

RLI[®]

DIFFERENT WORKS

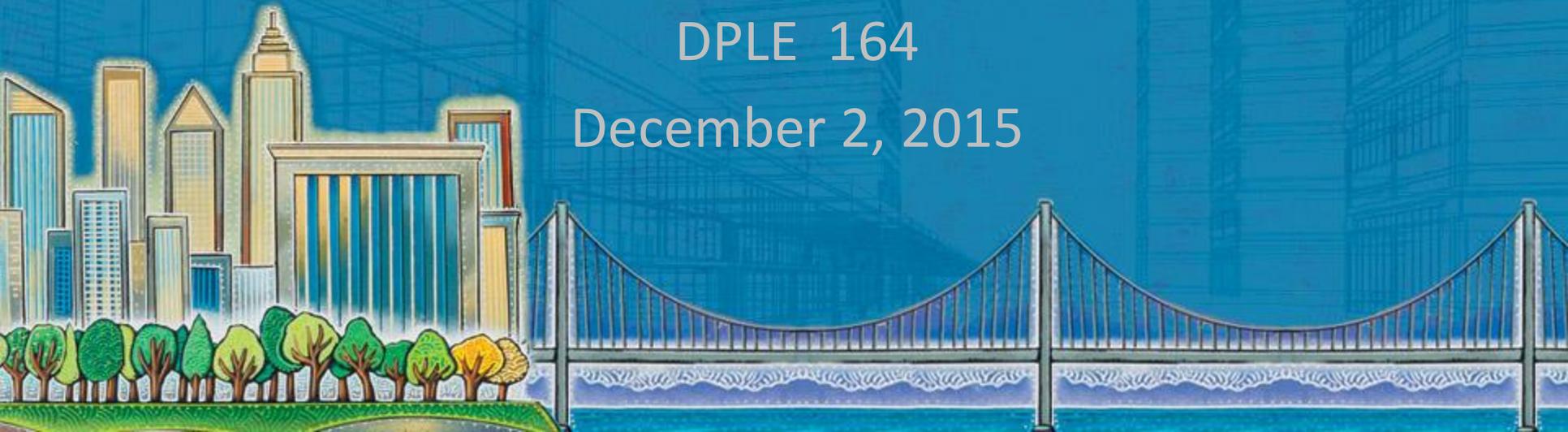
Managing Risk Through Contract Provisions: An Advanced Course in Contracts

RLI Design Professionals

Design Professionals Learning Event

DPLE 164

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Course Description

When reviewing contracts on behalf of our policyholders, rarely do we find a contract that is **fair, balanced, and detailed enough to serve the parties** well throughout the life of a project. Negotiating the various issues can be both time-consuming and frustrating. We've pared down these contract issues into a **checklist of twelve items** that, in our experience, if handled poorly, can become the genesis for a claim. During this course we'll review the twelve items on the checklist that we've found, when handled with care, can serve as **key risk mitigation tools** in a **sound risk management program**.



Learning Objectives

Participants will:



Review key contract provisions that have been shown to serve as the foundation for claims against design professionals;



Explore 4 of those provisions in greater detail;



Evaluate the risks to design professionals that are related to those provisions; and



Learn about resources for negotiation and further study.

Disclaimer

All provisions in this presentation are furnished solely for **educational purposes**.

Nothing herein is **intended as legal advice**, nor as a means of establishing an attorney-client relationship.

Laws and regulations may **vary considerably by jurisdiction**. Accordingly, you are advised to **consult a knowledgeable attorney** before making any contractual modifications.

