resulting from the contractor's work. This is usually the most practical since it is highly likely that the client will still be around if a claim is filed. The other protection—and this may be more appropriate in the case where the contractor is well-financed and stable or where indemnification by the client is unrealistic—is to have the contractor retain full responsibility for its activities and agree to indemnify your firm for the costs and value of the time expended in defending claims.

An example of an indemnification provision from the client that would cover the pollution risks is as follows:

> To the fullest extent permitted by law, Client shall indemnify and hold harmless Design Professional, its employees and agents from and against all claims, losses, damages, and costs (including but not limited to court or other dispute resolution costs, and the time of Design Professional expended in defense of such claims) caused by, arising out of or relating to the presence, discharge, dispersal, release, or escape of [the environmental hazard] at, on, under or from the Project site.

Language that a firm might suggest to the client for use in its agreement with the contractor might be as follows:

> Contractor agrees to hold harmless and indemnify Client and Design Professional from and against any claim or liability arising out of Contractor's performance of the removal of [environmental hazard] including any time spent or expenses incurred by Design Professional or Client in defense of any such claim.

EVALUATION OF THE WORK

Issue

Standard professional services agreements state that you are to visit the site to evaluate or become generally familiar with the progress and quality of the work on the construction site, but your client wants you to "inspect the work to ensure that it is properly completed."

Concern

Site services are but a part of the total professional services performed. Sometimes, your client believes they are paying you to ensure—or guarantee—that they receive that which they are entitled to receive under the construction contract. To accomplish this, your client may expect you to watch over the contractor to make sure proper construction is achieved and to assume responsibility if the contractor does not perform the work properly.

You do not have the authority or the appropriate compensation to do this for the services and risks that such a guarantee requires. You can reduce risk to your clients and your firm and minimize problems in the interpretation of the contract documents by providing more comprehensive construction phase services. With most normal projects, the level of site involvement routinely described as "evaluation" may be appropriate. However, you can provide a more comprehensive scope of services, including inspecting the work, if the contract accurately defines that duty and if the increase in services and risks results in an appropriate increase in fees.

Response

Your client should understand that you could provide an increased level of site services, such as inspection services, in addition to those required under the contract to determine substantial and final completion. Increasing your services is possible under the following conditions:

- there is a clearly defined scope of services;
- you are capable of providing the agreed-upon service or it is a professional service that you can obtain by subcontract;
- the general conditions of the construction contract provide you with the authority to carry out your duties;
- your services do not cause you to assume responsibility for the work of the contractor or others not under your control; and
- the client properly compensates your firm for the significant increase in services and risks.

Resources

In EJCDC E-500 (2020 edition), the "Visits to the Site and Observation of Construction" provisions of Exhibit A clearly define a scope of services. EJCDC suggests, "it may be advisable to insert…an agreed-upon frequency of the Engineer's site visits." AIA B101-2017 includes similar treatment in Paragraph 3.6.2, "Evaluations of the Work." In addition, in Article 4.2.3, B101-2017 requires the parties to specify the number of visits to the site and the number of inspections to determine substantial and final completion included in the fee for services.

Commentary

During execution of the design, your role has a significant impact on the client as well as the contractor. Some clients may want you to play a more aggressive role than that specified in the consensus AIA or EJCDC contracts. For instance, such clients may demand that you conduct intensive inspections to discover failure by the contractor to perform properly. In those cases, the client then wants to charge you with responsibility if the contractor does not perform properly, and insist that you use your skills to assist the contractor in executing the design properly.

Until 1961, AIA and EJCDC contracts stated that design professionals like you "supervised" construction. The courts interpreted that term as requiring you to exert control over the contractor, a responsibility for which you had no authority. Later contracts and courts clarified your true historical role using the term "observation." While the EJCDC documents still use that term, the AIA abandoned it as the description of services in the 1997 edition of the owner-architect agreement form and replaced it with "evaluation." Regardless of the name given to the site duties, you can provide an increased and responsive level of service for a client and can usually manage the risk of such duties. This increased level of service can assist in minimizing problems that generate claims.

If you agree to provide more extensive site services, you must be capable of doing so and given appropriate compensation for the much greater level of service the increased risk involves. Clients may also want to reduce your involvement in the administration of the construction contract. In any event, do not use terms describing your role unless you clearly identify your duties and limitations and make sure your client understands your role. While "observation" involves a scope of services that allows for only a general review of the contractor's work to determine visually if compliance is apparent, the use of "inspection" clearly expands the duties to include a critical evaluation of the work. It is critical to define the extent of evaluation, the type of evaluation required and at what stages of the work, and the duration of the evaluation—whether a full-time project representative is required. In addition, the general conditions must give you the authority to conduct inspections to parallel the responsibility in the client-design professional agreement. You may want to negotiate a specific level of service. For instance, the client may want "monitoring" services that would include a greater on-site representation and more extensive and direct testing of the work; or the client may want a definition of "reviewing" or "examining" to describe your evaluation of the contractor's work. There are no established definitions within the construction industry. Therefore, if you use other terms to describe your role in evaluating the work, carefully define them in the contract.

EXPRESS WARRANTIES AND GUARANTEES

Issue

You are asked to warrant or guarantee your services or the results of the project for which you are providing your services.

Concern

Express warranties and guarantees establish liability even though no proof of negligence is required. Under US common law, you have the responsibility of using due care in providing your services. There is no warranty of the efficacy of professional services, nor do you provide a warranty for the work of the contractor or others based on the services or instruments of service you provide. Courts have not extended the duty to provide a guarantee to design professionals like you because you provide services based on judgment and expertise; you are applying your professional skills and reasoning on a unique set of facts for each project. Professional liability insurance policies exclude coverage for claims arising out of express warranties or guarantees. Because coverage is for professional services provided, and not assumed contractual obligations, professional liability insurance does not "stretch" to provide coverage for a warranty of services beyond meeting the standard of care or a guarantee of a specific result.

Response

Explain to your client why guarantee language is inappropriate for professional services contracts and is not in your client's best interests. The reasoning against such express warranties or guarantees includes the following:

- a guarantee of services is not realistic or effective;
- the legal standard applied to all professionals, including design professionals, is one of negligence and not warranty;
- the cost of such a contractual commitment, reflected in the fee for the services to compensate for the risk assumed, will be a significant and non-productive expense to the client; and
- such contractual commitments are not within the coverage of professional liability insurance.

Resources

Language in Article 6 of EJCDC E-500 (2020 edition) specifically disclaims any implied or express warranties in connection with the engineer's services. 6.01.A states the standard of care and clearly steers the expectations of the client in this sentence: "Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer."

While no provision in AIA B101-2017 provides or prevents a warranty obligation, the treatment of specific issues, such as the transfer of documents, specifically prevents application of the concept of a warranty.

Commentary

Your client may ask you to warrant your services, or guarantee that you accomplished something specific or that certain conditions exist. Such requirements may come in a client-drafted contract, in the language used in proposals or letters incorporated by reference into a contract, or in a certification, such as those required by the client's lender or by a government agency.

The words "warrant" or "guarantee" mean to "ensure" or "confirm" that a standard has been met absolutely. Warranties, although inappropriate for the services provided by you, are attractive to clients since the breach of a warranty provision is much easier to establish than negligence in the performance and furnishing of design services.

A warranty or guarantee is a promise that does not require proof of negligence. The elements of a breach of warranty action require that you made a statement describing your performance of services or the result; the statement was false; and reasonable reliance on the representation caused rectifiable damage.

It is impractical for you to provide either a warranty of services or a guarantee of a result of your services. In addition, professional liability insurance does not cover express warranties or guarantees. Such a contractual commitment is different from the normal standard of care to perform in a non-negligent manner. Professional liability insurance specifically excludes coverage for express warranties or guarantees because there is no possibility for a professional liability insurer to measure the risk created by such a contractual obligation.

It is an established legal principle that your services do not imply or warrant a satisfactory result. As one court has stated:

> **Because of the inescapable possibility of error which inheres in these services, the law has traditionally required less than perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.**

Words such as "insure," "ensure," or "assure" are indicative of an express warranty or guarantee. Similarly, words such as "complete" or "every" and phrases such as "fit for the intended purpose" can create warranties. Words such as "state," "represent," or "declare" also can establish warranty obligations.

FAST-TRACK PROJECT DELIVERY

Issue

Your client wants a project designed and constructed as quickly as possible and has asked you to agree to "fast-track" the project.

