IRMI®

Workshop I

RISK MANAGEMENT AND INSURANCE FOR DESIGN PROFESSIONALS

Presented by

J. Kent Holland Jr.
Director, Risk Management Services
Arch Insurance Group

Catha Pavloff
FINPRO Architects and Engineers Practice Leader
Marsh

As project delivery methods increase in complexity, design responsibilities and the corresponding liabilities have become more complex. This session will identify risks design professionals may knowingly or inadvertently be assuming on their construction projects, provide strategies for avoiding certain risks and mitigating those they cannot avoid. By learning what to look for in their contracts, and the importance of good documentation processes, design professionals can better manage their project risks. An overview of professional liability insurance coverage, with emphasis on problematic provisions and current market conditions, will provide guidance on where changes may be needed, what response to expect from underwriters, available limits and pricing options, and guidelines for program success.

Workshop I

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

J. Kent Holland Jr.
Director, Risk Management Services
Arch Insurance Group

Mr. Holland is copresenting Workshop I, "Risk Management and Insurance for Design Professionals," on Wednesday. He is Of Counsel with the law firm of Wickwire Gavin, P.C., in Washington, D.C./Virginia, and he is director of Risk Management Services for the Environmental and Design Professional Liability Unit of Arch Insurance Group, headquartered in New York City. From 1982 through 1986, Mr. Holland served in the Office of General Counsel of the U.S. Environmental Protection Agency, with responsibility for advising the Agency in rendering decisions concerning wastewater treatment construction grants disputes, contractor claims, bid protests, suspension and debarment matters, and minority business enterprise matters. While at EPA, Mr. Holland served as a member of the Board of Assistance Appeals (Grant Appeals Board), with responsibility for deciding audit disputes between EPA and municipalities and public entities that received construction grants, and he participated in writing regulations and policy guidance for the Superfund program and Asbestos in Schools remediation program.

Mr. Holland's legal practice has emphasized construction and environmental law—representing project owners, design professionals, and construction contractors in contract negotiations, claim resolution, disputes, and litigation. He has written and spoken extensively on the subjects of construction project risk management, including chapters in several Wiley Law and Aspen Law books, and in the *Construction Risk Management* manual published by International Risk Management Institute (IRMI). He authored the 200-page *Architectural/Engineering Contracts Risk Management Guide*, published by Zurich Insurance, and edited and coauthored *Construction Contractor's Environmental Risk Management Procedures Manual* for the Associated General Contractors Association of America (AGC). An extensive list of articles and books authored by Mr. Holland may be viewed at http://www.ConstructionRisk.com/aboutus.htm.

For Arch Insurance Group, Mr. Holland reviews contracts of design professionals to comment on risk allocation and insurability of risks. He edits *Design Professional Briefings* as well as *Environmental Risk Briefings*, two new legal newsletters, and he presents risk management workshops for design professionals. He assisted Zurich North America in drafting several unique insurance policy forms, including Owner's Protective Professional Indemnity Insurance (OPPI), Owner's Protective Professional and Environmental Liability Insurance (OPEL(SM)), and Contractor's Protective Professional Indemnity and Liability Insurance® (CPPI®), and he is currently providing similar drafting assistance to Arch Insurance Group.

As a personal interest, Mr. Holland developed a construction risk management Web site, located at www.ConstructionRisk.com, and publishes a free monthly electronic newsletter by the same name, analyzing recent legal cases and risk management issues impacting design professionals and design-builders. He is active in the Design Build Institute of America (DBIA) and was recently appointed chair of its insurance and surety committee.

Mr. Holland is a 1979 graduate of the Villanova University School of Law.

Catha Pavloff
FINPRO Architects and Engineers Practice Leader
Marsh

Ms. Pavloff is copresenting Workshop I, "Risk Management and Insurance for Design Professionals," on Wednesday. She is a client advisor and an Architects/Engineers Practice leader. She is a resource to the Marsh network and its clients on design firm, contractor, construction manager, design/build, and related professional liability placements. She has 25 years' experience in the insurance business, the first 8 as an underwriter and the last 17 with Marsh.

During her career with Marsh, Ms. Pavloff has worked with over 20 different design firm and contractor clients ranging from $15 million to over $1 billion in revenues. She is experienced with all aspects of serving these clients including contract review, educational seminars, program design, coverage negotiations, mergers and acquisitions, and claim handling.

In addition, Ms. Pavloff has worked closely with all of the major design firm underwriters in the United States and in London. Most recently, Ms. Pavloff assisted one of the major architect/engineers insurers in drafting policy language for several new products. She has also been active in broking project-specific and owners protective professional policies for projects ranging from $17 million to over $2 billion in construction values. Ms. Pavloff recently spearheaded Marsh's World Trade Center Clean Up Project Specific Professional/Contractors Pollution Liability placement efforts. She has authored chapters of IRMI and Wiley-Aspen publications on related topics.

Prior to working in the New York office, Ms. Pavloff spent 11 years as a broker and account manager in Marsh's Philadelphia office. Also while in Philadelphia, Ms. Pavloff was the office training coordinator—designing, coordinating, and facilitating the office training program. Currently, she facilitates several of Marsh's regional training programs.

RISK MANAGEMENT AND INSURANCE FOR DESIGN PROFESSIONALS

Catha G. Pavloff
Marsh

J. Kent Holland, Jr.
Arch Insurance Group

I. Introduction

A. Risk Avoidance, Allocation & Reduction

B. State of the Insurance Marketplace

II. Documenting Communication between the Parties

A. Get it in writing

B. Clear, concise and temperate language

C. Recommendations by design firm should be in writing

D. Documenting communications between broker and insured

III. Keeping the Records Straight

A. Benefits of knowing how to find your records

B. What records should be maintained and for how long?

C. Organizing electronic files

D. Web-based systems

E. E-mail

IV. Records Retention/Destruction and Litigation

A. What documents must be given in response to discovery requests?

B. Records retention and negligent spoliation of evidence

C. E-mail confidentiality and discovery during litigation

V. Ownership and Copyright of Documents

A. Who owns the documents and the copyright?

B. Contract language

C. Case law examples

VI. Site Safety Responsibility and Liability

A. Case summaries

B. Basic principles learned from court decisions

VII. Insurance Issues

A. Underwriters' red flags and how to waive them / How risk management plays a role in the underwriting process

B. Practice policies—

1. The latest on who and what is, and is not, covered

2. How to structure a cost-effective policy in today's marketplace

3. Creating seamless, integrated professional/general and pollution liability policies

C. Project-specific policies—What can and can't be structured in today's marketplace

D. Alternatives to traditional insurance—from contractual limitations and waivers to captive insurance companies

VIII. Contract Terms and Conditions Affecting Risk Allocation and Insurance Coverage

A. Americans With Disabilities Act (ADA)

B. Cost estimates

C. Dispute resolution

D. Indemnification

E. Limitation of liability & waiver of consequential damages

F. Scope of service

G. Standard of care

IX. Conclusions

INSURANCE: "YOU CAN'T ALWAYS GET WHAT YOU WANT BUT IF YOU TRY SOMETIMES …"

Catha G. Pavloff
Marsh

State of the Marketplace

State of the Marketplace

You Do the Math…

Rate Hardening
+ Tightening of Terms/Conditions

Improved Underwriting Results

P/C Industry Financial Indicators ($ Billions)

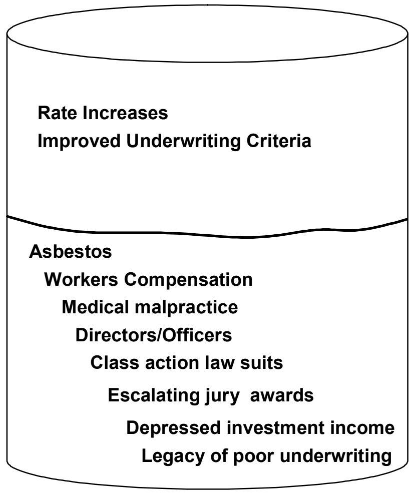
	6 Months 2003	6 Months 2002	% Change
Net Written Premiums	$207.3	$183.6	12.9
Pure Losses	120.6	114.4	5.5
Net Investment Income	18.9	18.1	4.3
Pretax Operating Income (Loss)	16.4	6.0	172.1
Net Income	15.5	4.7	226.9

Source: A.M. Best Co.

Workshop I

State of the Marketplace

But is the glass half full or half empty?