— *A Wise Lawyer*



The Contract “Dirty Dozen”

Issues that have been shown to increase risk/claims:

- Non-Standard Contract Forms—e.g., Purchase Orders
- Unclear Project Delivery Mode
- Elevated or No Standard of Care Established
- Change Orders/Additional Services Inadequately Addressed
- Unreasonable Indemnification Agreements
- Uninsurable Warranties/Guarantees
- Unfair or No Limitation of Liability in Your Favor



The Contract “Dirty Dozen”—continued

Issues that have been shown to increase risk/claims:

- Information Furnished by Others:
 - Confidentiality Issues
 - No Right to Rely
 - Ownership Rights Unknown
- Unclear, Unfair, or No Dispute Resolution Provision
- No Suspension/Termination Rights for You
- Ownership of Documents
 - Transferred from You
 - Improper or No Protection to You
- Waivers (some favorable/some unfavorable)



“Dirty Dozen” Issues Covered Today

- ❑ Standard of Care (including Warranties/Guarantees)
- ❑ Indemnification
- ❑ Waivers:
 - Subrogation
 - Consequential Damages
 - Liens
 - Trial Waivers
- ❑ Confidentiality



...And One More Disclaimer

RLI reviews professional service contracts to help its insureds:

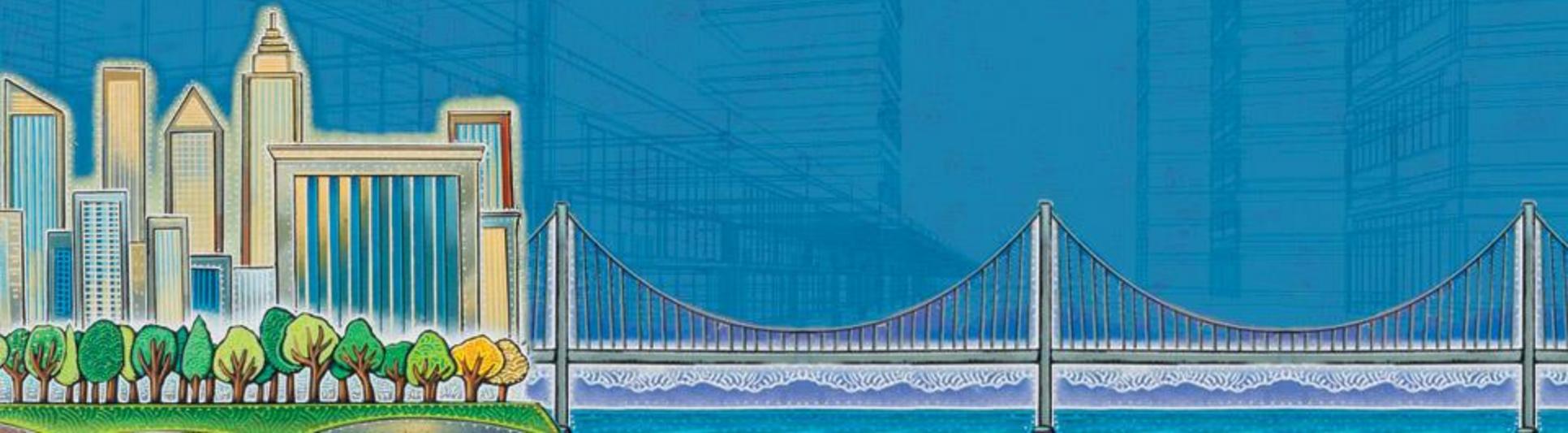
- (1) evaluate compliance with certain insurance requirements;*
- (2) identify contractual requirements that may exceed coverage under insurance policies that are maintained with RLI; and*
- (3) suggest areas of the contract that may pose increased risk to the insured design professional.*

The information contained in the review cannot be relied upon as legal advice. The review does not replace consultation with your own legal counsel, which we strongly recommend.



**Dirty Dozen
Issue #1**

Standard of Care



The Contractual Conflict

The Architect/Engineer shall perform its services under this agreement consistent with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

Architect/Engineer represents (may also include “and warrants”) that its services under this Agreement will be performed in accordance with the highest standards in the profession exercised by nationally recognized (Architecture or Engineering) firms performing the same or services for (type of project).



What is the Standard of Care?

Under tort law...

...the design professional is held to use the same degree of care as is ordinarily practiced by other similarly situated design professionals in that discipline.



What Does the AIA Say?