Concern

In times of high market demand, elevated interest rates, or significant inflation, client demands for speed in the design and construction of projects usually are paramount. The desire of clients to expedite project completion will result in the overlap of design services and construction. Clients often initiate the fast-track process with the intention of creating a shortened process, without being aware of the risks resulting from fast-tracking a project.

Fast-track projects are more likely to require clarifications and modifications to the contract documents signed by the contractor. Because the traditional sequences of completing the project are blended, a system of communication and a willingness by all parties to accommodate change is essential. The fast-track method also involves a higher risk factor for the client than any of the more conventional methods of contracting.

Response

In a financial environment dominated by a "time-to-market" mentality, limiting the design stage of a project is critical. Your client might want to accelerate the use of a facility by shortening the process leading to its creation. Your client and all project team members should understand the risks involved with fast-track construction and agree to such contracting methods only if the contractual relationships address fast-track responsibility issues.

Since construction costs will change as the documents are refined, the responsibilities for cost estimating and making changes to the design must be coordinated. If the documents are insufficiently coordinated or incomplete, subsequent work may require significant correction and additional costs.

Because this process departs from the customary sequential phasing of projects, your client must play an active role in establishing the project parameters. The contractor must also acknowledge that it will not receive a full set of plans and specifications and bid on the contract accordingly. Without such acknowledgement, the unfortunate result is usually a claim, with both the client and contractor taking a position based on projects that are more conventional and both blaming you for errors.

Resources

If you establish good lines of communication and reasonable expectations, and reinforce both the process and the anticipation of changes, you can manage the challenges of fast-track projects. Increasing client understanding of the characteristics of the process should lead to an increased level of compensation for increased services and a limitation of your risks.

The contract should include the following:

- construction contract administration services that begin before the completion of construction documents;
- compensation for corrections or adjustments to the drawings and specifications; and
- coordination of the schedules for professional services and construction.

Your legal counsel might suggest language such as the following:

> **If Client desires that Project be designed and constructed on a fast-track basis, i.e., that construction commences prior to the completion of all relevant Construction Documents, Client acknowledges that the fast-track process involves additional risk, including but not limited to the Client's incurring of costs for Design Professional to coordinate and redesign portions of Work constructed prior to the completion of all relevant Construction Documents and costs for Contractor to remove and replace previously installed Work. In consideration of the benefits to Client in employing the fast-track process, in recognition of the inherent risks associated with the fast-track process to Design Professional, and notwithstanding anything to the contrary contained herein, Client agrees to waive all claims against Design Professional for design changes and modifications of portions of the Work constructed, together with any associated delays, due to Client's decision to employ the fast-track process.**

Commentary

On a fast-track project, you can shorten construction time because you can create construction documents related to each phase of the construction contract during construction of the previous phase. This effort to improve planning and performance efficiency takes advantage of the facility utilization value of the project. Such a method may be economical for a client because it decreases the total amount of financing charges paid on the project and enables the project to earn revenue earlier than expected. As you conserve time, you increase potential savings to the client.

Fast-track projects contain inherent pressures that increase the likelihood of claims. There is a chance for costly litigation when determining whether completed drawings represent a change in scope from the original preliminary drawings or simply represent completion of the original drawings. As you complete or revise the plans and specifications, there is a greater likelihood of scheduling problems and an increased chance of claims for damages for delay. Further, a subcontractor or prime contractor may perform work not specifically provided for in the plans, but believed to be implicit when fulfilling the contract as a whole. This can lead to disputes about whether authorization was necessary, and whether the client expressly or implicitly authorized the extra work.

Another related consequence is the increased possibility of a waiver of the change order procedure. With an increased volume of change orders resulting from incomplete plans and specifications, there may be a temptation to shortcut the procedures set forth in the contract and handle change orders informally to avoid delays and paperwork inherent in the change process.

Most fast-track clients understand that there will be additional design and construction costs stemming from design changes and change orders necessary to address coordination issues. Fast-track projects cost more to create and the knowledgeable client weighs the increased design and construction cost against the profitability of putting the capital asset in place more quickly. The intermittent delays for redesigning or modifying work are already in place and the additional costs involved are intrinsic to the process. Fast-track projects are inherently more expensive for you and present risks not easily managed.

Every party involved in a fast-track project should know the inherent risks. The contract documents should specify the extent to which the design is complete and encourage the flow of information from the client and its design team to the contractor, and vice versa. Contract mechanisms should quickly carry the discovery of interference and design problems to the attention of those responsible. Establish similar mechanisms to communicate the solution to those who will incorporate it into the work. Supplement rapid and clear channels of communication with rapid change and claims processing procedures.

The management flexibility necessary to complete successfully a fast-track project should not depend upon the parties' bargaining strength or sophistication. Fast-track construction, by its very nature, is an evolving, cooperative process. Memorialize this cooperation in the language of the professional services agreement.

INDEMNIFICATION

Issue

Your client wants you to agree to defend them against any claims resulting from your services, and to indemnify them for all costs, losses, or damages because of your services on the project.

Concern

Contractual indemnification provisions, like other provisions of a client-design professional agreement, establish rights and obligations for the parties and may shift risk from one party to another. An indemnification provision that obligates you to defend the client, or indemnify or rectify damage to a client or third party not resulting from your failure to meet the standard of care, represents a risk to you beyond normal liability and outside the scope of professional liability insurance.

There is no need to include an indemnity provision based on negligence since indemnification is a basic remedy under common law. Agreeing to defend or indemnify your client is a business decision. Agreeing to an indemnity provision not based on damage caused by your failure to perform or furnish professional services as required by the applicable standard of care (negligence) is a business risk that is beyond common law indemnification requirements and insurance coverage.

Contracting to defend a client against an allegation of your negligence may present a significant financial burden for your firm since your professional liability insurance policy does not cover such exposure. Your professional liability policy exists to defend your firm as the policyholder and excludes the defense of others, such as required through a contractually assumed defense obligation.

Response

Advise your client that your legal duty does not exceed the indemnification of losses directly caused by your negligence. Your "liability in the performance of professional services" is what your professional liability insurance covers. To establish an equitable allocation of risk, the contract language should reflect your insurable risk and not extend to those parties to whom you would not normally be liable. While you may make a business decision to accept a defense or indemnification obligation beyond your normal legal liability, such an assumed risk should result in greater compensation.

A statement that you will indemnify the client for damages and costs to the extent caused by your negligent acts, errors, or omissions reflects your normal legal liability. Client-proposed indemnity provisions often demand more of you than the law would otherwise require. As a basic proposition, you should not accept risk unfairly allocated to you; that is, risk that you are unable to control. Ideally, indemnity obligations should be restricted to your adjudicated negligence and drafted in a manner consistent with the coverage afforded under your professional liability insurance policy. A sample indemnity provision consistent with this proposition follows:

> **To the fullest extent permitted by law, Design Professional shall indemnify Client, its officers, directors, partners, employees, and representatives, from and against losses, damages, 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 found to be caused by a negligent act, error, or omission of Design Professional or Design Professional's officers, directors, members, partners, agents, employees, or subconsultants in the performance of services under this Agreement.**

Resources

A narrow indemnification obligation is contractually included for the engineer in EJCDC E-500 (2020 edition). With the exception of B103-2017, the AIA professional services agreements avoid any contractual indemnification obligation; the common law obligation to indemnify is sufficient. The AIA B103 language serves as both a narrow form indemnity obligation and a limitation of liability for the architect.

Commentary

Note that any client that asks for an indemnification provision should also be willing to provide a complementary provision in which it protects you from the harm caused by the client and the client's agents, contractors, and consultants.

Clients rarely propose mutual or cross-indemnity provisions wherein you indemnify the client and the client indemnifies you. The general rationale for clients insisting on a unilateral contractual indemnity provision is that you (or the contractor) is directly involved in design (or construction) and should take responsibility for claims and shield those whose involvement is passive. In addition, laws and policies bar many municipalities and governmental entities from assuming contractual indemnity obligations. Nevertheless, you should view mutual indemnity provisions as more reasonable than a unilateral indemnity provision in favor of the client (or in favor of the prime professional under a subcontract). A sample mutual indemnity provision consistent with common law principles follows:

> **To the fullest extent permitted by law, Client and Design Professional each agree to indemnify the other party and the other party's officers, directors, partners, employees, and representatives, from and against losses, damages, 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 found to be caused by a negligent act, error, or omission of the indemnifying party or any of the indemnifying party's officers, directors, members, partners, agents, employees, or subconsultants in the performance of services under this Agreement. If claims, losses, damages, and judgments are found to be caused by the joint or concurrent negligence of Client and Design Professional, they shall be borne by each party in proportion to its negligence.**

Two other issues that could arise because of a client's overly broad indemnification obligation are the following:

- There is a significant risk assumed by a client that secures an indemnification provision. If a client's employees or contractors are aware of a broad form of indemnification that would take effect even in the case of the negligence of the client or others named as indemnitees, those parties may not meet the standard of care normally applicable to their activities.
- In addition, when parties other than those signing the contract are included in the indemnification obligation, you may be extending rights to parties that otherwise may not be able to bring a cause of action against your firm.