State of the Marketplace
Impact on the A&E Marketplace

1. Insurer insolvencies/rating down grades more prevalent.
2. Fewer markets/limited capacity for larger firms ($>$50 million annual fees).
3. Less reinsurance participation - Primary carriers taking larger net positions.
4. Reduced capacity – Larger design firms may need to involve more carriers to build capacity.
5. Average rate increases of 20%.
6. Some firms will continue to experience deductible increases.
7. Coverage restrictions by some carriers – mold, construction management, design/build, residential work, asbestos, joint ventures.
8. Increased appetite for good risks.

State of the Marketplace Predictions for 2004

The Good News –

- Stabilization
- Deceleration of rate increases
- Carriers emphasizing risk mitigation, contract management, training services

The Not So Good News –

- Unfunded prior year liabilities
- Lackluster investments

The Potentially Catastrophic News –

- Another terrorist attack
- Natural disasters/other catastrophic events

Waiving the Underwriters' Red Flags

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
Project Type • Residential	• Legal environment • Condo assns. • Contractors • Leaky roofs, windows • Mold • Air quality	• Risk avoidance • Contract management • Owner selection • Contingencies • Jurisdictions • Tort reform
• K-12 schools	• Volume of work • Revolving school boards • O&M funding • O&M liabilities • Mold • Air quality	• Owner selection • Budgets – O&M funding • Contracts • Avoid, O&M responsibility/liability • Manage revolving school boards

Workshop I

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
Project Delivery		
• Design/Build	• Claims by d/b'er against design sub- consultant on GMP contracts • Often fast-tracked • Lack of experience	• Client selection • Contract management • Experienced team members • BI/PD in GL/Excess programs
• Construction Management	• GL vs professional • Faulty workmanship • Site safety • Establishing standards of care	• Contract management – clear, well defined scope • No responsibility for site safety • Place BI/PD in GL/Excess programs

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
10 Year Loss History		
	• Severity or frequency • Litigation costs	• Identify/mitigate trends - project type - client selection - contracting procedures - project management • seek underwriters' support - training /contract management/choice of counsel/litigation management • assume higher retentions in short term

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
Contracts	• Scope • Standard of care • Indemnities • Warrantees/certifications • Site safety	• Read Kent Holland's white paper (!) • Seek broker's/carrier's input in contract review process

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
Risk Management Procedures	• Lack of control/ inconsistent practices	• Seek carrier's/broker's assistance in designing/ implementing/ monitoring these procedures

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
Mold	• Increase in frequency of claims against design professionals regardless of actual liability • Class action – BI claims. Residential, schools, assisted living facilities, higher education • MEP/HVAC	• Mold mitigation plan • Contractual protection • Risk avoidance – residential, schools, Texas, Florida, California • Support legislative reforms • Dehumidify!

Workshop I

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
Firms that both design/manufacturer products	• Products liability vs. Professional liability - strict liability - standard of care • Replication of one "bad" design creates catastrophic loss potential	• Recognize there is little, if any, available coverage • This is a business risk • Manage contractually • Fund for expected losses • Factor into pricing model • Seek BI/PD coverage on GL/Excess policies for traditional products liability claims

Waiving the Underwriters' Red Flags

Red Flag	Concern	Waiving
M&A	• Retroactive tail exposure • Lack of proper due diligence	• Adequate due diligence • Solicit broker's support on due diligence • Consider run-off policy for pre-acquisition liabilities

Waiving the Underwriters' Red Flags Other Tips - a/k/a Preach What you Practice

- Start early - 4 months in advance
- Avoid July 1 and January 1 dates
- Complete submissions
  - Applications
  - 10 years loss history
  - Representative owner, sub consultant contracts
  - Identify any/all:
    - Construction revenues
    - Equipment procurement revenues
    - Project specific revenues
    - Subcontracted revenues

Waiving the Underwriters' Red Flags
Other Tips—a/k/a Preach What you Practice

- Scour the marketplace
- Develop underwriter relationships
- Know your claim representative. Establish mutually acceptable claim handling procedures.
- Take advantage of carrier's loss prevention, contract review and training capabilities

A&E Professional Liability Practice Policies

9 Tips for A&E Professional Liability Program Design

1. Underwrite your carriers':
   - Financial strength
   - Commitment to the A&E marketplace
   - Net vs. reinsurance participation
   - Risk management services
   - Claim handling capabilities
   - International capabilities, if applicable

2. Consider layering multiple carriers – the eggs in one basket theory.

9 Tips for A&E Professional Liability Program Design

3. Benchmark your limits/retentions against your peers

4. Explore a number of per claim/aggregate limit and deductible options. Contemplate:
   - Historical/projected revenues
   - Scope of services/project types
   - Claim history
   - Contractual requirements
   - Risk "appetite"
   - What is commercially available
   - Any potential acquisitions

9 Tips for A&E Professional Liability Program Design

5. Coverage
   - Definition of Professional Services
     - Design/build
     - Construction management
     - Project management
     - Facilities management
     - Security consulting
     - Dovetail with any GL/Excess policy professional services exclusions

9 Tips for A&E Professional Liability Program Design

6. Exclusions
   - Watch out for
     - Pollution
     - Asbestos
     - Mold
     - Cost overruns
     - Delays
     - Construction Management
     - Design/build
     - Design of products
     - Project placements
     - Liquidated damages
     - Other
   - These are absolute/universal/mandatory
     - Contractual
     - Warrantees/guarantees

9 Tips for A&E Professional Liability Program Design

7. Other
   - Additional Insureds - A Big “NO, NO”
   - Is policy auditable?
   - Coverage for newly acquired/formed/affiliated companies
   - Reduced retention language
   - Blanket waiver of subrogation language

9 Tips for A&E Professional Liability Program Design

8. Understand/Comply with carriers’ subjectivities

9. When changing carriers/increasing limits:
   - prior knowledge language is critical
   - restrict to key senior individuals

Alternatives to Practice Policy Coverage

Alternatives to Practice Policy Coverage

1. Project Policies
   - Still available
   - Limited marketplace
   - Residential is problematic
   - Underwriters concerns
     - Project type
     - Q&E's of prime professionals
     - D/B project delivery
     - Jurisdiction
     - Team's experience with this project type and with each other
     - Contracts
     - Mold
   - Carrier more involved in risk management - dispute resolution.

Alternatives to Practice Policy Coverage

2. Captives
   - Group
   - Single Parent
     - To fund higher SIR's,
     - Include environmental, general liability, property, etc.?

“If you try ~~sometimes~~ *many times*, you’ll get what you need.”

Thanks for attending!

Workshop I

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

RISK MANAGEMENT AND INSURANCE FOR DESIGN PROFESSIONALS

J. Kent Holland Jr.
Arch Insurance Group

I. Some Risk Management Essentials

Risk managers often speak of three primary means of risk management, including risk avoidance, risk allocation, and risk reduction. Key points concerning these three methods are briefly presented below. Additional information and legal examples expounding upon the concepts discussed in this paper are presented in a 300 page book by the Kent Holland, entitled: *Construction Law & Risk Management: Case Notes and Articles.* The book compiles and organizes case notes, articles and papers written by a over 30 attorneys and professional consultants. The cases and articles included in the book were selected based on their value for demonstrating risk management principles to be considered and applied. It is provided free of charge by Arch Insurance Group to its design professional insureds, and it is also available for purchase to others directly from Kent Holland at http://www.ConstructionRisk.com. Arch believes that a significant added value that can be provided by an insurance company to its design professional insureds is to help them identify potential problem areas in contracts and projects, and to help them avoid the cost, distraction and sometimes time consuming efforts that can be associated with a professional liability claim. Diligent early handling of circumstances that could lead to a claim is one method to avoid a claim later on. Managing risk should be a key element in our insured's overall business strategy and we would like to be of assistance to our insureds with that effort.

A. Risk Avoidance

The most obvious way to avoid risk on a project is to not perform any services on the project. In other words: Don't accept the contract. The problem with this approach, of course, is that design professionals are desirous of being retained for assignments are only to anxious to sign contracts. The key is to recognize what is an onerous contract containing unacceptable risks that must be avoided. Contracts that propose onerous risks, especially risks that are uninsurable under the professional liability policy should be negotiated to revise the language so as to be acceptable and insurable. If it is not possible to negotiate a reasonable contract the appropriate course from the view of risk management may very well be to decline the contract and the project. To accept uninsurable risks is to bet the firm—and for what? You are probably getting a small fee from a client that is more often than not obstreperous and difficult to get along with. The client that insists on shifting risks to the design firm that more appropriately belong to the project owner or contract is, in my experience, the client that is most likely to have unreasonable expectations and fail to communicate well. It is this client that is also quickest to take you to court when things don't go the way they erroneously expected. The best decision you make in managing your firm might be the decision to reject a bad contract.