“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 makes no warranties, either express or implied, with respect to services provided under this Agreement.”



Standard of Care – Often Required

Consultant and its subconsultants will exercise a degree of care commensurate with the **highest** standard of practice in the industry. Consultant will **guard Client against any potential defects in the work.**



Standard of Care – Standard Provision

Consultant shall perform its services consistent with the professional skill and care **ordinarily provided** by consultants practicing in the **same or similar locality** under the **same or similar circumstances**. The Consultant shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.



Elevated Standard of Care – Superlatives and Extremes

We caution against use of:

HIGHEST

MOST

BEST

Total

All

FULL

First class



Elevated Standard of Care - Words That Promise

Assure

Certify

Attest

Ensure

Guarantee

Warrant

Insure

Represent

Shall

Will

**Endeavor
to Guard**

**Free From
Defects**



A Note on Scope of Services

We caution against use of:

One hundred percent compatible

Optimize

State of the art

WORLD CLASS

MAXIMIZE

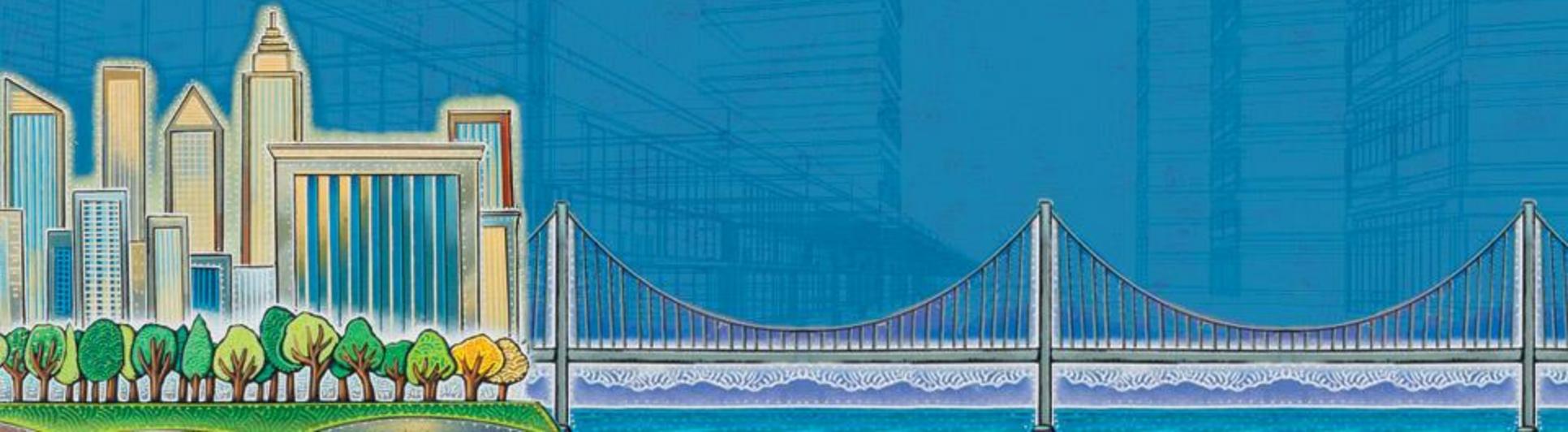
Very innovative and precise

Superior



**Dirty Dozen
Issue #2**

Indemnification



What is Indemnification?

Indemnification is a contractual obligation by one party (**indemnitor**) to pay or compensate for the losses, damages or liabilities incurred by another party to the contract (**indemnatee**) or by a third party.



Broad Form Indemnification



Broad form
indemnification
provisions often
include a
“duty to defend”



Professional Liability Insurance

Correlation ≠ Causation

References to damages that **“arise out of,” “in connection with,”** or **“as a result of,”** (and other similar phrases) the performance of professional services may exceed those damages that are proximately caused by your negligent performance of professional services.