Evaluate indemnification provisions individually to determine if the assumed obligations exceed normal legal liability. There are significant differences on how different jurisdictions interpret and enforce indemnity provisions. Because indemnification provisions are typically in response to specific state statutory and case law, the advice of a jurisdictionally competent legal counsel is appropriate in evaluating the responsibilities established in indemnification provisions.

INSURANCE REQUIREMENTS

Issue

Your client wants you to carry a professional liability insurance policy with coverage for each occurrence with limits specific to the client's project; a waiver of all subrogation rights; coverage to insure the broad indemnity provision in the client's contract; and to provide notice of any changes to the policy.

Concern

The insurance requirements of some contracts reflect a lack of understanding about the nature and scope of professional liability insurance. In many cases, the requirements either make no sense or are impossible to accommodate within available professional liability coverage options.

Requests that can create difficulties for you and your insurer include:

- insuring an indemnity provision through contractual liability coverage;
- applying the policy's coverage only to the specific project;
- paying for each and every claim with no limit on the amount of insurance; or
- providing notice to the client beyond the professional liability insurer's administrative ability.

Misunderstanding the claims-made nature of the policy and the ability to provide future coverage also frequently occurs.

Response

With the assistance of your insurance advisor, you can explain to your client that your professional liability insurance policy, as with all professional liability insurance policies, only pays for damages that are actually the result of your negligently performed professional services. You have an opportunity to work with your broker to educate the risk managers or attorneys providing advice to your clients. They may make the mistake of assuming that such insurance is equivalent to that of a construction contractor or vendor of goods. Your professional liability insurance pays on your behalf only to correct damage or to indemnify for injuries, costs, and losses to the extent that payment is necessary after adjudication of your substandard performance of your professional services or of the subconsultants for whom you are vicariously liable.

Sometimes, your client may request professional liability insurance requirements or endorsements without realizing that they are inappropriate. Such requirements (beyond those listed above) may include:

- incorrectly characterizing the policy as an "occurrence policy;"
- not recognizing that every policy has "per-claim" and policy "aggregate" limits;
- requiring coverage for contractual risks that go beyond your responsibilities;
- naming the client as an additional insured on the policy; and
- requiring that your firm waive any subrogation rights of its insurer.

Resources

AIn addressing the insurance specifications of a prospective client, the best resource of information or advice about professional liability insurance is the independent broker you chose to represent your interests. Additionally, your firm and your broker can refer to the information on professional liability insurance requirements found on the Victor website. *Intro to Professional Liability Insurance* is a clear discussion of the special nature of your coverage.

Commentary

Professional liability insurance exists to defend your firm against allegations of substandard performance of your professional duties and to pay on behalf of your firm the amount (above your deductible, but within your firm's limit of liability under the policy) to correct damage or compensate for personal injury caused by your firm's negligence. The CNA liability policy refers to coverage for "a wrongful act" that is defined as "an error, omission or other act that causes liability in the performance of professional services."

ADDITIONAL INSURED STATUS

Clients mistakenly think you can name them as an "additional insured" on your firm's professional liability insurance policy. See the "Additional insured status" section on why that is not possible and why no knowledgeable client would ask for the endorsement.

CERTIFICATE AND NOTICE REQUIREMENTS

Because of their concern that insurance coverage continues in force, clients sometimes attempt to impose notice requirements as holders of a certificate of insurance. Insurers cannot give notice to a client of "changes" or "reductions" in the policy or the coverage since changes and reductions are not defined adequately to administratively allow such a notice. In fact, it could be argued that a reduction occurs whenever a claim reserve is established, a claim expense occurs, or a claim payment is made since both defense and indemnity payments are within the agreed-upon limit. Any payment effectively reduces coverage. Notice of cancellation or non-renewal of a policy can be given because such an action can activate an automatic notice. Such a notice requirement is usually limited to 30 days because of practical considerations.

CLAIMS-MADE VS. OCCURRENCE COVERAGE

Often, clients demand "per-occurrence" coverage even though all professional liability insurance is a "claims-made" policy, and therefore covers claims and not occurrences. While referring to coverages as being "per-occurrence" does not modify the fundamental coverage of a professional liability insurance policy, the use of the term can cause confusion. Such a misunderstanding can lead to a lack of confidence in your business skills.

CONTRACTUAL LIABILITY COVERAGE

Some clients may ask you to have your PL policy endorsed to insure contractual liability—that is, the risks you assume under the professional services agreement. Clients often ask for contractual liability coverage from you because such coverage is normal under a contractor's CGL policy. Such a request is problematic, however, because CGL contractual liability is broad-form coverage due to the contractor's broad risk exposure. Conversely, the PL policy has a limited-form contractual liability because PL coverage limits your risk exposure to professional negligence. The CNA policy automatically includes a limited-form contractual liability coverage to the extent that the liability stems from your negligence in the rendering of professional services. If your request for contractual liability coverage is consistent with the coverage already provided by the policy, a special endorsement is unnecessary.

INSURING AN INDEMNITY PROVISION

A broad-form indemnity provision is another form of uninsurable contractual liability that goes beyond the coverage of a PL policy. Examples of this include you agreeing to indemnify your client for claims, damages, and losses not caused by your negligence, and you agreeing to indemnify the client for the client's negligence or that of any party other than your subconsultants. The CNA policy, without any special endorsement, provides limited-form indemnity coverage. Such coverage applies when you caused damages by your negligence in performing or furnishing professional services. There is no coverage for anything broader than this normal liability in the performance of professional services. Your client should also understand that there is no need to "insure an indemnification provision" if it is based on your normal legal duty; nor is it reasonable to attempt to cover, by specific endorsement, a contractual obligation such as an indemnity provision that extends beyond the policy coverage.

PER-CLAIM AND AGGREGATE LIMITS

A client might ask for coverage for "each and every" claim. Every professional liability insurance policy has two limits:

1. a firm selects a limit of coverage for a claim that is above the firm's deductible obligation, and
2. the policy has a selected aggregate limit for all claims (from all projects) made against the firm during the policy term.

Often, the amounts are the same, but increasingly firms have a larger aggregate limit to cover more claims during the policy term.

PROJECT POLICY VS. PRACTICE POLICY

Firms carry practice policies that apply to all claims made during the policy term for services covered by the insurance. The limits—both per-claim and aggregate—apply to all claims from all projects and sources. When a client wants the policy to apply separately to the specific project, a project policy might be available and, if so, the cost is usually reimbursed by the client. However, project policies are rare and only written for specific types of projects in specific ranges of construction values. Some firms are able to secure an endorsement to the normal practice policy that is a "specific additional limits endorsement," which applies to a named project, but is separately underwritten for specific types of projects.

WAIVER OF SUBROGATION RIGHTS

One requirement that can be automatically met by the CNA policy is a contractual request that the insurer waive subrogation rights. Those rights allow the insurer to act on behalf of the insured in bringing a claim to recover payments made by the insurer. A waiver is common in property insurance—no one wants to pay for coverage only to have an insurance company sue everyone possible in an attempt to cover its losses. Under the CNA professional liability insurance policy, if the policyholder agrees by contract to waive subrogation rights, CNA agrees that it no longer has the option to recover on behalf of the policyholder. Subrogation actions against clients of policyholders are extremely rare so waiving that right does not change the firm's risk profile. Do not waive your subrogation rights against subconsultants since that could mean that you would have to pay on behalf of the subconsultant because of your vicarious liability without any recourse to recover from the subconsultant.

For further information, you can consult your independent insurance broker for details of the coverage and explanations of the policy language.

LIABILITY FOR OTHERS

Issue

Your client asks you to provide services using subconsultants of the client's choice or others about which you have no knowledge or over which you will have no control.