Another aspect of avoiding risk is to reject requests for your services on projects that fall outside your area of knowledge and experience. Even if you have the expertise to perform certain services, your personnel that have that expertise may be tied up on other projects. In the busy construction market of the past several years it has not been uncommon to see design firms submit proposals on multiple projects—expecting to be awarded no more than one contract—and being awarded contracts on multiple projects. This might seem great until you realize that your key personnel are unavailable because they are still working on another project, for a different owner, in a distant location. This has been particularly problematic when construction contractors are late in completing their work and this delays the completion of the design services during construction, thereby preventing the release of your key personnel to move over to other projects. Key points are to make sure you have the expertise to perform the services and that your personnel with the requisite expertise will be available.

B. Risk Allocation

In allocating the risk through the contract terms and conditions, the goal should be to allocate it to the party that has the best ability to manage that risk. The contract can give ownership of the risk to any party. But if the party that accepts ownership of that risk does not also have the ability to manage that risk both legally and in fact, there can be serious consequences, both in terms of problems that actually develop as a result, and in terms of the legal consequences of that risk allocation. When assisting parties in negotiating contracts for construction projects I explain that a reasonable contract must be reasonable for all parties involved. A contract that is one-sided and attempts to shift all the risks to one party or the other is going to create hard feelings during contract performance and is more likely to result in claims and litigation. As a practical matter this means that I don't try to negotiate a contract for my particular client that shifts the most risk possible to some other party. That would spell trouble. From my experience it seems that those most likely to push for such one-sided contracts are young, inexperienced attorneys or owners who have been ill advised by associations that encourage them to adopt bad contract language despite the advice to the contrary by seasoned construction lawyers and wise risk managers and insurance professionals.

I encourage parties to determine what is truly reasonable and negotiate to that end. In evaluating what risks should be assigned to each party, I encourage parties to develop a type of matrix of the project risks so that they can see more easily which risks fall to each party. For example, site safety would fall most naturally to the construction contractor. Easements and right-of-ways, as well as site data, including Geotechnical information may most naturally fall to the project owner. And responsibility for exercising due care in the planning and designing of a project generally falls to the design professional performing those services. Problems begin when any of these risks are allocated to one of the other parties that is not technically responsible for those services. Unless you are in a position to manage a particular risk, it is not appropriate for you to accept contractual liability for that risk.

C. Risk Reduction

After the decision has been made to accept the risk by taking the contract, and the decision has been made to allocate certain risks to the design professional, as deemed appropriate, the next step is to reduce the risk that is being assumed. Risk reduction includes those preventative actions that are taken to decrease the probability, frequency and severity of losses. Sometimes called "proactive," these activities can be planned in advance to respond to risks that are known and that are manageable when encountered. What these proactive steps will include depends upon the nature of the project, the location and the risk.

II. Documenting Communication between the Parties

A. Get it in Writing

Correspondence, memoranda, notes, faxes, and e-mails between (a) the owner and design professional, (b) the owner and contractor, (c) the design professional and contractor, and (d) the design professional and governmental departments has obvious value in preserving the communication between the parties that may be helpful to later determining what was said, when it was said, and who decided what. As discussed elsewhere in this course, this can be particularly important for proving that you complied with contract requirements of giving required notices and getting required approvals. It can also show that you gave sufficient information to others so they could make intelligent decisions and possibly even assume the risk of their decisions. Many communications between the various parties will initially take place orally in the ordinary course of conversation on the project. Unless these oral conversations are somehow reduced to writing in the form of meeting minutes, memoranda, or correspondence, their content and their value may very well be lost. If you are communicating something orally that you believe is important it needs to be reduced to writing and preserved. Likewise, if you are receiving oral communication that has significance to the project, some written record of that conversation needs to be made.

The discussion of a couple of case examples later in this text explains how a project owner in one HVAC case denied receiving a memorandum from the design professional warning of the risk of substituting equipment. This type of a denial could be avoided if there was a record of the memorandum to prove that the communication had been made. As suggested earlier, a record can be a fax confirmation notice, possibly an e-mail confirmation notice, a certified mail-return receipt, or a note from the client acknowledging the design professional's recommendation. But if no written record is made confirming that the recommendation was received by the client, there are other methods that can be attempted to prove that the client received the notice and acted upon it. For example, a follow-up note to the client referencing the written recommendation can be useful. This can state something to the effect that you are sending this to confirm that you sent the earlier memo and will be taking action in accordance with any understandings that may have been reached concerning those recommendations. You could also raise the issue at a formal project meeting and have the matter, including the fact that the written recommendation was made, recorded into the meeting minutes. Even telephone logs and notes are useful as contemporaneous business records to be used later to show that a conversation occurred concerning the recommendation contained in the memorandum that was never formally acknowledged by the client. By doing these things you are making it more difficult for the client to later deny having received the written recommendation.

Documents that should be maintained in well-organized files for ready access include:

- Requests for Information (RFIs)
- Telephone logs
- Change order requests and change orders
- Inspection Logs (i.e., monitoring or review reports)
- Daily reports (e.g., weather, laborers, etc.)
- Safety reports
- Payment requests
- Certifications
- Lien waivers

These are some of the more significant types of documents, but is by no means exclusive or exhaustive. Other documentation that has proved invaluable in prosecuting claims or defending against claims include tape recordings of pre-bid conferences, photographs of job progress, and video tapes of job progress.

B. Clear, Concise and Temperate Language

It goes without saying that we should not put anything in writing for distribution outside our own firm that we believe could in any way embarrass or damage us. This same principle should be applied, however, to all notes, memos, yellow sticky notes, and e-mail notes that are intended for viewing only by those inside the firm. In the law firm where I learned this rule, we called it the *Washington Post* test—meaning that if you would not be proud to see your words printed in the *Washington Post,* don't write them. If there is document discovery during a claim involving your firm, you may be sure that any damaging comment, observation, or statement contained in your internal files and memoranda will be among the first documents sought by the reviewing attorneys. Some basic principles concerning documentation apply to the language you use, whether it is included in reports, correspondence, memoranda, telephone logs, meeting minutes, yellow sticky notes, and any other written materials.

C. Pre-Proposal or Pre-Bid Data and Information Provided by Client

Information and data provided by the project owner with the Request for Proposal (RFP) for design services or with the Invitation for Bid (IFB) for construction work may be useful in proving entitlement to payment for additional design services or extra construction work. Geotechnical reports, site data, client program requirements, and other information provided by the client can and should be able to be relied upon. In this regard, however, you should make sure that your contract with the owner does not deny you the ability to rely upon such data and information. Standard form contracts generally state the terms under which you may rely upon that information. Recently, however, contracts being generated by owners have been including language stating that any site conditions information provided by the owner is done so merely for general information and shall not be deemed a part of the contract, nor may it be relied upon by designers or contractors. Some of these contracts state that the designer or bidder is expected to perform their own site investigation and make their own determinations of what will be encountered at the site.

By disclaiming any responsibility for the information it provides, the owner may be able to avoid paying for additional services or change orders. Several courts, including those in Florida and Texas, have recently published decisions holding that municipal governments had no duty to grant change orders based on differing site conditions where the contracts had expressly disclaimed reliance upon site information provided by the owner. Despite the existence of differing site conditions clauses in the construction contract, the court held that there could be no viable claim based on conditions differing from those represented by the contract since the contract specifically said that it was not making any representations whatsoever.

The impact of such disclaimer clauses is that bidders who can no longer rely upon site information provided by the owner will need to include extra costs in their bids for the unknown contingencies of encountering differing site conditions for which they cannot be paid under change order. If bidders understand that they cannot be paid by change order for the extra costs incurred when encountering unknown site conditions, they should naturally increase the amounts of their bids to protect themselves from the loss they may suffer.

The refusal to allow the bidders to rely upon documentation and data provided by the owner may have adverse impacts on the design professional. A contractor that is denied recovery under a differing site condition clause might find creative ways to argue that its damages were actually caused by acts, errors and omissions of the design professional, misrepresentations by the design professional or interference by the design professional with the contractor's means, methods and procedures of performance. The result of denying reliance on site information documentation provided by the client may very well be increased claims and litigation as contractors are forced to find creative ways to make themselves whole from the loss they will otherwise suffer. This may also result in higher bids and project costs incurred by the project owner as bidders across the board increase their bids to cover contingencies. Many of the owner contracts that prohibit contractor reliance upon owner documentation likewise require the design professional to essentially guarantee that the contractor's work will be performed with the project budget. If the design professional has provided the owner with a project budget and estimates of construction costs that are exceeded by the high bids, that design professional may find itself redesigning the project (at its own costs) in order to get the contractor's price within the budget.