Indemnity – Often Required

To the fullest extent permitted by law, Consultant shall **defend**, indemnify and hold harmless Developer...against **any and all claims... including the reasonable fees of attorneys, arising out of or in any way connected with any act or omission of Consultant**...whether such claims, liens, demands, damages, losses or expenses are based **upon...any other legal...theory whatsoever**, and **regardless of whether or not such claim...is caused in part by a party indemnified hereunder, including the partial negligence of any such party.**



Indemnity – Standard Provision

The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against **damages, losses and judgments** arising from claims by third parties, including **reasonable attorneys' fees and expenses recoverable under applicable law**, but **only to the extent they are caused by the negligent acts or omissions of the Architect**, its employees and its consultants in the performance of professional services under this Agreement. The Architect's duty to indemnify the Owner under this provision shall be **limited to the available proceeds of insurance coverage**.

AIA B503-2007



More Red Flag Words

As a general rule, “Red Flag” words are **B.A.D.**

Breadth

- “arising from”
- “defend”
- “in whole or in part”
- “fees, costs, expenses”

Ambiguity

- “agents”
- “affiliates”
- “representatives”
- “assigns”

Degree

- “any”
- “all”
- “to the fullest extent”
- “highest”



**Dirty Dozen
Issue #3**

Waivers

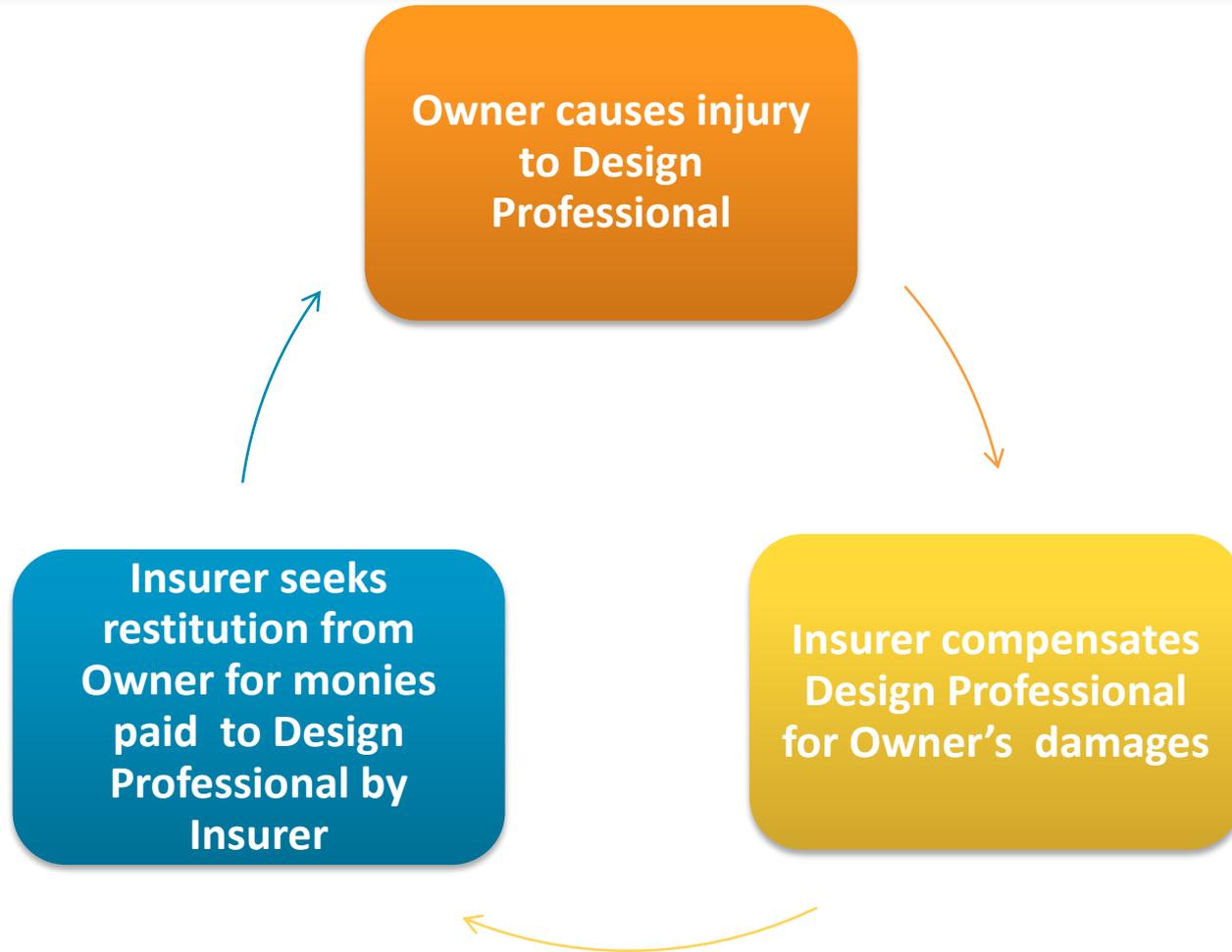


What is a Waiver?

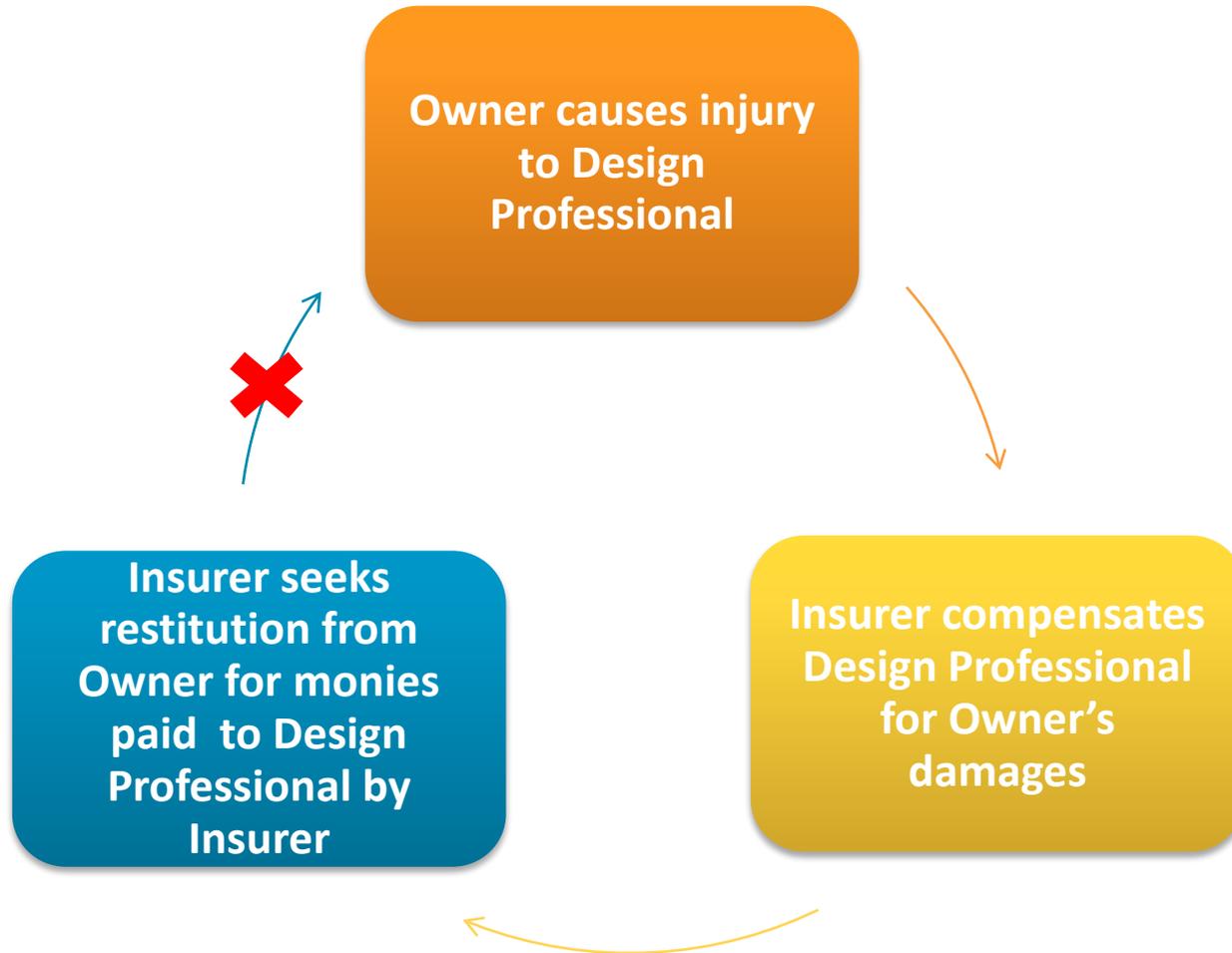
A **waiver** is the **voluntary** relinquishment, either **expressly** or **by implication**, of a present or future right, claim, or privilege.



