



RLI[®]

DIFFERENT WORKS

 **WILSON ELSER**
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Risk Allocation, Contractual Defenses and General Risk Management Practices to Mitigate Claims

DPLE 283

November 2, 2016

RLI Design Professionals is a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members are available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.



Copyright Materials

This presentation is protected by US and International Copyright laws. Reproduction, distribution, display and use of the presentation without written permission of the speakers is prohibited.

© RLI Design Professionals



Course Description

The course will address issues of importance for Architects and Engineers including: allocation and management of risks and avoidance of claims; key contract provisions and concerns; and recent legal developments and trends.

Learning Objectives

Participants in this session will:

Understand the concept of Risk Management and its application to the professional practice of architecture and engineering, including client relations, contract negotiation, and construction phase services;

Identify the possible defenses to a professional liability claim;

Spot and recognize the nuances of various contract clauses that may result in increased exposure to risk and potential professional and other liability;

Formulate a strategy for shifting, transferring, mitigating, and managing risk through: client education, controlling, and managing client expectations, limiting liability, qualifying and conditioning contract language, and monitoring continued exposure to risk throughout the duration of a project or a client relationship.

Guest Presenter



Wendy Testa, Esquire

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP

Smart Contracting

- Effective ADR
- Scope of Work
- Cost Estimates
- Standard of Care
- Site Visits
- Compliance with Laws and Codes
- Limitations to Liability
- Termination
- Ownership of Documents
- Duty to Defend, Indemnify and to Insure Another



Effective Alternative Resolution (ADR) Clauses

- Agreed upon and SPECIFIC terms
 - Have a detailed resolution process that is
 - Realistic
 - Attractive
 - Negotiated
 - Do not forget to address the details such as specifically what issues would be addressed under ADR
 - “anything arising from a contract”
 - Select a location for arbitration/mediation
 - Specify a selection process for an arbitrator/mediator

Mediation v. Arbitration

- Benefits to Mediation:
 - Non-binding (not a final decision)
 - Flexibility
 - Less costly than trial
 - not all arbitration forums are equal
 - Very open to negotiation
 - Resolve dispute under “relaxed” terms
 - Arbitration awards may be final / binding decision or difficult to appeal
 - Arbitration allows for limited discovery
 - Arbitration is more adversarial than a mediation (like a mini trial)



Effective Alternative Resolution (ADR) Clauses

- Steps to effective resolution
 - Ease of process
 - Time limited steps prompt resolution
 - Agreed to by all
- Do not agree as a nonparty to be bound by arbitration
- Requirement of contract between other on job (e.g., owner/GC/CM)



Scope of Work—Avoid wearing too many hats

- Design professionals trying to add value to services provided
 - Detail must be provided in scope
 - Actual work done on project must follow work outlined in scope
 - Avoid ambiguity in scope and titles for your role on the job
 - E.g. different names or titles for you throughout the contract
 - Avoid performing services outside traditional scope of design professionals services
 - DOCUMENT



Cost Estimates

- Design professionals should make no guarantee or warranty that a project can be built within the estimate
- Insist that an owner identify a project budget in writing
- If a project does not move forward within specified time period, a cost estimate may be revised
- Design professionals should limit responsibility for redesign due to reduced scope or budget constraints



Example of favorable language for cost estimates

ARTICLE 6 - OPINIONS OF COST AND SCHEDULE

- 6.1 Since Consultant has no control over the cost of labor, materials, equipment or services furnished by others, or over contractors', subcontractors' or vendors' methods of determining prices, or over competitive bidding or market conditions or economic conditions, Consultant's cost estimate and economic analysis shall be made on the basis of qualification and experience as a professional.
- 6.2 Since Consultant has no control over the resources provided by others to meet contract schedules, Consultant's forecast schedules shall be made on the basis of qualification and experience as a professional.
- 6.3 Consultant cannot and does not guarantee that proposals, bids or actual project costs will not vary from his cost estimates or that actual schedules will not vary from his forecast schedules.

Standard of Care

- Avoid assuming a heightened standard of care
 - Accepting relationship of trust and confidence
 - Assuming fiduciary duty
 - Convenient or promise to perform to our best skill and judgment
- The best language to use will compare you:
 - To a similarly situated design professional
 - Reasonably prudent design professional
- Recommended language can be found in AIA Document B101 Section 2.2

Standard of Care

We recommend language similar to this AIA-approved language:

“The Architect shall perform its services consistent with the professional skill and care ordinarily provided by members of the profession 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.”