For purposes of this course, the points to remember are that design professionals and contractors need to understand how documentation provided by the owner in advance of accepting professional proposals and contractor bids may be relied upon, and how contract language may affect how much reliance, if any, can be placed on such information and documentation. Assuming that you are entitled to rely upon the documentation, it is important that the records that you generate in your files at the time of preparing your proposal or bid refer to those documents and show that you relied upon them. As a design professional, there may be additional benefit from referring to these documents in the proposal that you submit to the owner, thereby demonstrating the underlying assumptions upon which you have based your proposal. If the owner subsequently requests you to perform services differing from what was anticipated based upon the documentation provided to you in advance of your proposal, you may be able to use that documentation to prove that you are being required to perform additional services entitling you to additional fee.

D. Put Recommendations in Writing

Put recommendations in writing, including an explanation of potential benefits of following the recommendations and the potential risks of failing to do so. If there are alternative solutions or recommendations, sufficient information should be conveyed in writing to the client so the client can make an informed and well-reasoned decision—taking the risks into account. Enough detail should be provided in the written recommendation so that the client cannot assert that it did not understand the ramifications of the decision it was making.

In one example of a claim against an architect, the owner claimed that the architect was responsible for all damages caused by the failure of the heating, air conditioning and ventilation (HVAC) system to meet the performance requirements of the building. In its defense, the architect asserted that the owner had overruled its advice to it had advised the project to reject the "or equal" equipment substitution that was being offered by the construction contractor. The architect proved that it had submitted its recommendation to reject the equipment in writing to the owner. Unfortunately, however, the owner argued that the recommendation did not provide adequate information and details on which to reject the equipment. According to the owner, the language seemed equivocal and did not contain facts, figures, and data on which to persuade it to reject the equipment which was promised would save money. What the owner argued was that if the architect felt so strongly that the owner should reject the equipment, the recommendation should have essentially made this so clear and obvious a decision (with scientific reasoning to support it) that the owner would have made the right decision. The owner basically argued that it was negligent for the architect not to provide a more forceful recommendation and negligent to have ultimately approved the installation of the HVAC system.

In another case involving an HVAC system, the architect provided a detailed written memorandum to the owner recommending the rejection of equipment. Again, the owner decided to accept the equipment despite that recommendation. When the equipment failed, the owner sought to recover the cost of its damages from the architect. The architect defended itself by asserting that it had given its client appropriate information by way of a written memorandum, and that the client had assumed the risk of failure by accepting the "or equal" equipment. A copy of the memorandum was located in the architect's files but the project owner denied ever having received it. At this point, one might wonder whether the memorandum was never given to the owner or even whether the memorandum was created after-the-fact. Fortunately for the architect, someone eventually found a copy of a Fax confirmation in the architect's files showing a copy of the first page of the memo with the fax telephone number, date, number of pages, and delivery confirmation printed neatly across its top. Because of this evidence the matter came to a prompt conclusion, with the architect avoiding any liability.

What these cases teach us is that recommendations not only need to be in writing, they need to provide appropriately detailed information and there needs to be evidence that such recommendations were received by the client. Sending everything certified mail—return receipt requested would not make you very popular with your client and, there are indeed ways to accomplish what you need without antagonizing the client. It's advisable to obtain written responses from your clients to your recommendations. This does not have to be very formal. A simple note, or even e-mail acknowledging receipt of the recommendation will do, provided you properly file the note or e-mail in an appropriate location and folder for future reference. Keep in mind that in the example above, the architect that eventually got out of the case by finding a fax confirmation, spent a lot of money in legal fees and wasted a lot of time in the months prior to finding that piece of paper. Keeping such matters organized so they can be found is the key.

If the client does not respond in writing you may create a paper record of your own to help assure that the client actually received the recommendation, and that you can prove it if ever necessary. For example, you could send a short follow-up memorandum such as a "speed memo," Fax, or E-mail to the client reiterating that you gave the client a written recommendation, and stating any conversations you and the client may have had pertaining to that recommendation and any decisions that were made by the client. If the client later denies that it received the original recommendation, the subsequent confirmation type notes will be helpful in persuading both the client and court, if necessary, that the client received the original recommendation.

Nothing in the above examples is intended to suggest that owners do not act ethically. One fact of life is that on large projects, with multiple people working in the owner's office as well as in the trailers of the design professionals and contractors, papers can sometimes get lost or misplaced before they are read by the appropriate people. Even if, however, the documents are read by the right people, those individuals may be far removed from the project (or even deceased) before litigation concerning the project ever arises. The new individuals working for the owner may know nothing of information that had been provided to the people on the job at the time, and the attorneys for the owner certainly will not have independent knowledge of what happened on the project. This is where written documentation becomes especially vital. It memorializes what went on even after memories have faded or those who had memories have passed away or moved on to other places unknown.

State any foundation or assumptions underlying your opinions. If you are writing a report in which you are offering a professional opinion, state any foundation and assumptions upon which the opinion is based. This may include reference to information that was provided by the client or others for your use. It may also include reference to the basic assumptions that you have made based upon the client's program for the project and information provided to you. In addition, if there are limitations impacting your ability to formulate an opinion, these limitations can be noted in the report. Budget restrictions will certainly impact the design and construction. In instances where you would propose something more expensive than what the owner can reasonably get for its restrictive budget, it may be appropriate to point this out in a written report to the client so the client can make a well-informed decision on how to proceed.

Time limitations may impact the ability of the consultant to conduct the full research and investigation that it might otherwise have done on a similar project. There have been cases, for example, where the parties to a real estate transaction failed to contract for environmental site assessments sufficiently in advance of the settlement date. Instead of postponing the settlement, they contracted a consultant to perform a Phase I environmental site assessment only three days before the real estate closing date. The consultant agreed to perform these services, provided that its client agree to certain contract terms. The site assessment report would state that the services were limited by the time restrictions and that this affected the completeness and reliability of the information presented. The consultant also negotiated an agreement that the client would indemnify it and hold it harmless for damages arising out of the consultant's services under those conditions.

Limitations on information, data and site access provided by the client should be identified in writing. A building owner recently requested an architect to prepare a report estimating what it would cost to renovate part of an old building into new office space. A limitation was placed on the architect's access to the premises that would impact its ability to give an opinion. The owner forbade the architect from removing ceiling tiles to determine whether there was asbestos in the plenum. Unless it knew what was above the ceiling tiles, the architect could not provide an estimate of construction costs with a significant degree of reasonable probability. If it was later discovered that asbestos was in the ceiling and had to be removed as part of the renovation, the original opinion of probable costs provided by the architect could be completely off-base.

In this example, the architect accepted the contract with those conditions, and drafted a preliminary sketch of renovations and provided a preliminary estimate of costs - but with a boldly stated caveat that it was not making any warranties, guarantees or representations concerning the estimate in the event that any additional work needed to be performed as a result of anything that could not be observed by the architect in the area at or above the ceiling tiles. By clearly stating the limitations upon its access to the building and the limitation on information the architect hoped to limit the ability of its client (or others) to rely upon its report. Stating such a limitation is one risk management tool that may provide some protection for the architect in this situation. It should be noted, however, that the risk management method other architects would use in fact situations similar to this would be to decline the work, and thereby avoid potential liability that could arise later. This becomes a matter of prudent client selection.

When professionals work for clients who are choosing to close their eyes to environmental issues impacting their property, they may find themselves under pressure to issue reports that do not state their findings and opinions with the degree of clarity and forcefulness that they deem ethically appropriate. In this regard, there are some environmental regulations that create an independent duty for consultants that acquire knowledge of an ongoing pollution release to notify government agencies concerning the release. Conditions in the consultant's contract with its client attempting to limit such disclosures will not excuse the consultant from meeting its independent duty to the governing agencies. For this reason, if there is a clause in your contract addressing confidentiality of information and documents acquired by the consultant from the client, it should be drafted in such a manner as to allow the consultant to provide information to others that is required to be provided by law.