Concern

When you agree to provide services for a client, you assume the same level of responsibility whether you or a subconsultant perform the services. The legal concept of vicarious liability is the imposition of liability on one party, in this case you as the prime design professional, for the conduct of another party, the subconsultant, based solely on the relationship between the two parties.

For various reasons, a client may want specific consultants as part of the professional services team, or the project may require a specific expertise that is beyond your ability to evaluate or provide in a way over which you have no control. In addition, the service providers selected by the client may not be able to obtain insurance appropriate to cover their risks or have assets available to support their obligation to indemnify for harm they may cause. Because you are legally responsible for the acts of your subconsultants, significant, and perhaps uninsurable, risks may shift to you.

Response

You may negotiate either the use of subconsultants for whom you are willing to take responsibility for or an arrangement for the consultants or specialty service providers to contract directly with the client. If the contract is between the client and the other professional, you are not vicariously liable for their actions.

The latter arrangement may necessitate greater coordination of the independent services, and coordination liability on your part would still expose you to risk. Your coordination of the documentation requires careful attention and appropriate compensation. Because you do not have authority over the services of the independent consultant, the client should not hold you responsible for their accuracy. Moreover, it would be appropriate for the client to agree to look solely at the client's subconsultant for any recovery for harm caused by the subconsultant and to indemnify you for any costs, losses, or damages to you resulting from the negligence of the client's independent consultant.

Resources

The standard of care provisions in the consensus documents establish the responsibility for furnishing the services of interprofessional consultants. The AIA guide to changes in the owner-architect agreements, B503-2017, suggests a possible paragraph relating to responsibility for consultants employed directly by the client. Our article, "Serving as a Conduit for Services," discusses the prime serving as a conduit for the services provided by others so that there is clear recognition that owner-selected consultants are solely responsible for their business and professional obligations.

Commentary

The legal system strives for efficiency, and holding one party vicariously responsible for the acts of another eliminates the need to apportion fault. The most common vicarious liability situation is the responsibility of an employer for the unlawful acts of its employees committed during their employment. This concept extends to the negligence of a subconsultant providing services through a prime consultant.

Often, one participant on a design team is the cause of damage or injury, but that participant may be unable to pay a court judgment or may lack insurance coverage to pay on its behalf. If you, as the prime design professional, hire that participant, the client needs only to look to you for correction of the damage or compensation for the harm.

If they wish to, clients can select specific consultants for separate contracts. 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 should be required to coordinate their instruments of service through a designated prime consultant. The coordinating entity should describe carefully the scope of the entity's review.

When the client contracts directly with individual consultants, the contract should acknowledge each consultant as being able to rely on the technical sufficiency and timely delivery of documents and services furnished by the other consultants. In addition, it may be prudent to require the client to hold the individual consultants harmless from claims, costs, losses, or damages resulting from the negligence of the client's other consultants since they do not have independent capability to evaluate the accuracy of the results of the services of the other consultants or the responsibility for such services.

In situations where a mandated subconsultant may not be capable of providing a service—and may not be insured or otherwise have the financial strength to stand behind the professional and contractual commitments—a prime consultant may want contractual protection. While it is best to achieve such protection through an indemnification from the client, as an alternative, the subconsultant may be required to indemnify the prime consultant for any costs, losses, or damages caused by the subconsultant. This usually has to be through a provision in the client's contract with the independent subconsultant.

To state such an obligation as a contractual commitment, legal counsel advising the parties might agree on language such as the following:

> **Subconsultant agrees to defend, indemnify, and hold harmless Prime Design Professional from claims, damages, and losses arising out of personal injury, including death or property damage caused by Subconsultant's negligent acts, errors, or omissions in performing and furnishing professional services on this Project to the extent and in proportion to Subconsultant's comparative degree of fault. Prime Design Professional shall give Subconsultant prompt notice of any claims of injury or damage subject to this defense and indemnity obligation and shall, at its own expense, provide its time and efforts to cooperate with Subconsultant's defense of Prime Design Professional.**

Case studies

Below are case studies from our comprehensive benchmarking study, *From Risk to Profit: Benchmarking and Claims Studies*. The case studies below highlight some of the risks related to subconsultants on projects.

LIMITATION OF LIABILITY

A contractor made a claim against a city for $1 million in extra costs. The city settled with the contractor and looked to the engineer for contribution. The engineer contributed $500,000, but believed any exposure it had was related to services performed by the engineer's geotechnical consultant. The engineer attempted to subrogate against the geotechnical consultant, but ran into problems because the contract between the engineer and geotechnical consultant contained a $25,000 limitation of liability clause. The engineer was only able to recover $25,000.

VICARIOUS LIABILITY

A large university retained an engineer to design a co-generation plant. The engineer's only exposure was the vicarious liability created by a structural engineering consultant that failed to adequately determine the structural loads for the design-build client. The consultant paid the entire $250,000 policy, leaving the engineer to pay the remainder of the $2.5 million claim.

LIMITATION OF PERSONAL LIABILITY

Issue

Your client insists that you sign the contract both on behalf of your firm and as an individually licensed design professional.

Concern

Often, state licensure laws make the professional who signs and seals the documents personally liable for any harm caused by the negligence of the firm. Some clients are apprehensive about only relying on the assets of a firm, especially if that firm is set up as a corporate entity. With professional liability exposures, responsibility is not limited to insurance carried by the firm or the corporate assets of the firm. Even without a separate signature on a contract, the professional who takes responsibility for the professional services by signing and sealing documents is usually subject to personal liability in the performance of professional services.

Response

Educate your client that your professional liability insurance policy not only covers the firm as an entity, but stands behind every individual in that firm—even if at the time of a professional liability claim, the person who acted on behalf of the firm is no longer employed by the firm. Therefore, the idea of any individual's personal liability for the acts of the firm does not have to be separate from the firm's liability since the same coverage applies.

You might express concern with how the client signs the contract and require documentation of the signatory's authority. No client wants its officers or directors at risk for contractual liability, but unless the person signing on behalf of the client is empowered to do so, the company as a whole might not have any responsibility for payment.

Resources

To limit the possibility of personal liability beyond the insurance and assets of your firm, you might suggest a mutual limitation such as the following:

> **NO PERSONAL LIABILITY. None of the covenants, undertakings, or agreements of the Client or the Design Firm are made or intended as personal covenants, undertakings, or agreements, and no personal liability is assumed by, nor may at any time be asserted against, any member, shareholders, partner, officer, director, or employee of either party. All such liability, if any, is expressly waived or released by the Design Firm or Client as applicable.**

Commentary

Most firms understand that when they sign a contract for, as an example, major purchases or even leases, they sign the contract both as an individual and on behalf of the firm. Some clients feel the same way about the professional services provided by your firm. The rationale is that signing as an individual and on behalf of the company means that the ability to "hide behind a corporate veil" does not exist. For professional liability exposure—and professional liability insurance coverage—the separation between the firm and individuals is not necessary. Professional service firms cannot limit professional liability exposure by forming any special business entity. The responsibility for negligent performance does target the professional who signs and seals documents and indicates that as a professional, the individual takes full responsibility for meeting the standard of care. Because the firm employs the individual, the firm cannot avoid its responsibility as long as the individual was acting within the scope of employment duties with the firm.

In some states, there is a recognition that as business entities, design firms have the right to negotiate with a client a limitation of the firm's liability and that such a limitation also extends to the individual signing and sealing (being in responsible charge of) the professional services provided by the firm.

With some clients, because concern with the ability to contract and the responsibility for contractual compliance is reciprocal, you might ask to have attached to the contract a designation of corporate authority in which the client specifically states the authority and limitations on the party signing the document. Individuals often have the authority to enter into negotiations, approve, and/or sign contracts on behalf of a client only pursuant to a resolution of the client's governing body or a valid delegation of authority from the company's president. Most organizations cannot disavow a commitment made in accordance with the company's procurement and contract approval and signatory authority policy.

PAYMENT APPLICATIONS

Issue

Your client will select the contractor for the project on a low-bid basis and your client wants you to make certain that the contractor's payment is only for work properly performed.

Concern

In the role as the client's evaluator of the quality and progress of the work, the client may ask you to review the contractor's applications for payment and certify that the contractor has met the requirements for a progress or final payment.

While this service provides a significant benefit for the client and stresses the importance of your use of independent professional judgment on behalf of the client, such certifications can generate unintended risk for your firm. It is unrealistic and ineffective for you, who makes occasional visits to the site to evaluate the work of the contractor, to guarantee compliance of the work-put-in-place with the contract documents. By asking you to "make certain" of compliance, a guarantee is what the client wants.