Subrogation



Waiver of Subrogation



Waivers – Subrogation

What we often see...

Architect shall waive and require its Insurers providing coverage by these requirements,...to waive subrogation rights against the **contractor, owner and all other additional insureds** for losses and damages incurred and/or paid under the insurance policies.



Waivers - Subrogation

What we prefer to see....

The Design-Builder and Design Professional **waive all rights against each other and the Owner, Subcontractors, and Subsubcontractors** for loss or damage **to the extent covered by property or equipment insurance**, except such rights as they may have to the proceeds of such insurance. The Design Professional shall **require similar waivers from its consultants and subcontractors.**

ConsensusDOCS 420-2011, § 7.3



Consequential Damages

Lost Profits

Loss of Use

Loss of Rent

**Interest and
Finance
Charges**

**Additional
Labor Costs**

**Material
Escalation
Costs**

Depreciation

**Loss of
Productivity
and Efficiency**



Consequential Damages Waiver – Standard Provision

Neither the **Client nor the CONSULTANT** shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.



Waiver – Liens

Consultant understands that Client may finance the development or construction of the Project with lenders. Consultant agrees that Client may assign this Agreement to such lenders as security for such loan, and **Consultant agrees to waive or subordinate its lien rights**, if any, to the rights of any such lenders providing financing for the Project. Consultant also **agrees to follow administration and reporting procedures required by such lenders**, and to cooperate with Client in satisfying the requests and requirements of such lenders, and to **deliver such waivers, affidavits, or subordinations of lien as may be required by the lenders.**