III. Keeping the Records Straight

A. Benefits of Knowing How To Find Your Records

Being able to promptly locate records can bring an instant end to potential claims. In a suit against an A/E by a building owner alleging that the A/E failed to properly advise of the risk of accepting an "or equal" equipment substitution offered by the contractor, the A/E asserted that it had given the owner a detailed memorandum explaining why the equipment should be rejected, and that the owner had ignored that advice at its own peril. In response, the owner claimed that it had never received such a memorandum. The matter went through months of document discovery and depositions before someone finally located in the A/E's files a "Fax confirmation" of the missing memorandum. This confirmation showed a small copy of the first page of the fax, along with a vital information at the top of the page showing the date it was sent, to whom it was sent, and how many pages were received. As a result of finding that confirmation copy, the matter was promptly dismissed.

If a copy of the missing document had been made available to the project owner at the outset, it is likely that the suit never would have been filed. Giving the owner the benefit of presumed honesty, it seems likely that although the memorandum warning of the risk of accepting the substitute equipment had been sent to the owner, that document had been misplaced or misfiled so that the owner's principals were not aware of its existence when the problems with the substitute equipment began to surface and demands and claims were made against the A/E. If the A/E had filed its own copy of that memorandum in a logical place so that it could be quickly retrieved, clear communication with the owner would have been made possible so as to avoid the misunderstanding that led to the litigation.

Maintaining project documentation in a manner that can be easily retrieved makes good sense from a claims and litigation point of view. But more than that, it enhances communication and makes it possible to more efficiently manage the project during design and construction if the parties can quickly locate documents and use them in making their decisions. Good document management enhances project quality control and provides a means to benchmark changes that are being made from original program requirements, drawings and contract agreements. Time spent in establishing a maintaining a logical document control system will prevent time from being wasted later in looking for information and documents that have been misplaced, misfiled, lost or unintentionally destroyed or lost.

Records that are maintained contemporaneously n the ordinary course of business are invaluable evidence in proving what communications took place on a project.

B. What Records Should Be Maintained?

Documents and information need to be managed. That is not the same thing as just keep everything forever. Nor is it sufficient to just throw everything into boxes and put them into a self-storage facility to be forgotten. Documents maintained in a logical manner with easy access can become a vital tool in your day-to-day business not only on the project to which they pertain, but in performing services on other projects as well. If you have performed calculations and completed research on one project, it may very well have applicability on other projects you are working on. Even without creating a subject matter index or filing system, you may remember those files that you personally worked on so that you can reuse information to assist you in performing services on other projects. But what about others in your office? Will they know that similar work has been done before which might be useful and save time for them in future projects?

By creating a simple indexing system, a firm can create much greater accessibility to records by everyone in the firm. Using computer software programs can enable word searching or table of contents searching in certain electronic documents. But even without using sophisticated software, much can be done to organize records for future reference.

In my law practice, I like to keep notebook binders of major legal memos and briefs that I have written pertaining to contractor claims, bid protests, contract terms and conditions, and other matters. These all have a table of contents and a subject index both in hard copy in the notebooks, as well as on my computer. When it comes time to do research in a new matter, my first resource is to look through my own notebooks. What is interesting is how often I find things directly on point that I wrote almost 15 years earlier, and which I didn't even remember.

With time and age, memories fade, but the recorded, filed, written word lives on. Not only does this have the benefit of creating greater efficiency, it can reduce the amount of time and work needed to perform the new services. It also provides some enhanced quality control—particularly if the previous briefs had proved to be winners. And this translates into more cost-effective services for the current client. When these notebooks are placed on the library shelves for others in the office to use, and when electronic files are put onto CDs where they can be accessed and research by others in the office, the benefits are multiplied many times over. (Note that if you give up ownership and copyright of your work product to the project owner, you may deprive yourself of the ability to reuse your own work on other projects and defeat the benefits referenced above.)

C. Organizing Your Electronic Files.

Your electronic data files including drawings, specifications, correspondence, memoranda, e-mails, and other types of documents should be carefully filed in electronic folders on your computer hard drives and on specifically labeled diskettes or compact disks (CDs) for easy access and retrieval. If these documents are co-mingled with electronic files from other projects or from your firm in general, you may be required to give the requesting counsel access to your entire computer or your entire e-mail system, unintentionally permitting them to have access to sensitive information that is not even related to the case at hand. This could even be embarrassing if you have been keeping personal information and correspondence on your computer, and you are required to turn that over because project files are located on the same hard disk. The key here is to keep project specific files separate and apart from all other non-related files.

If you are using your home computer for doing work on a project for your employer, you need to understand that the electronic files that you are creating for your employer's business become the responsibility of your employer for purposes of document control and document discovery. If you don't want to risk sharing the contents of your entire computer with strangers (and attorneys opposing your firm), it is advisable that all data related to your employer's business be kept in separate electronic folders while you are working on them, and then moved onto diskettes and removed from your computer's hard drive.

D. Keep Attorney-Client Privileged Files Separate from Others

If you are receiving the advice of legal counsel during your project you should keep all correspondence and memoranda created by your counsel in a file that is separate from your general files. The file should be marked "attorney work product" or "attorney-client privilege" or such other designation that you or others in your office will recognize that this file and its contents are not to be given to requester during discovery. If these documents are copied and put into numerous files around the office or jobsite trailer there is a significant chance that some of them will be inadvertently revealed during discovery. It is not the purpose of this course to study the details of the attorney-client privilege, and the ethics of how to handle privileged documentation that may be inadvertently given to the requester. It is better to manage the documentation so that it does not become necessary to argue over it later. By keeping these documents properly segregated, your attorney will be able to review them and make a decision concerning how they are to be handled during discovery. Typically, the attorney will provide a letter to the requester identifying the documents for which the privilege is claimed. This permits the parties to argue over the matter before a judge, if necessary, but it at least prevents them from getting into the hands of the requester unless and until a judge orders them to be released.

E. Documenting Contract Negotiations

The "parol evidence" rule generally prevents evidence from outside of the four corners of a signed contract from being used during litigation to attempt to change or alter the terms on the face of the contract. Despite this rule, however, there may be times that documentation between the parties to a contract (particularly one that failed to ever be signed), may be accepted by a court. In one recent case, for example, the architect and property owner exchanged multiple versions of contracts for designing and building a large house. While the architect got started with its design, the parties continued haggling over the contract terms and never did sign a contract. Ultimately, the owner terminated the architect and replaced him with another architect that utilized the design documents that had been provided to the owner by the first architect designer to complete the final design and construct the house. In a suit alleging copyright infringement, the original architect was permitted by the court to present a series of letters and draft contracts that had been transmitted back and forth between the architect and owner. These persuaded the court that the architect did not intend to give up the ownerships and copyright to the drawings. What this case teaches us is the importance of maintaining copies of documents that were generated prior to contract finalization. These can, in some cases, assist the parties and the court in determining the intent of the parties.

F. Web-Based Systems

Web-based project management systems are becoming widely used for large construction projects, and even for projects are not so large. A recent Client Impact Study by Constructware™ one of the major providers of web-based systems, reveals the reasons firms are choosing to use the systems and the impact from such use. According to their 2001 Client Impact Study, here are some of the key findings: (a) 96% said the system plays a role in eliminating or reducing the barriers and delay points in communications, workflow, and processing information and documentation; (b) 62% said they use it to reduce claims and litigation; and (c) 99% said it is used as a means to increase productivity. Specific areas in which it has helped increase productivity include, faster RFI submittal and turnaround; (b) reducing barriers in communications; (c) automated document creation; and (d) time saved in finding files and documents. Ninety nine percent of the respondents stated that the system has improved document management and thereby impacted the firm's ability to manage risks and reduce claims and litigation.

As this technology continues to change and improve, and as new vendors come into the market and others leave, it will important to proceed cautiously. A project participant that does not own the rights to the web-based system, for example, may want to continue maintaining its own duplicate set of documentation as back-up for what goes onto the web-based system. There is still much to be said for paper documentation.

Using electronic data and storage, it is possible to store all kinds of documents, including correspondence, Requests for Information (RFIs), minutes, notes, and logs with relatively little effort for long periods of time. Burning the data onto Compact Discs appears to better maintain the integrity of the data than does the use of floppy disks. Because of the tendency for electronic data to lose integrity over time, however, it may be advisable to duplicate the disks periodically over the years of storage. In addition, it is generally advisable to maintain hard copies of the final instruments of service in order to have a standard against which to benchmark any electronic files that may have been given to the A/E's client or others. In fact, retaining the hard copies may the best (or even only) way to protect against a client's suit that alleges the electronic data is defective several years in the future.