In addition, you must be in a position to use sound professional judgment on behalf of the client. While part of this activity involves exerting a level of control over the quality and progress of the work by influencing disbursement of payments to the contractor, that control is not absolute. Even when you believe that the progress and quality of the work will, or will not, support a recommendation of payment, there are other matters between the client and contractor that might affect payment.

Response

You need to emphasize that you create real value to the client by your service during the construction phase. The client benefits from your evaluation of the work and your review of the applications for payment as specified in both your contract and the general conditions of the contract between the client and contractor. Your involvement in reviewing the schedule of values, established to be the basis for progress payments, and your assessment of the work based on the level of your services negotiated with the client, both empowers and limits your ability to protect your client's interests.

If the client wants you to undertake a greater responsibility—perhaps even a responsibility to audit the payment records of the contractor—and you believe you have the necessary expertise to do so, you can provide that service. Such an effort, however, extends far beyond the professional evaluation of the quality and progress of the work and into accounting and legal duties.

Resources

In AIA B101-2017, §3.6.3.1 clearly spells out your duty in certifying the contractor's applications for payment. In EJCDC E-500 (2020 edition), Exhibit A contains equivalent provisions. In both contracts, the language states that the certifications are qualified. That is, you do not represent that you conducted exhaustive or continuous on-site inspections to check the quality or quantity of the work, or that there was any review of the construction means, methods, techniques, sequences, or procedures. In addition, the contract language clearly avoids responsibility for:

- making any examination to ascertain how or for what purpose the contractor has used the money paid to the contractor by the owner;
- determining that title to any portion of the work, including materials or equipment, has passed to the owner free and clear of any liens, claims, security interests, or encumbrances; or
- considering other matters at issue between the owner and contractor that might affect the amount that should be paid.

Commentary

The limited services for which the client pays you, the carefully circumscribed authority granted to you, and the peculiarities of the contract between the client and contractor often make it difficult for you to provide the level of control over the quality and progress of the work that many clients demand. Your certificate for payment should be qualified and should be explicit as to what the certificate does and does not cover. It is realistic to have the certification based upon your judgment to the extent that the progress and level of quality of the contractor's work be in accordance with the contract documents.

With the appropriate qualifications, the representations made are to the extent of the observations and other contacts with the work that the client has employed you to provide. You are not required to become involved in supervising, directing, or controlling the work, such as becoming involved in the means, methods, techniques, sequences, or procedures of construction or safety precautions and programs. The essence of this is recognition of the fact that the contractor is in charge of performing the work and that you have appropriately limited responsibility and authority at the site during construction. Accordingly, you can only give the client a general assurance that "to the best of the design professional's knowledge, information and belief," the work covered by the application for payment has progressed to the point indicated and the quality of the work is generally in accordance with the contract documents.

There is also a reservation made in the payment authorization process with respect to the client's interest. If the construction work does not to conform to the requirements of the contract documents, the client should authorize you to withdraw or revise a previous certificate as necessary to reflect the current state of the work. The client, therefore, obtains specific rights to recover payments previously made to the contractor that proved to be unearned.

The statement that you are not responsible to audit the contractor's books or to check to see if the contractor has properly applied amounts paid to the contractor as progress payments is basic to the division of responsibility. You generally have no duty to make any independent determinations about what contractors have done with funds previously paid because you are not experts in accounting matters. If a client requires detailed information about a contractor's use of funds, this responsibility should be borne by the client's staff, accountant, or another consultant.

PREVAILING PARTY RECOVERY OF LEGAL FEES

Issue

Deep within your client's standard contract is a provision that states that in any dispute between the parties to the contract, the prevailing party can collect its legal fees from the other party.

Concern

With very few exceptions, attorneys' fees are not generally awarded or recoverable as damages in adjudication of a dispute between two parties to a contract. There are a few statutory causes of action that may permit a prevailing party to recover attorneys' fees as an element of damages. However, under the "American Rule" in civil litigation, there is no entitlement at common law to recover attorneys' fees as damages. Therefore, the issue as to whether a professional liability insurance policy would cover attorneys' fees awarded as damages focuses almost exclusively on the basis for the award. That is, professional liability insurance will only cover liability (including liability for attorneys' fees) that would exist in the absence of a contract. There is no coverage for awards based on a contractual fee-shifting provision. The issue that determines whether there is coverage is why the insured design professional is liable to pay the claimant's attorneys' fees.

Response

While you may favor such prevailing party legal fee provisions because you think you will benefit if you have to sue a client to collect a fee, be cautious in your response to such a provision. In addition to putting your firm's assets at risk because legal fees are not damages covered by insurance, a prevailing party provision creates another risk. The threat to your firm of an uninsured obligation to pay the legal costs of your client usually has a chilling effect on such actions as attempts to collect fees for professional services provided. Prevailing party provisions often result in the coercion of the weaker party—you as the design professional—by the financially stronger client. Even in a professional liability claim situation, there may be pressure to settle where there may be minimal liability to prevent you from using your firm's own assets to pay the client's legal fees. Often, a client can find one cause of action, such as the breach of a milestone date, one forgotten design detail, or a change order potentially due to your negligence, on which it could prevail. Then the client can exaggerate legal fees, and the gamble may be too much for your firm.

Resources

IThe AIA and EJCDC documents are silent on the issue, implying that each party should bear its own attorneys' fees. Therefore, if the award of attorneys' fees is desirable, insert an express provision into the contract.

Prevailing party clauses have always had their pros and cons. In most states, attorneys' fees are not generally awardable to the prevailing party in litigation unless the opponent acted in bad faith or the contract authorizes award of attorneys' fees. Although the American Arbitration Association rules allow an arbitrator to grant any remedy or relief that is just and equitable and within the terms of the agreement of the parties, state arbitration laws modeled on the Uniform Arbitration Act follow the American Rule's prohibition on the award of attorneys' fees in the absence of express contractual authorization.

One way to counter an attempt by the client—or possibly the client's attorney—to shift legal fees is to cite your professional liability insurance policy prohibition on assumed contractual exposures. While any agreement on the recovery of legal fees by the prevailing party is a contractual obligation a firm is free to assume, professional liability insurance policies uniformly exclude coverage for costs "arising out of the liability of others you assume under any oral or written contract or agreement, except that coverage otherwise available to you shall apply to your liability that exists in the absence of such contract or agreement." With many clients, the uninsured exposure changes the likelihood that they can shift legal fees. With others such as developers, the lack of insurance coverage may reinforce the ability of the developer to extract a fee concession or other unmerited recovery from your firm.

Commentary

There are clients that do not use the prevailing party provision as leverage. In some cases, a client will use a provision such as this:

> **In the event any controversy, claim or dispute between the parties hereto, arising out of or relating to this Agreement or the breach thereof, results in arbitration or litigation, the prevailing party in such proceedings shall be entitled to recover from the losing party reasonable expenses, attorneys' fees and costs, if covered by professional liability insurance.**

However, as stated above, few professional liability insurance policies would recognize the legal fees of a client in a dispute between the client and your firm as damages recoverable under applicable law.

So it is prudent for your firm to carefully consider accepting a "prevailing party" fee-shifting agreement that would apply to claims alleging costs, losses, or damages caused by your firm's negligently performed professional services because the contractual obligation to pay the client's costs probably would not be covered as part of an adjudicated determination of liability.

REQUESTS FOR INFORMATION

Issue

Your client intends to select the lowest bidder as the construction contractor and is hesitant to pay you for more detailed construction documents. Your client also has no concept that this could lead to numerous requests for information.

Concern

Construction documents are not complete guides to the construction of a project. They should provide adequate information for a construction contractor with appropriate experience to bid or negotiate a contract, and, through the contractor's knowledge of the documents and construction experience, to construct the project.

Requests for information have a valid role in the construction process. When used by a knowledgeable contractor, whose focus is on project delivery, requests for information can clarify or supplement the information in the plans and specifications, but RFIs can both ruin your firm's profitability on a project and result in professional liability claims under two scenarios:

1. when used by a contractor that has not taken the time to understand the contract documents or
2. when used by a contractor intent on finding a way to augment its compensation by relying on using the *Spearin* Doctrine to show that the client violated its warranty that the documents were adequate for construction.