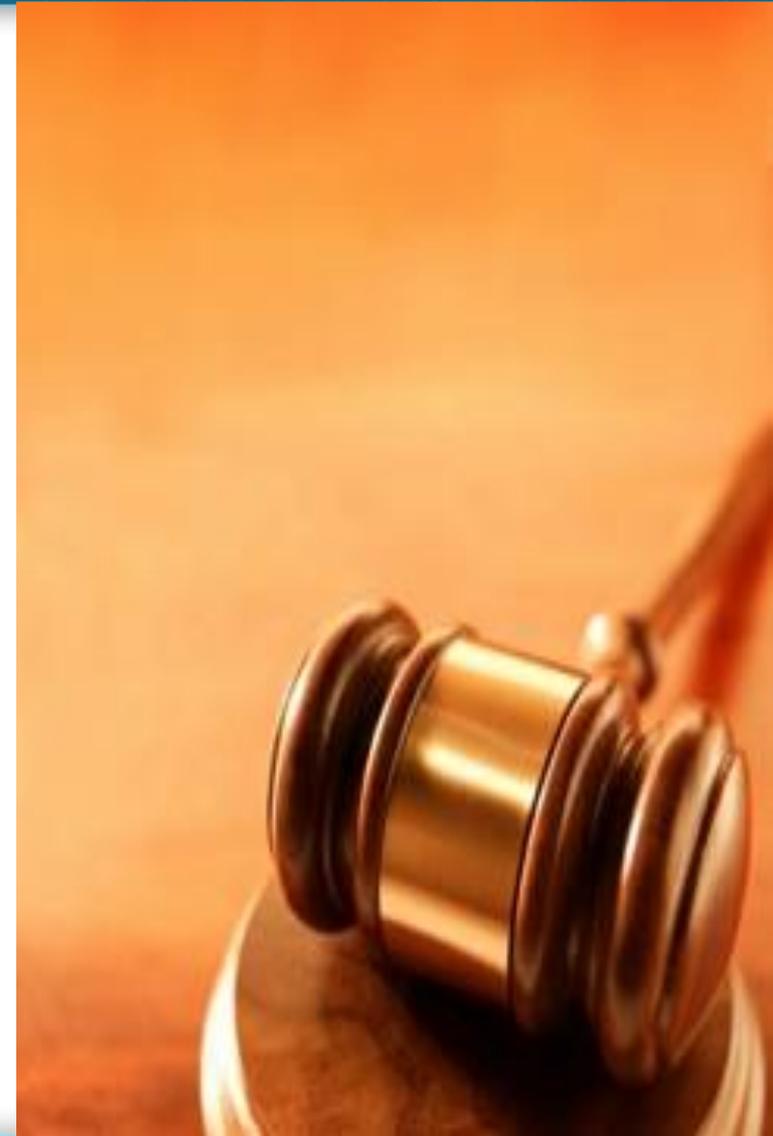
Sample Conditional Waiver of Lien Rights

“Architect hereby agrees and acknowledges that its **rights to file a construction lien...** are hereby **waived** and released in consideration for, upon receipt of, and to the extent of **all payments** received by Architect hereunder.”



Trial Waivers

“By agreeing to resolve **all disputes** through **binding arbitration**, Client and Consultant **each give up the right to have their respective claims and defenses decided by a judge or jury**. All claims and defenses shall instead be decided by the arbitrator.”



Waiver of Jury Trial

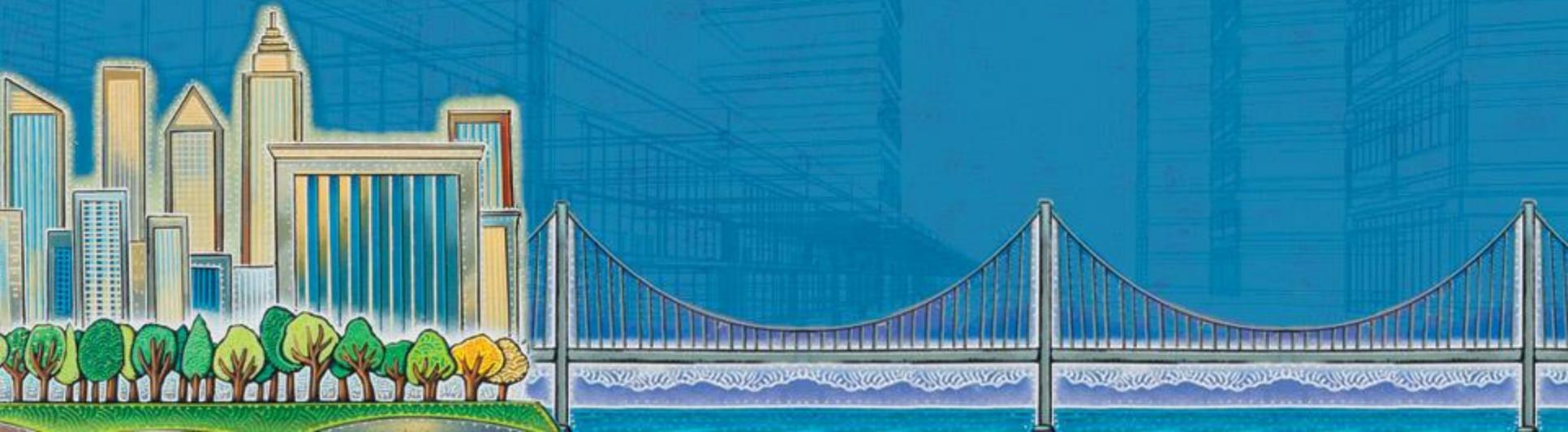
Sample Waiver of Jury Trial

“Each party, to the extent permitted by law, expressly and voluntarily, waives any rights to a trial by jury in any dispute arising under or related to this Agreement.”