An A/E firm recently suggested that instead of having to deal with hundreds of e-mail messages and questions, and instead of having to deal with electronic drawings and data, they wished they could just tell the owners and contractors to stick to the old way of doing business. They feel more comfortable doing things the way they've always been done. Stopping time, however, is not the answer. And it's not going to happen. There's no going back. We are in the electronic age and should accept the benefits and promises it has to offer. There will be problems and pitfalls along the way, but it should be worth the journey.

G. E-mail

E-mail as a form of project documentation runs the gamut from being highly effective to being terribly dangerous or even having disastrous consequences for the unwary. It is so fast and easy to use e-mail that it is becoming a major communication mode on many projects. Some firms swear by it and others swear at it. So why is there such a difference of opinion and why are such variable results in using it?

It can be a good way to communicate. Oral communication leaves the sender not genuinely knowing whether the party that is doing the "listening" really understood and received the meaning intended by the speaker. With E-mail you get to see, in writing, what someone is saying. You get to respond—in writing. And they get to fire back a quick note telling you that you misunderstood and got their meaning all wrong. With a quick series of written messages, the parties can pretty quickly figure out (and even document) what they are each saying and actually come to genuine agreement on what they intend to do.

What needs to be understood by participants in construction projects is that when they communicate by E-mail, they are creating a document that may very well become a project record. Such a document may become key evidence to be used in proving or defending claims, and may be entered into evidence in litigation. With that in mind, E-mail needs to be handled with due care. Some simple rules that I have devised for dealing with E-mail include:

(a) Be careful what you write. Think for a moment before you let your fingers type those first thoughts that may be going through your mind. Don't write anything that you would not be proud to see published in the newspaper the next day.

(b) Don't be too informal. Be careful, for example, about the use of politically incorrect language, jokes and remarks that may seem funny to you but boorish to others. O.J. Simpson was found not guilty by a jury that could not help but be angry about prejudicial remarks made by the key investigating detective for Los Angeles. Microsoft was found liable for monopolistic, anti-competitive practices by a trial court judge who later told the press that Bill Gate's e-mail messages proved he had not been honest in his oral testimony. Ironically, the judge's comments to the press proved to be imprudent, and an appellate court accepted an appeal from Microsoft based on its concern that the judge's comments might have shown he did not act with complete impartiality.

(c) Don't send it out until you have spell checked it, and checked it for grammar—including proper punctuation. Since this may be the only document a judge or jury will ever see in support of some issue of vital importance to the case, write it with that in mind—providing a subject matter line, an addressee line, a proper salutation, and a proper closing.

(d) If internal concurrences would be required for the content you are writing if it were in the form of a written memorandum, get concurrences on the e-mail before you send it out;

(e) Don't add additional services to your scope based on e-mails from people who do not have the contractual authority to assign additional services or approve change orders. E-mail messages are not deemed acceptable substitutes for properly executed approvals for additional services or properly executed change orders.

(f) If your contract calls for the use of specified procedures for requesting information and scope changes, use those procedures and don't try to substitute E-mail messaging for what is required.

(g) Organize your outgoing and incoming e-mail into electronic folders for easy access and retrieval. If you comingle personal e-mails with work-related e-mails, you may be required to provide all of your e-mail messages during litigation concerning a project on which you wrote e-mail messages.

(h) Print paper copies of e-mail messages and put them into appropriate files for future reference. Electronic folders may be accidentally destroyed or lost. If the message is evidence of some decision or matter of potential significance it should be saved with other documents addressing that issue, and should be saved in a form that will not be accidentally or inadvertently lost.

(i) Delete E-mail off of your system and erase it off of any back-up tapes or other disks, computers and servers in a manner consistent with your corporate records purging/retention policy.

Contrary to what some people seem to think, e-mail is not just a temporary document that lives in the nether world of the electronic universe. Even after e-mail messages have been deleted from your computer, they may still be retrieved from a server in some other location. Another confounding issue is that the e-mail you thought was a private communication between you and someone may get forwarded either intentionally or accidentally to others, and before you know it, your little message is being read by half the world. You might remember that during the Senate hearings of Oliver North regarding the Iran-Contra scandal, senators demanded to see his e-mail. He responded that it had all been deleted from his computer much earlier. To his surprise, the government was able to use some simple disk utility programs to resurrect his dead e-mails. It seems that e-mails have a life of their own.

To get rid of old e-mail by deleting it, erasing the disk, and re-recording over it in a manner that will better assure it will not later be retrieved, consult with a good IT adviser to use the best technology to accomplish the purpose. But be careful that you don't erase e-mails that may be subject to discovery requests in pending claims.

IV. Records Retention and Destruction and Litigation

A. How Long Should You Keep Records?

Time periods established by state statutes of limitations and statutes of repose can be useful guides to determining how long to maintain project records. State statutes of repose typically bar claims that are brought more than a specified number of years after substantial completion of construction. Each state statute is different with regard to the time limit and with regard to who is covered by it and for kinds of services or work. As a general rule, if a statute of repose applies to your services or work, you should maintain significant project records at least until the end of the time period established under that statute. It may, however, be prudent to maintain records for an even longer period. If you are working under a contract for a federal, state or local government or agency, for example, you may have statutory or regulatory obligations to maintain your records for a significant number of years beyond what you might normally expect.

B. What Documents Must Be Given in Response to Discovery Requests?

When you receive a request for "discovery" of documents by counsel in litigation, you are required to provide copies or access not only to those documents that are part of your "official file," but those copies that may be in "working files," desk drawers, job-site trailers, worker's homes, computers both at the office and at home, and any other documents in whatever location that pertain to the request. You, as owner of these records, have the responsibility to locate them wherever they might be and make them available to those who are requesting them through discovery. There have been a number of cases where the documents most vital to the plaintiff's case were found in the home of one of the defendant's employees. If the plaintiff locates such a document after the defendant has denied its existence or otherwise failed to produce it, this could lead to sanctions being imposed against the defendant by the court.

In federal courts, as well as some state jurisdictions, parties to litigation are required to provide the other party with all documents relevant to the case even if not requested to do so by the opposing counsel. This creates an affirmative duty on each party and requires due diligence in reviewing your records and providing access to the other side. This duty makes it all the more important that you establish and follow and records purging and retention policy so that you do not unnecessarily create an obligation to give someone records that should have long since been destroyed.

C. Records Retention and Negligent Spoliation of Evidence

There can be serious liability and potential sanctions for intentionally destroying evidence to avoid discovery of damaging information. News stories fill the newspapers with reports that corporations and accounting firms that have allegedly destroyed records to in order to avoid shareholders, courts and even congressional committees seeing those records which might contain information embarrassing or damaging to positions taken by the corporation. In some particularly egregious situations, it is argued that the destruction of records may even constitute a crime punishable with prison sentences.

Courts in some states recognize a tort of negligent spoliation of evidence. *Foster v. Lawrence Memorial Hospital*, 809 F. Supp. 831 (D. Kan.) Some of the factors considered by the courts in deciding whether to impose liability for negligently destroying evidence include the following: (1) there was a duty to maintain the evidence imposed either by law or contract; (2) a potential claim or law suit existed; (3) evidence has been destroyed; (4) the ability of the plaintiff to prove its case has been significantly impaired by the destruction of documentation; and (5) the plaintiff has suffered damages as a result of the document destruction. In the case of *Kirkland v. NYCHA*, 236 A.D. 170, 666 NYS 2d 609), a New York court held that dismissal of a suit was an appropriate sanction against a litigant for disposing of evidence before its adversary had an opportunity to inspect it. And this was held to be so regardless of whether the destruction was done intentionally or negligently.

Implementing a document retention policy, and implementing practices to consistently follow that policy are important risk management tools. Records might be appropriately purged from your files and destroyed as part of a routine procedure that has been established as your standard business practice, and yet it might be deemed inappropriate to destroy the same records in the absence of an established procedure. If you ever find yourself in litigation and the plaintiff is arguing that you destroyed records that had once been a part of your files, the court may consider not only whether you had a records retention/ records destruction policy, but whether the specific destruction of records at issue was done pursuant to that policy. A policy that is designed and carried out in good faith in the ordinary course of business may provide you an excellent defense to claims of spoliation of evidence. But remember that if you are in litigation or a dispute with either your client or a third party, or if there is an investigation or audit by a governmental agency, you must preserve the records rather than following the scheduled document destruction policy.