Response

You may want to explain to your client that more extensive design services may be able to reduce RFIs, or that an experienced contractor may need, and indeed want, less information so that it can use its resources most efficiently. You should also inform your client that an inexperienced contractor, or one who is incapable of managing its own forces or coordinating subcontractors, may request information that is often present in or apparent from the contract documents. The client should understand that responding to such requests could cost you extensive time and effort, time and effort for which the client should pay.

Your client should also be aware that, in some cases, RFIs exist only to call into question the adequacy of the contract documents so that the contractor can later request additional time or compensation. If the client understands that some contractors use massive numbers of RFIs to enable the contractor to increase its compensation, the client should accommodate having a clearly enforced process built into the general conditions of the contract for construction.

Understanding the reasons for RFIs is the first step. It is also necessary to make the client aware that delays, including those caused by a client's indecision, can severely impact project progress and cost. Developing a reasonable system to respond to appropriate requests for information—and to eliminate the inappropriate ones expediently—is desirable.

Resources

The standard documents create a system to evaluate RFIs, or to charge the client or recover costs from the contractor for providing information that already exists or is inferable from the contract documents. In B101-2017, §3.6.4.4 states the following:

> **The Architect shall review and respond to requests for information about the Contract Documents. The Architect shall set forth, in the Contract Documents, the requirements for requests for information. Requests for information shall include, at a minimum, a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested. The Architect's response to such requests shall be made in writing within any time limits agreed upon, or otherwise with reasonable promptness. If appropriate, the Architect shall prepare and issue supplemental Drawings and Specifications in response to the requests for information.**

Further, the architect has the contractual right to payment for additional services when:

> **responding to the Contractor's requests for information that are not prepared in accordance with the Contract Documents or where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation.**

Under EJCDC E-500 (2020 edition), the engineer is responsible to:

> **accept from Contractor and Owner submittal of all matters in question concerning the requirements of the Construction Contract Documents (sometimes referred to as requests for information or interpretation—RFIs), or relating to the acceptability of the Work under the Construction Contract Documents. With reasonable promptness, render a written clarification, interpretation, or decision on the issue submitted, or initiate an amendment or supplement to the Construction Contract Documents.**

Commentary

On any construction project, there is a constant flow of information between the project participants by means of a variety of media. Drawings are revised, shop drawings are submitted, reviewed and returned, change orders or field orders are issued, questions are asked, and clarifications are provided. Cumulatively and individually, these exchanges of information are essential for building the project as designed. Acknowledge and record the communication flow during the course of a project to help resolve any after-the-fact claim setting.

Rarely does a set of construction documents completely or accurately reflect every element of the design. In fact, the professional standard of care contemplates that some degree of imperfection will exist in those documents and that some details are more appropriately developed during the construction process, often in association with the contractor's development of shop drawings and other submittals. During construction, the contractor is likely to have questions about the design intent or information provided in the contract documents and you should expect a reasonable number of these types of questions or requests for information. As the responsibility for the delivery of design elements of a project delegates to the contractor to design and build components of a project, the issue of RFI management will become more critical.

At times, the requests are in response to insufficient project documentation or ambiguities. Often, such RFIs are not the result of a basic need for additional information, or the consequence of inadequacies in the plans and specifications. Requests for information often come from contractors who do not have the necessary understanding of the plans and specifications or who will not take the necessary time to coordinate the work of subcontractors. Other contractors may simply be unwilling to exert the effort or are incapable of recognizing and understanding the information they already have. Additionally, some contractors constantly seek more information regarding drawings, specifications, site conditions, and other project concerns as a foundation for a delay claim based on inconsistent or incomplete information from the design professional.

It is important, however, that no party manipulate this clarification process. The contractor could use a request for information to justify additional costs or delays. In addition, information not clearly present in the contract documents could create a situation where a client pays a contractor for designing to correct an omission or resolve an ambiguity when the client feels that such a design element was your responsibility.

Certainly, the preparation of an RFI form, and the requirements that a contractor provide evidence on that form of a good-faith attempt to find the information and specify the need for information, would mitigate problems with RFIs and minimize the disruptions and added costs to the client.

RISK ALLOCATION

Issue

You want to assist your client on a project that involves risks you have identified as being beyond your control or far in excess of any benefit you will receive by performing such services for your client.

Concern

Every contract allocates risk, but not all contracts allocate risks equitably or in such a way that it also allocates the authority to manage the risk. You should have a realistic understanding of the risks that might have an impact on your firm's delivery of services and long-term financial health. In assessing the level of risk your firm may face, you must objectively and subjectively determine if your firm's resources, abilities, and authorities can manage the risks.

You cannot easily quantify some risks; others are beyond your firm's ability to manage. When you evaluate a project and a client, identify these risks and negotiate a fair allocation. Concern should continue, however, for contractual solutions, such as indemnification provisions or limitation of liability agreements, where the protection sought may be little more than illusory.

Response

If you and your client reach an understanding that a particular risk on a project is one over which you have no direct control, should continue to be the client's risk, or would have such an adverse impact that the fee for your services is disproportionate to the risk, you and your client can agree to limit your risk. You can negotiate a release from any liability or limit your risk to a specific dollar amount, your fee already earned, or available insurance proceeds. In addition, your agreement could involve the client protecting you against third-party claims by defending and indemnifying you for any costs, losses, or damages to you from such claims. Your allocation of the risk could also be accomplished through a contractual adoption of comparative negligence; through an exclusion of or indemnification for incidental or consequential damages; or through the creation of a "safe harbor" for anticipated change order costs so that you are protected from client claims resulting from anticipated imperfections and necessary additions to the construction documents.

Resources

Exhibit I of EJCDC E-500 (2020 edition) includes options for realistic limitation of liability provisions in addition to the limitations and exculpations contained throughout the professional services agreement.

AIA B101-2017 also contains two basic limitation of liability provisions; the first is in §6.7. The provision applies when the bids or negotiated proposals exceed the budget for the cost of the work and the client wants you to modify the construction documents. The redesign is the limit of your responsibility and precludes the client from legal actions to recover additional financing costs, lost profits, or other financial impacts of the delay necessary for the redesign.

AIA B101-2017 also has a separate "mutual waiver of consequential damages" in §8.1.3, which exists to limit the risks of both you and your client. The AIA also includes in B103 language that clearly indemnifies the client for harm caused by your negligence. The language goes on to limit that indemnity to "the available proceeds of the insurance coverage required by this Agreement," which could result in no payment in the case of negligence in the performance of professional services if your professional liability insurance policy's aggregate limit has been eroded by other claims or defense costs.

Commentary

Risk allocation can work in a number of ways. While clients often demand to shift risks away from them to you or the contractor, in many situations the risks should stay with the client. The logical principle is that each risk should generally be borne by the party best able to control and insure against that risk. Parties to a contract should acknowledge their respective duties and agree to the authority and compensation to permit the discharge of their respective responsibilities.

On many projects, there is a disparity between the potential risks the client wants you to assume and the amount of control you have over those risks. In addition, the compensation may not be adequate to allow you to use the appropriate practice management techniques to minimize the risk or to compensate you for the business decision of assuming the risk.

There are a variety of ways to achieve a fair allocation of liability risk on a contractual basis between you and your client. These contractual devices fall into two broad and sometimes interrelated categories, described below.

INDEMNIFICATION OBLIGATIONS

You would be defended against any claims and indemnified for any costs, including expenses, losses, or damages to you caused by risks beyond your control. Thus, if one party brings a meritless claim against your firm, the indemnification provision could protect your firm and pay for the significant costs and non-billable time caused by such a claim.

LIMITATION OF LIABILITY PROVISIONS

If risks are disproportionately high in comparison to the fee or ability of your firm to control the risk factors, or if you encounter unique risks or those for which no insurance is available, the liability to the client could be waived or limited.

Courts discourage provisions used specifically to shift risk or limit liability by protecting a party against its own negligence. If you do not specifically negotiate broad-form indemnification or limitation of liability provisions, they are often subject to legal attacks. Before negotiating any such provision, you should consult with legal counsel to determine whether the suggested language is legally enforceable in the applicable jurisdiction and what risks it transfers or limits. As a rule, courts will strictly construe the language of a limitation of liability clause or indemnification provision against the party seeking the benefit of the contractual obligation so such provisions must be specific and unambiguous.

SCHEDULE CONCERNS

Issue

Time is of the essence for your client and your client wants time to be of the essence for your performance of services for completion by a specific date.