**Dirty Dozen
Issue #4**

Confidentiality



Confidentiality

This is what we often see:

Consultant agrees to **keep confidential all information** supplied by the Client (“Confidential Information”), or any knowledge of the same acquired by the Consultant in the course of performing any Services hereunder, including the terms of this Agreement and any amendments thereto, and regardless of whether such information is supplied verbally or in writing. Consultant shall **return to the Client any Client-supplied information or information generated in connection with this Agreement** upon company’s request.



Confidentiality

It's unlikely EVERYTHING is confidential. Are there appropriate carve outs that should be defined, like:

- Information that you knew previously but was not protected as confidential?
- Information that is in the public domain?
- Information that needs to be shared with subconsultants or your employees?
- Information that you may be legally or ethically obligated to disclose?

Shouldn't you be permitted to keep one record copy of all information for your project files?



Confidentiality

Why don't we see more of this?

The **Design Professional shall treat as confidential** and not disclose to third parties, **except as necessary for the performance of this Agreement or as required by law**, or use for its own benefit, any of the **Owner's information**, know-how, discoveries, production methods, and the like that are **so identified in writing** and disclosed to the Design Professional or which the Design professional acquires in performing the Services required by this Agreement.

followed by...



Confidentiality

...more of this.

The **Owner shall treat as confidential information all design systems** that may be disclosed to the Owner in connection with the performance of this Agreement. The **Owner and the Design Professional shall each specify those items to be treated as confidential** and shall mark them as “Confidential.”

ConsensusDOCS 240-2011, Standard Agreement Between Owner and Design Professional, § 3.10



Confidentiality

Narrow definition of
“Confidential
Information”

Try to require the
confidential documents
must be identified in
writing.

Exclude information you
already have or that is
already in public domain.

Include subconsultants.

Make certain that
administrative burdens
are manageable and do
not restrict project
performance.

Exclude information
required to be disclosed
by court or government
official, to prevent harm,
or to perfect a claim.

Confirm you may retain a
complete set of
documents.

Try for mutuality.

A Note on Data Privacy

Has anyone seen this type of clause in their contract?

Data Privacy. Consultant will process all Personal Data it processes on behalf of Company in accordance with all applicable laws and Company's reasonable requests with respect to protecting Personal Data, including but not limited to: restricting employee and agent/subcontractor access to Personal Data, following Company's instructions in connection with processing Personal Data, not disclosing Personal Data to any third party without Company's written permission, applying appropriate security measures to protect Personal Data, and deleting any Personal Data in its possession or control at the expiry or termination of this Contract unless otherwise agreed between the Parties. **In the event of any unauthorized, unlawful, and/or unintended processing, access, disclosure, exposure, alteration, loss, or destruction of Personal Data, Consultant will immediately notify Company and cooperate with Company's reasonable requests to investigate and remediate such incident and provide appropriate response and redress.** "Personal Data" means any information that can be used directly or indirectly, alone or in combination with other information, to identify an individual.



Closing Thoughts - Leverage

What do you have?

- Insurability**—What does your client get if they “win” in a claim, but the winning claim isn’t covered?
- Education**—Some clients just won’t know or understand industry standards...really...
- Professional Societies**—One-on-one negotiations are much more difficult! Use your strength in numbers and your advisors.



Closing Thoughts - Resources

Who can you call on?

- Standard Industry Documents
 - AIA
 - EJCDC
 - ConsensusDOCS
 - DBIA
 - AGC
- Insurance Companies
- Insurance Brokers
- Attorneys



Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects
Continuing Education Systems Program

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