Once a records retention and purging policy has been established it is important that you consistently review your records on a periodic basis so that you comply with the policy—purging and destroying those records that the policy states are to be purged, while faith-fully filing and maintaining those records that are still be maintained pursuant to that same policy. Firms have been known to get into trouble for destroying records on the eve of discovery by an opposing party even though those records could have (and should have) been destroyed years earlier pursuant to their formal records retention policy. A policy is no good unless you use it. Moreover, the fact that you have a written, records retention policy can be used against you if it turns out you destroyed records in a manner inconsistent with that policy even though you may have been entitled to destroy those same records in the absence of any policy. The key is to apply the policy consistently to each of your projects and to all of the documents covered by the policy.

When purging records from your files in the ordinary course of business and pursuant to a proper records retention policy, care should be exercised in how the records are disposed of. Throwing copies of confidential client records into the trash or recycle bin where they might be improperly viewed and used by other individuals should not happen. They should be shredded or otherwise destroyed.

We see then that records have value in protecting you in the event of misunderstandings by others on the project, and in helping you to prosecute or defend a case in the event of litigation. Some forms of documentation may also hurt you, especially if they have been imprudently written or maintained. By creating clear and temperate communication through written and electronic documentation, you not only help manage in advance any future disputes and litigation, you also benefit from improving the communication and management within your firm and with your clients and others right now, on an ongoing basis.

D. E-Mail Confidential and Discovery during Litigation

A host of confidentiality issues arise in connection with the use of e-mails. For example, who is entitled to receive an e-mail message or document? Who actually has access to the e-mail message or document? When the message is deleted from the sender/and or the recipient’s e-mail folder, does it still exist somewhere else? For how long?

In office computer systems, firms often create back-up files to copy documents each night or at a regular interval to insure against inadvertent corruption of document file or computer system failure. Should such back-up systems routinely include copying e-mail messages? If so, who should have access to the back-up e-mails and for how long before the messages are destroyed? Should a firm have the right or obligation to review the number and/or content of e-mail messages sent by employees? If an e-mail is not successfully transmitted to the intended recipient, should anyone other than the sender be included in the routing of the return of the message?

These questions become even more critically important to individuals and firms involved in, or who may be involved in, litigation in the future. One suggestion is to treat e-mails no differently than a document sent by facsimile. Thus, similar to the warning contained on many fax cover sheets—and on almost all faxes sent by lawyers—an e-mail user may choose to include a caveat at the bottom of the message.

The caveat may advise that the information contained in the e-mail message, and any attachment, is intended only for the personal and confidential use of the designated recipient. The warning should also indicate that the message may be privileged and confidential attorney-client communication. It should also advise that if the reader is not the intended recipient, the e-mail has been received in error and should not be disseminated or copied, and that the e-mail should be deleted immediately and the sender notified by telephone.

As a general rule, computerized data is discoverable. Thus, even if a party produces a hard copy of electronic evidence, he or she may still be required to produce the electronic version. A recent examples include *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999) and *Murphy Oil USA, Inc. v. Flour Daniel, Inc*., 52 Red. R. Serv.3d 168 (2002 WL 246439 (E.D. La).

V. Ownership and Copyright of Documents

Instruments of service produced by the design professional, including plans, specifications, drawings, opinions, reports and calculations have historically been treated as intellectually property belonging to the design firm that created it. This has been plainly stated in standard form contracts such as those published by the American Institute of Architects (AIA) in Document B141, and the Engineers Joint Contract Documents Committee (EJCDC) in EJCDC Document 1910–1. A sample contract clause protecting the design firm's ownership rights is as follows:

> Drawings, specifications and other documents, prepared by the Design Professional (DP) and the DP's consultants are Instruments of Service for use solely with respect to this Project. This includes documents in electronic form. The DP and the DP's consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights. The Instruments of Service shall not be used by the owner for future additions or alterations to this Project or for other projects, without the prior written agreement of the DP. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the DP and the DP's consultants.

A clause like the above-quoted one sets forth clearly the rights of the design professional and protects against the risk of liability that might otherwise arise out of reuse of the documents by an unauthorized person, including the project owner. The protection afforded by this clause is appropriate because if the documents are used on other projects without the design firms knowledge and input, the designer will be unable to assess and revise the design for the new circumstances or new project on which they are being utilized. This means he or she will not be able to manage the risks that will naturally arise when design documents are used on a project.

In contrast to the reasonableness of the AIA and EJCDC clauses, the provisions of the Construction Owners Association of America (COAA) contract form state the following:

> The Construction Documents and any other documents or electronic media prepared by or on behalf of the Professional for the Project are the sole property of the Owner free of any retention rights of the Professional. The Professional hereby unconditionally transfers and assigns to the Owner all copyright claims, trade secrets or other proprietary rights with respect to such documents, and agrees, upon request of the Owner, to turn over to the Owner the originals and all copies of such documents and materials as of the date of such request.

If an owner is insistent that it be given ownership rights to the design documents, and the design professional is willing to grant such rights, it should seek to add an indemnity clause to protect it against claims that might arise out of the reuse of the documents. For example, the design professional (DP) might include language like the following:

> The Owner agrees to hold harmless, indemnify, and defend the design professional against all damages, claims, and losses of any kind (including defense costs), arising out of any use of the plans and specifications on any other project, for additions to his project, or for completion of this project." The design professional should also be careful not to give away

its own right to reuse the documents in the course of its future services for other clients. The EJCDC Document 1910-1 (clause 6.04) handles this by stating: "Engineer shall retain an ownership and property interest therein (including the right to reuse at the discretion of the Engineer) whether or not the Project is completed.

The problem with allowing the owner to reuse the design professional's documents, besides the obvious fact that the design professional is giving its work away for free, is that the DP loses control over how the documents are interpreted and used. This puts the DP at significant risk since it will not be able to make necessary revisions and changes to the documents that may be necessary before they can be used successfully on the new project. The liability exposure from such reuse should be carefully considered before the DP agrees to permit it, and before agreeing to permit such reuse, it is advisable to negotiate specific disclaimers on the reuse and indemnification from the owner. A couple recent court decisions may be useful in getting an understanding of how the courts apply contract language.

A. Case Finding Copyright Infringement of Design Documents

When an architect's drawings were used to complete a project by a different architect when the original project developer transferred the project to a new developer, the original architect successfully sued the new developer for the unauthorized use of his design documents. The original architect ("NSI") performed professional services for the original developer ("Strutt") in three separate phases. In the first phase, NSI delivered to Strutt a proposed letter agreement under which NSI agreed to develop a schematic building footprint for an assisted living center called Satyr Hill. Although Strutt never executed the agreement, both Strutt and NSI fully performed according to its terms.

Next, NSI submitted a proposed letter agreement to provide additional architectural services to develop the exterior elevations for the project and attend a zoning exception hearing. Again, all terms of this proposed agreement were performed by Strutt and NSI although Strutt never actually signed the agreement. After this, NSI created four architectural drawings depicting the building footprint, the floor plans, and the exterior elevations. These were incorporated by Strutt's civil engineer into the development plan for the project and submitted to the zoning board which granted the request for a zoning exception.

While the zoning application was pending, NSI submitted a third proposed letter agreement to Strutt offering to create the design and working drawings for the remaining development of the project. This proposal stated, "If the above is acceptable, we will prepare a Standard AIA Agreement." Consistent with its record, Strutt did not execute the letter agreement. Several months later, NSI submitted a revision to this proposed agreement along with a "revised AIA Contract for Satyr Hill Catered Living per our recent discussions." The AIA Contract provided in relevant part that: "[t]he Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project, or for completion of this Project by others unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect." Once again, Strutt failed to sign this agreement. One month later, Strutt advised NSI to cease performing services because Strutt's potential business partner had backed out of the project and Strutt lacked sufficient expertise to go forward with the project alone.

In an interesting twist, Strutt asked NSI if it might know of any potential buyers of the project that could complete it. NSI then successfully solicited buyers on behalf of Strutt and as a result a group called "Morningside Development" took over. Ironically, however, Morningside decided to consider different architects to complete the project. NSI advised Morningside that if it did so it had no authority to use the NSI drawings without its express written consent. Morningside thereafter entered into a design-build contract for construction of the project and provided the design-builder ("Hamil Commercial") with a copy of the NSI drawings. The design-builder in turn gave the drawings to its subcontracted architect ("EDG Architects"). Morningside then met with EDG and instructed it to avoid any modifications to the original plans and drawings that would necessitate obtaining a new zoning exception. After the project was completed, NSI Architects filed suit against Morningside alleging copyright infringement for unauthorized use of NSI's design documents.

In their defense, the defendants argued that they could not be held liable because they had an "implied nonexclusive license" to use the NSI drawings. They argued that the totality of NSI's conduct implied the existence of such a license. In analyzing whether such an implied license had been created, the court concluded that an implied license is created when three conditions are met, including "(1) a person (licensee) requests the creation of a work, (2) the creator (licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intended that the licensee copy and distribute the work."