(See AIA Document B101, Section 2.2)

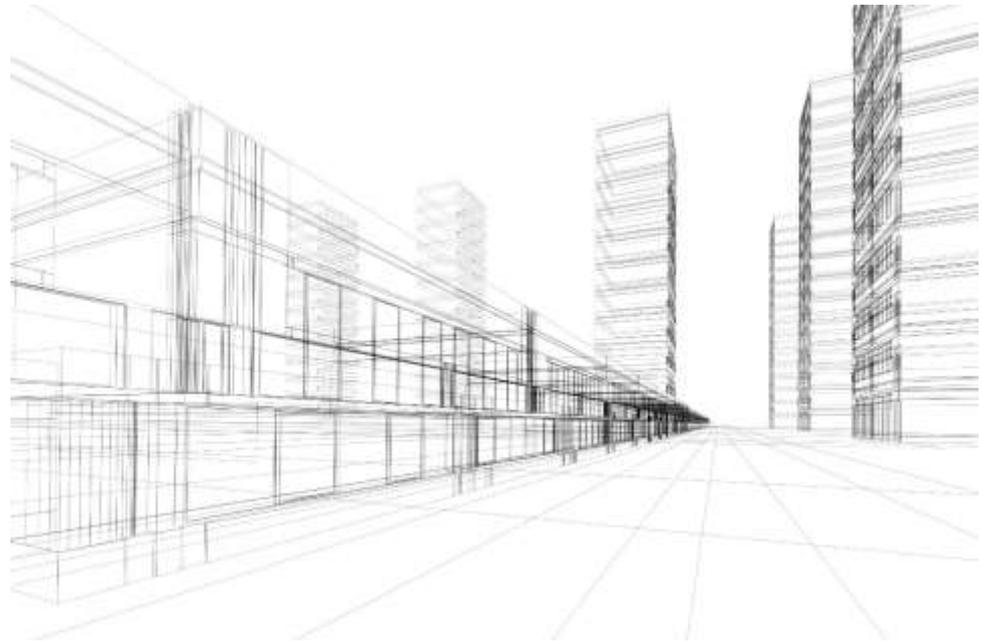
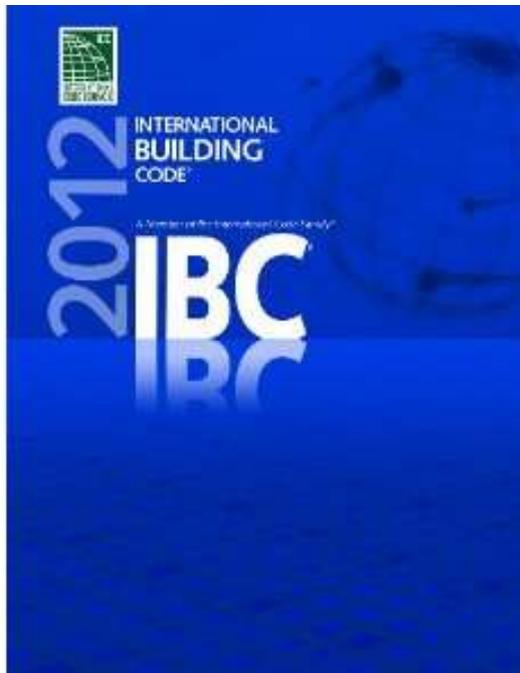
Site Visits

- Identify these as observations, not inspections, to avoid an assumption of duty to supervise the work
- Documenting and photography while on site is critical
 - Multiple design professionals on a project (clear delineation of work)
 - Predecessor design professional
 - Preexisting issues on job –resolve before your entry onto the site
 - Abandoned and restarted projects
- Regular site visits may result in an assumption of a duty to supervise the work
- We caution against language stating that the DP will be present during critical periods
 - What if something goes wrong and you are not there?
 - Breach of duty



Compliance with Laws & Codes

Some contracts may mandate compliance or specify that failure to maintain compliance will place a professional consultant in default.



Compliance with Laws, Codes, Etc.

2.8 Compliance with Law. Professional Consultant and its Services shall comply with, and Professional Consultant shall ensure that Professional Consultant's Representatives and their Services comply with the Law in effect at the time any Services are performed, and all conditions of any approvals or permits issued by a Public Entity that relate to a Project. Any Loss Caused By Professional Consultant's failure to comply with the Law shall be at Professional Consultant's Sole Cost.

1.20 Law. "Law" means any applicable federal, state, county, city and local law, statute, ordinance, code, rule, regulation, injunction, order, decree, judgment, license or permit, as amended from time to time.

Compliance with Laws, Codes, Etc.