Concern

Timely performance of professional services is a concern for all clients. Clients have a vital interest in eliminating as much uncertainty as possible, and mandates on the time of performance attempt to make a highly variable process fit into a precise time schedule. Your client may attempt to force specific time limitations on you or establish late-performance penalties, such as through the inclusion of liquidated damages provisions.

A "time is of the essence" provision could convert any schedule slippage past a stated time constraint into a material breach of the contract for services. Thus, the client could use any minor delay as the basis of a claim for damages or as a justification for termination of the agreement. Accepting such a provision may mean an assumption of the consequences.

Time limits for professional services must be reasonable and adjustable for events beyond your control. Do not state schedules as a guarantee of timely performance or otherwise state them as absolutes.

Response

You should be able to develop a reasonable schedule for the performance of professional services that does not impinge on your ability to provide the services consistent with professional skill and care. Your client needs to understand that arbitrary attention to interim deadlines can result in more refinements needed later in the design process or during construction. In addition, you should be able to convince your client that project schedules rarely accommodate the unexpected and that absolute deadlines are not appropriate in connection with the performance of professional services because they may force you to choose between the exercise of sound professional judgment and the schedule. Educate your client that liquidated damages provisions, which authorize a stated amount of recovery for any delay, create a contractually assumed liability that your professional liability insurance may not cover. Your professional liability insurance policy only covers actual damages that are the result of your failure to meet the standard of care for the professional services you perform—your "liability in the performance of professional services."

Resources

EJCDC E-500 (2020 edition) discusses the issue of timely performance in Article 3, titled, "Schedule for Rendering Services," and in Exhibit A, which further describes the engineer's services. One of the attributes of the "Schedule for Rendering Services" is the language that limits the liability of the engineer through this provision:

> **If Engineer fails, for reasons within control of Engineer, to complete the performance required in this Agreement within the time set forth, as duly adjusted, then Owner shall be entitled, as its sole remedy, to the recovery of direct damages to the extent, if any, resulting from such failure by Engineer.**

The standard language of AIA B101-2017, §2.2, refers to services being performed "as expeditiously as is consistent with professional skill and care and the orderly progress of the Project." You can include specific scheduling requirements as an attachment.

Commentary

Many clients and their attorneys attempt to apply language typically used in construction contracts to the performance of professional services. With absolute provisions such as a "time is of the essence" clause, the client is attempting to impose a risk on you that is contrary not only to your interests, but also to the client's best interests.

Whenever a client dictates an arbitrary and mandatory schedule, make the client aware of the difficult situation faced by you when the schedule interferes with the exercise of usual and customary professional care as required by professional licensure laws. No client should force you to choose between breaching the contract requirements and curtailing sound professional practice in a manner that could jeopardize the integrity of the project or the safety of the public.

A "time is of the essence" provision essentially places the highest level of importance on the timeliness of performance. Any failure to meet the schedule is a material breach of the contract. While the law requires only that you provide professional services with reasonable promptness based on individual facts and circumstances, if the contract requires a different level of performance, you must deliver services in strict accordance with such a requirement. Therefore, not meeting interim deadlines or not responding to construction phase obligations in the timeframe established could represent a material breach. Such a material breach could provide the opportunity for the client to avoid payment of fees and establish your contractual liability for damages based on the delay.

It is important that any schedule for professional services allow appropriate time for design exploration and coordination of subconsultant services, without tying the schedule to events beyond your control. All schedules need to be adjustable for delays caused by circumstances beyond your control.

You should acknowledge the importance of the client's project schedule and pledge that you will use appropriate professional efforts to perform the services in a manner consistent with the schedule. However, the client must understand that the law and standard of professional ethics guides your performance of sound judgment and practice.

SHOP DRAWINGS

Issue

Your client's standard contract requires you to approve shop drawings to assure compliance of the work.

Concern

Clients sometimes attempt to place a greater duty on you beyond your normal review of shop drawings, which is only "for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents," as required in the standard agreement forms. Clients may want an increased level of review to assure compliance with applicable laws and that the work represented by such submittals will comply with the requirements of the contract documents. In providing professional services for shop drawings and other submittals, you should:

- review requested shop drawings for a purpose that is reasonable given your authority and ability;
- establish a clear and enforceable procedure to carry out the duty;
- document a course of action that indicates you followed the procedure; and
- use a shop drawing stamp that accurately reflects your contractual duty and limitations.

Response

Clearly, assuming responsibility for "assuring" compliance provides an unreasonable guarantee. It is also a commitment not covered by insurance. If you perform services for a client who wants such expanded services, you should be very careful in preparing the contract and performing the duties. The client should properly compensate you for providing enhanced services and for the increased effort and expanded risk since your firm's exposure to claims from the client and contractor is significantly increased. If you agree by contract to provide greater services than are normally required, you should modify your stamp to reflect the duties and the language of the contract.

Resources

The provisions stating the normal services and applicable standard of care in the review and approval of shop drawings are in Exhibit A. § 1.06 of EJCDC E-500 (2020 edition) and § 3.6.4.2 of AIA B101-2017. The protections afforded both you and the client by the standard language are pragmatic if you carefully perform your duties and demand that the contractor perform its contractual duties in an appropriate manner. In both standard contracts, it is clear that the review is for communication purposes and that shop drawings do not constitute contract documents—the official construction obligations of the contractor.

Commentary

While the language you include on a shop drawing stamp is critical, so are the following items:

- developing a system of scheduling the submittal of shop drawings;
- creating the in-house procedure for a prompt and contractually appropriate review;
- insisting that the contractor check and approve shop drawings prior to submittal; and
- committing to returning unrequested shop drawings.

It is reasonable that you only request needed shop drawings, in your professional opinion, since any affirmative action taken in response to a shop drawing submittal is "approval" in the eyes of the law. If you have not asked for a submittal, but the contractor provides one and you examine it and return the submittal to the contractor without objections noted, the contractor will likely assume that you have approved the shop drawing.

The wording on shop drawing stamp disclaimers should express the concept that it is the contractor's responsibility to provide shop drawings and other requested submittals so that you can determine if the contractor understands the contract documents. It is not the purpose of shop drawings to assure that the contractor is meeting the requirements of the contract documents.

While you may assume responsibility for a more extensive review of shop drawings without jeopardizing professional liability insurance coverage, it is essential that you and the client know what is required in the review process. Clearly, you and your client should agree that the effective review of shop drawings is important and that it is imperative to compensate you properly for the time and risk involved. Your client could increase the effectiveness of shop drawings by making contractors aware of their responsibilities to check shop drawings before submitting them; to adhere to the shop drawing submission schedule accepted by you; to call attention to any variations; and to meet the other requirements and responsibilities of the general conditions.

The client should recognize you as reviewing shop drawings solely for their conformance with the design intent and information given in the contract documents. Such review does not mean you assume responsibility for any aspects of a shop drawing submission that affect the means, methods, techniques, sequences, or procedures of construction or for safety precautions (all of which are the contractor's responsibilities), unless you agree to such responsibility.

SAMPLE SHOP DRAWING STAMP

You may be inappropriately apprehensive over the use of "approved" on a shop drawing stamp. It is clear that whether or not the word "approved" or some other word is used, the same legal consequences will follow. You may want to avoid the implication of having accepted the item for the project as originally specified in the contract documents, but that implication is precisely the reason for the required submittal and review.

The following language is often suggested as a shop drawing stamp:

- **Approved**
- **Approved as noted**
- **Revise and resubmit**
- **Rejected**

Approval is only for general conformance with the design concept of the Project and the information given in the Contract Documents. Contractor is responsible for dimensions to be confirmed and correlated at the job site; information that pertains solely to the fabrication process or to the means and methods of construction; coordination of the work of all trades; and performing all work in a safe and satisfactory manner. This approval does not modify Contractor's duty to comply with the Contract Documents.

The first category is self-explanatory. The second is used when minor changes need to be made and you feel confident that a subsequent submittal is unnecessary. Some firms use "Approved as Corrected," but such language may imply that the contractor can rely on the changes made by you. The third category is used when changes are noted or are so extensive they are not worth noting and you need a resubmittal.

The last category has a variety of uses. If a shop drawing comes directly from a subcontractor instead of through the contractor who, according to its contract, may be contractually obligated to coordinate the work by checking and approving the submittal, it should be rejected. If a shop drawing is not required, it should be rejected with a note such as "not required by the contract documents." You can include such a category on your stamp or have a separate stamp with this statement. Any deficient shop drawing or other submittal from the contractor should also be rejected.