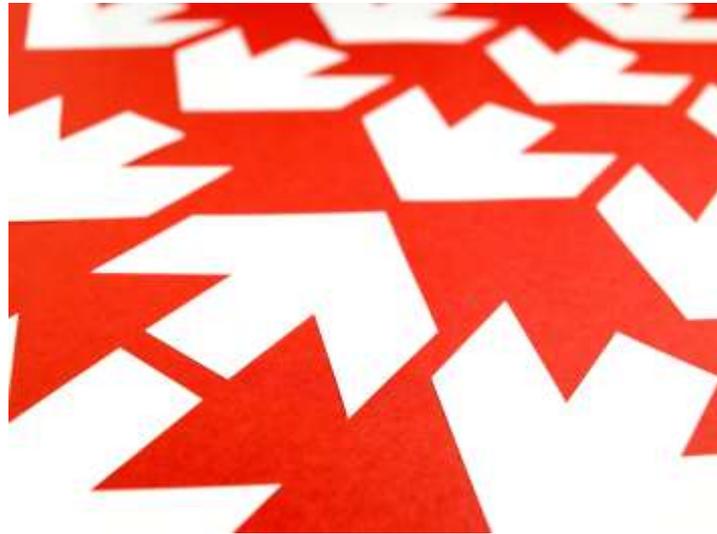
Why is this a problem?

7.1 Default. Professional Consultant shall be in default of this Contract if:

- (a) Professional Consultant becomes insolvent, is adjudged a bankrupt or institutes a bankruptcy, insolvency, reorganization, dissolution, liquidation, readjustment of debts or similar proceeding, or makes a general assignment for the benefit of its creditors, or becomes a subject of any proceeding commenced under the Law for the relief of debtors which is not dismissed within thirty Days after commencement;
- (b) A receiver, trustee or liquidator is appointed as to any property or income of Professional Consultant;
- (c) Professional Consultant fails to comply with the Law;
- (d) Professional Consultant fails to make proper payment to a Professional Consultant's Representative or other payees unless Professional Consultant's nonpayment is due to a default by such Person in their obligations to Professional Consultant, or Owner's default in its obligations under this Contract to pay Professional Consultant for such portion of the Services;

Limitations of Liability

Drafter beware: Contract ambiguity will likely be interpreted in favor of the party who did not draft the document.



Limitations of Liability

- Evidence that a contract was negotiated strengthens the chance of enforcement
 - Put communications about proposed changes in writing
- Most courts will uphold clauses limiting liability if they appear overreaching or against public policy
- Limitations on liability are more likely to be upheld than “hold harmless” clauses

Limitations of Liability

Takeaway: There should be a reasonable relationship to limiting damages and costs of service or design professional involvement on a project.



Termination

- Termination for convenience—must ensure sufficient notice
- Termination for cause
 - Make sure design professional also has a right to terminate for an owner's breach
 - Make sure there is a cure period



Ownership of Documents

- Owner should not be entitled to drawings, professionals are selling services (i.e., the building).
- Recommend a non-exclusive license to the owner
- If ownership is insisted, include indemnification language and do not represent that the documents are complete.



Contractual Obligations to Defend, Indemnify, and Provide Coverage

- Professional liability (PL) policies cover professional services of its insureds only.
- Insurer pays on behalf of its insured if insured is negligent while performing professional services



Professional Liability (PL) v. General Liability (GL)

- You may be able to obtain additional insured status under another's GL policy if policy language provides for it
 - Caveat—what is promised for in contract, may not be provided for under promisor's policy
- Design professionals **NEED BOTH PL and GL policies**
 - But must be wary of coverage gaps based on different types of policies

Indemnification Clauses in Contracts

Not typically available under PL policy of another
EVEN IF PROMISED (with a few exceptions...limited
endorsement)



Indemnification Clauses in Contracts

- To the extent you can get it:
 - Hold harmless clauses strictly construed by courts and frequently stricken
 - Can only be indemnified by another to the extent of that other party's negligence
 - Indemnification clauses precluded in some states
 - Know your anti-indemnity statutes
 - Consider split indemnification clauses in contracts
 - Review contractual obligations against policies under which promises are made
 - Even if you are not a contractual indemnitee you may be (or seek) additional insured status

Insurance Clauses in Contracts—What's Important?

- Requiring that the other party gives you a general certificate of insurance (COI) may NOT be enough
 - COI = evidence that party has insurance but not what may be required to afford additional insured status to you



Suggested Insurance Clause Language

- Policy of another required (not just a COI)
- Other party's policy applies on primary basis
- Obligation to provide insurance coverage to defend you should be consistent with indemnification clause
 - BUT two clauses are NON-CONTINGENT
 - For “alleged” negligence—immediate trigger
 - If indemnification clause is stricken by a court → Insurance clause survives
- When it is possible (CGL policy), seek additional insured status.

Takeaways Related to Contractual Risks & Defenses

- Review your contracts and coverage **REGULARLY**
 - Review for consistency
 - Make sure policies respond to promises made in contracts
 - Keep policies up to date on emerging risks
 - Check to see what rights you are afforded under contracts of others (third party beneficiary)
 - Anti-indemnity statutes – know them; vary from state to state
- Enforcement of language is **very** state specific.
 - Have policies reviewed regularly by a knowledgeable professional.

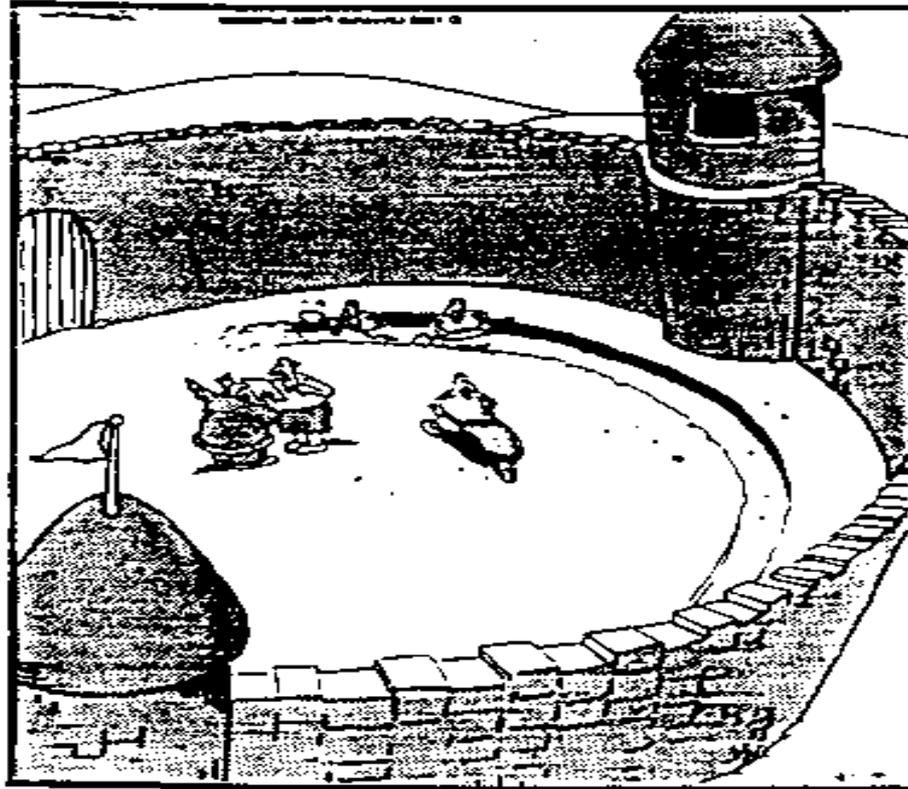
Claim Trends

- Abandoned, Suspended or Restarted Projects
- Green building issues
- Code Changes
- Scope Creep
- “Warranty” statements / assuming heightened standard of care
- New and novel - storm water claims

Risks Related to Restarted Project (DP Previously Involved on Project)

- Before Resuming Work
 - Identify the Scope of Work!
 - Document conditions prior to doing so
 - Beware of “time is of the essence” language; makes the DP the guarantor of the time schedule and is unwise
 - Particularly problematic for restarted projects!





“Suddenly, a heated exchange took place between the king and the moat contractor.”

Risks From Green Design



- Materials
- Timing

Risks Related to Code Changes

Identify all applicable code requirements and performance criteria

e.g. Superstorms (negligent design for failure to design consistent with flood protection); exterior envelope litigation (adequacy of material and requisite thickness of materials used)

Risks Related to “Scope Creep”

- Desire to provide added value to the cost of services
- Performance of services outside the documented scope or outside the traditional professional services performed
- Failure to document change in scope of work
- Failure to confirm whether services you agree to perform under the contract (or outside the original contract) are consistent with coverages
- Mischaracterization of your title or duties on a project

Risks Related to “Warranty” Statements or Assuming a Heightened Standard of Care

- Advertising/marketing materials – avoid guarantee of specific results
e.g. website; others’ marketing materials for the project
- Assuming an expansive role on project by ambiguous language in contract documents / scope of work
e.g. design manager; owner’s agent

Risk Management - Mitigating Losses

- Document, document, document
- Risk training for employees (documented and regularly)
- Vet clients and subconsultants
- Present options to client and document client's directives /selections in design, materials
 - Outline advantages and disadvantages
 - Impact on cost, performance, schedule and aesthetic
- Document Retention: what to keep and for how long
- Project Closeout Procedures (checklist)
 - Review scope v. actual work on project
 - Client signs off on completion
 - Retain detailed project file / checklist – notices to agent of incidents; COs; RFIs and responses; final approvals; contract documents; policies / Cos; communications (electronic/written); observation logs/photos, etc.

Thank you for your time!

QUESTIONS??

**This concludes The American Institute of Architects
Continuing Education Systems Program**



Alayne McDonald, Professional Development Coordinator

Alayne.McDonald@rlicorp.com

Abbey Brown, Client Solutions Manager

Abbey.Brown@rlicorp.com