SITE SAFETY DISCLAIMER

Issue

Your client asks you to review the contractor's safety program to protect public safety on the site and expedite completion of the project.

Concern

Once the contractor signs the construction agreement, the contractor is in control of the site and the construction workforce. Therefore, the contractor is in the best position to implement and monitor the safety program. You have an obligation as a professional to take some action when you see and recognize a dangerous condition during the course of your on-site services. You must act in a reasonable manner, such as immediately reporting the observation to the contractor's superintendent and following up with proper notice to the client. In some instances, the threat to safety is so manifest that you must take immediate action by mitigating the danger. You could accomplish this by informing workers of the danger and requesting that they take appropriate precautions followed by notice to the contractor and client. Clearly, an immediate response to an apparent danger does not create a duty to monitor further the situation, to examine other areas for dangerous conditions, or to assume the duty contractually placed on the contractor to provide a safe site.

Response

It is inappropriate for you to assume contractual responsibility for safety beyond your professional duty unless the following conditions are present:

- the purpose and the standards for your effort are clear;
- you are capable of performing the service, willing to accept the responsibility and risk, and are compensated accordingly; and
- there is no "co-responsibility" with the contractor or another party not under your control.

Unless the professional services agreement requires specific actions, your contract should disclaim any responsibility for safety. The extent to which your contract might involve you in reviewing procedures, monitoring safety programs, or serving as a full-time project representative involved in protecting workers should be carefully negotiated and reviewed by legal counsel.

However, even in using standard site safety disclaimer language, the guiding rule seems to be that if you recognize an unsafe condition, you should report it to the person most capable of dealing with the condition, i.e., the construction superintendent, and inform the client (who retains the power to stop the work) or the appropriate government officials.

Resources

For over six decades, the standard professional services documents have clearly demarked responsibility for construction site safety. Paragraph 6.01.I of EJCDC E-500 (2020 edition) states:

> **Engineer shall not at any time supervise, direct, control, or have authority over any Constructor's work, nor will 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.**

In AIA B101-2017, § 3.6.1.2 disclaims any responsibility of the architect for site safety based on the contractor's control of the site and the performance of the work. That provision includes this language:

> **The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.**

Commentary

Unless you have special skills or are acting in a construction management role, you should avoid any obligation to review safety programs; any co-responsibility with the contractor for the creation or implementation of safety precautions; or any assumption of responsibility for safety on the construction site beyond the safety of your staff. Generally, there is no rationale for you to review the content of safety programs or the nature of the procedures because there is no need to coordinate the activities of the client with those of the contractor. If you commit to a review, however, checking only for the existence of safety programs and procedures may be appropriate. If you are performing construction management activities, however, courts will hold you to a higher standard of responsibility for site safety even if the contractual duties attempt to limit your responsibility.

The contractor is in control of the site and the workers and is therefore in the best position to implement and monitor the safety program. The contractor also profits the most from a safe site. You do have an obligation as a licensed professional to protect public safety and to take reasonable action when you observe a dangerous condition. Usually, it is reasonable for you to report immediately the observation to the contractor's superintendent and to follow up with proper notice to the client. It is not reasonable, and may be an assumption of safety responsibilities, for you to recommend how to solve the safety problem.

In some instances, the danger to you, the construction workers, or the public is so apparent and manifest that you must take immediate action by mitigating the danger, such as by informing workers of the danger and requesting them to take appropriate action. It is clear that an immediate response to a conspicuous peril does not create a continuing duty. An immediate action by you responding to a specific, recognized unsafe condition does not require further monitoring of the situation or create a duty to examine other areas for dangerous conditions. Responding to public safety concerns does not mean you assume the duty contractually placed on the contractor.

Consistent court decisions state that unless you observe an unsafe condition that obviously amounts to an immediate peril, your duty is to report the condition to the entity most capable of dealing with the condition. In most situations, notify the construction superintendent. If the dangerous situation is constant or recurring; could result in a threat to the safety of areas adjacent to the construction site; or indicates the contractor's inability to meet contractual or legal requirements, report that hazardous condition to the client, who should be made aware of such a breach of contract, and perhaps notify government officials charged with protecting worker and public safety. If the danger is obvious and immediate, prudence requires immediate actionThe wording on shop drawing stamp disclaimers should express the concept that it is the contractor's responsibility to provide shop drawings and other requested submittals so that you can determine if the contractor understands the contract documents. It is not the purpose of shop drawings to assure that the contractor is meeting the requirements of the contract documents.

STANDARD OF CARE

Issue

You marketed your services based on your expertise and qualifications, but now your prospective client wants you to agree to perform to the highest professional standards.

Concern

There is a significant difference between promotional information (often called "mere puffery") and a contractual commitment to meet a standard of care beyond that normally expected of you. In some cases, such as in meeting the "highest" professional standards, the suggested language is evidence of either an unsophisticated client or a client who is ingeniously manipulative. If seen as inspirational, such language as a contractual obligation can distort the client's expectations. In other situations, use of an unmeasurable or absolute standard of care means that regardless of the quality and competence of the services provided, you will be in breach of the contractual obligation.

The law recognizes that you provide professional services based on reasoned judgment and that there is no one correct course of action. While a client may want a precise definition of the services and the ability to judge performance based on objective criteria, such exactness is not possible because of the unique characteristics of each project and the latitude allowed under law for the application of professional skill and experience to the challenge each project presents.

Response

The AIA and EJCDC documents clearly indicate that meeting a professional standard of care is a contractual obligation. While it is reasonable for a client who selects you based on special expertise or demonstrated competence to ask that you meet a more specific standard of care, the raised standard must be measurable and attainable.

You can avoid the problem of unfulfilled expectations or the legal coercion of an unrealistic or impossible standard of care by carefully crafting contract language to reflect a standard of care applicable to the type of project, the specific practice characteristics of a specially qualified group of firms, or the locale of the project. You should clearly distinguish between advertising hyperbole, such as might be present in your marketing brochures or on your website, and your clearly negotiated contractual obligation.

Resources

Paragraph 2.2 of AIA B101-2017 includes the well-established standard of care applicable to your services and further defines it through the description of services you will provide. The AIA language is 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 EJCDC E-500 (2020 edition), § 6.01.A. describes the standard of care applicable to your performance or furnishing of services. The EJCDC paragraph also disclaims the existence of any implied or express warranty in connection with your services. It states:

> **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.**

Commentary

Courts have described the common law standard of care applied to the performance of professional design services as a "duty to exercise the degree of learning and skill ordinarily possessed by a reputable design professional practicing in the same or similar locality and under similar circumstances." Legal precedent imposes this common law standard of care on you if a contract is silent as to the standard of care.

Clients often seek to change the standard of care by requesting that you perform to certain standards. At times, clients who are unaware of the professional duty to provide services in a non-negligent manner attempt to include vague or absolute language such as a reference to meeting "highest" professional standards. Other clients, knowing that you cannot meet a vague standard such as the "highest" or "best," include the language so that they can hold you to an unachievable standard and validate a breach of contract claim.

When clients seek to change the standard of care, discuss with the client the practicality of a modified performance measure. If the client selects and compensates you for your special skills, experience, or talent, replace the uncertain meaning of "highest" with a measurable standard of care. If the client is attempting to force you into a situation in which you must perform your services perfectly to avoid being in breach of a contractual duty, recognize that you would be foregoing many protections otherwise provided by common law. You are assuming a level of responsibility that may be unattainable.

In all 56 jurisdictions, the American legal system recognizes that you cannot guarantee a perfect result. Professional liability insurance only provides coverage for damages caused by your breach of a standard of reasonable care. A standard of care that demands perfection essentially places you outside of your normal legal liability and professional liability insurance coverage.

Use caution when modifying the standard of care for professional and related services performed or furnished by you. If a client demands a standard of care beyond that consistent with due professional skill and care, the standard should be measurable and you should receive compensation related to the increased services necessary and increased risk assumed under such an agreement.

About Victor

Victor Insurance Managers LLC is the world's largest managing general underwriter with locations in the US, Canada, UK, Netherlands, Germany, Italy, and Australia. It handles more than $2.5 billion USD in premium on behalf of numerous insurance carriers, through a large network of more than 25,000 active insurance agents and brokers. With deep, specialized underwriting expertise, the company provides a wide range of insurance coverage – from specialty property and casualty and professional liability insurance to group and retiree benefits. Victor is committed to building on 60-plus years of experience to develop products that address risk in new and evolving areas. For more information, visit victorinsurance.com.

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