The third element of this test was not met in this case, said the court, because NSI did not intend that its copyrighted drawings be used on the project for which they were created independent of NSI's continued involvement. Nothing about NSI's representations or conduct suggested that it intended either the original developer or Morningside to use its plans without NSI's future involvement or express consent. In fact, NSI specifically advised Strutt to the contrary. The court made particular note of the fact that NSI submitted an AIA agreement to Strutt that stated NSI's intention that its drawings not be further used without its express consent. For these reasons, the court held that NSI did not grant a implied license to the defendants to use its drawings. *Nelson-Salabes v. Morningside Development*, 284 F.3d 505 (4th Cir. 2002).

Risk Management Note: Several lessons are learned from this case. It demonstrates the importance of using agreement forms such as those of the AIA that preserve the copyright interest of the architect. It demonstrates the importance of getting things in writing but shows that even when written agreements are not signed, the actions of the parties in performing in a manner consistent with the terms and conditions of the unsigned contract may be evidence of the contractual intent of the parties. Another issue is the importance of choosing clients that are financially sound and have experience with similar projects and contracts so that expectations may be managed and the project may be completed as anticipated by the design professional. Finally, it is somewhat surprising that the architect here apparently did not obtain any written assurances from Strutt before it assisted Strutt in finding another developer to buy the project, and that it likewise did not obtain any written assurances of the new developer, Morningside, before introducing it to the project.

B. Case Allowing Reuse of Architects Plans

Who owns the contract documents? Is the project owner entitled to reuse them on other projects? Can the Architect reuse them for other projects? These questions are becoming increasingly common and the answers more and more complex. Whereas form contracts of the American Institute of America and other organizations provide for ownership of the copyright and documents by the Architect, more recent agreements between design professionals and their clients have given the client greater rights to reuse the architect's work product.

Serious liability risks arise when a client is permitted to reuse the drawings without input and revision by the design professional that originally drafted them. In addition, the Architect may lose out on income it would have otherwise earned from a continuing relationship with the project owner in which it produced revisions and additional plans for other facilities.

In *Eiben v. A. Epstein & Sons International, Inc.,* 57 F. Supp. 2d 607 (N.D. Ill. 1999), the court addressed the intent and application of the "Instruments of Use" provision of the AIA B 141 contract to determine whether the project owner (a county government) was entitled to use an architect's drawings ten (10) years after they had been drafted, for the purpose of renovating part of the original project designed by the plaintiff, architect. In that matter, a county government was the project owner and signed a contract with the A/E contained an "instruments of service" provision stating the following:

> Drawings and specifications as instruments of service are and shall remain the property of the Architect whether the Project for which they are made is executed or not. The County shall be permitted to retain specifications for information and reference in connection with the County's use and occupancy of the Project. The drawings and specifications shall not be used by the County on other projects, for additions to this Project, or for completion of this Project by others, except by agreement in writing and with appropriate compensation to the Architect.

When the county later decided to build a new health services center as an addition to its Department of Corrections Residential Treatment Unit (RTU) Building that had been designed by the plaintiff, architect, it retained the services of a new architect. The plaintiff sued that architect when he learned that the new architect had used plaintiff's original drawings to create the new drawings and had provided information to contractors in the bidding documents for the remodeling portion of the contract. Renovation of the RTU building was only a small part of the total costs of new medical center construction. Most of the design services performed by the new architect were for new construction of an addition and less than 5 percent of the project was for renovating one room of the original structure by dividing it into several smaller rooms.

The plaintiff sued the new architect for copyright infringement as a result of this reuse of its drawings The court found that the use and copying of the drawings was permitted under the unambiguous wording of the contract because the activities occurred "in connection with the County's use and occupancy of the [original] Project." According to the court, "alteration in the use of the occupancy of a fractional part of the RTU Building cannot arguably be characterized as 'other projects' within the contract's meaning." The court concluded:

> Where a change in the use of a portion of a building is involved, encompassing the partitioning of a previously open area into a number of rooms and the creation of necessary modifications in the systems serving that space, it is of course inevitable that the old plans must be drawn to prepare the new plans. [Plaintiff's] beef that the new plans were derived from and substantially similar to his earlier drawings is much like Portia's contention that the contracted-for pound of flesh could not be extracted unless it could be done without any accompanying drop of blood—but here [plaintiff's] consent to use of his work 'for information and reference' necessarily

carried with it the right to use his drawings as the basis for the new plans covering the revisions in the use of the space.

Risk Management Note: When project owners create their own contract documents it is critical that the design professional pay close attention to the language pertaining to ownership and use of the design documents. Clients are more frequently demanding that the documents be deemed their property to be reused at their will, without compensation and without any liability protection afforded to the designer. The problem with such clauses is that the designer loses the ability to control the use of its work product. Where a client uses some other firm to complete the design, the original architect is at greater risk because he is not on the project and is unable to and able to correct the inevitable design errors that could be discovered and corrected as construction work progresses. By being on the project, the architect can interpret its drawings and specifications and cooperate with the contractor and owner to correct deficiencies or errors before they turn into problems.

Where the owner terminates the A/E and uses partially completed documents or takes the documents and modifies them for use on some other project, the risk is even greater. With this increased risk it is prudent to require contract language with specific disclaimers and indemnification obligations on the part of the project owner.

VI. Site Safety: What Is the Design Professional's Responsibility?

The extent to which design professionals have responsibility and liability for job site safety continues to be debated in courts around the country, with widely divergent results. This makes it difficult to provide uniform advice or counsel to design professionals (DPs). Risk management consultants and attorneys are generally quick to advise design professionals to obtain legal advice specific to the law of their individual state, rather than rely upon general educational information that may be provided in risk management workshops and nationally distributed newsletters such as this one. The reader of this newsletter is likewise advised to obtain advice of local counsel and not rely upon the general principles presented herein. Having provided that caveat and disclaimer, this article will provide an overview of recent case decisions, as well as some generic risk management ideas for design professionals concerned about their potential responsibility for the safety of individuals other than their own employees.

Site safety is primarily the responsibility of the construction contractor. Prosecuting the work to meet the specifications and maintain a safe job site is within the contractor's means, methods and procedures of performing the work. Construction contracts such as standard form American Institute of Architect (AIA) contract forms expressly state that the contractor has responsibility for site safety. The DP contract form typically states that the DP is not responsible for site safety, and that the construction contractor has sole responsibility for safety.

In such circumstances, a contractor that is told by the design professional to perform its work in a manner different than the contractor intended may have a basis for alleging entitlement to a change order for extra costs incurred in making the change, plus any delay and impact costs that might be caused by the change. In addition, where the DP has involved itself in site safety decisions and exercised control over the work or workers' safety, some courts have looked beyond the written language of the contract and held the DP to be responsible for site safety based on its actions in the field that created implied authority to control the work despite the contract language to the contrary.

A. Engineer with Actual Knowledge of Danger Liable Regardless of Contract Language to the Contrary

Several court decisions have held that once a design professional has insinuated itself into site safety responsibility by actions such as instructing laborers to get out of unshored trenches, the DP has a continuing obligation to stay involved in site safety, and cannot subsequently ignore safety problems and assert that they are the exclusive responsibility of the contractor. In other words, if a DP saved the life of a worker by ordering him out of an unsafe trench, and a few days later that individual died in the trench that was still unsafe, courts have held the DP responsible.

Partly as a reaction to such decisions, some (or perhaps many) DPs have adopted a position that they will not see or report safety problems that they observe. The idea is that if you don't say anything to anyone about safety, you can't inadvertently create legal responsibility that goes beyond your contract requirements. In the case of *Carvalho v. Toll Brothers and Developers*, 675 A.2d 209 (N.J. 1996), however, the court held that when an engineer observes work and inferably has actual knowledge of a dangerous condition, the engineer has a duty to exercise reasonable care to the worker. Although the contract did not give the engineer responsibility for site safety, the court stated that "the engineer's responsibilities for ensuring compliance with the plans and the rate of work progress, including the proper handling of utilities that crossed the trench, implicated safety concerns."

The court in *Carvalho* further stated that the engineer had authority to halt work that was not in compliance with the specifications, and that this gave the engineer "sufficient control to halt work until adequate safety measures were taken." What this decision appears to mean for engineers in New Jersey is that if they have actual knowledge of dangerous job site conditions that could foreseeably cause harm to workers, they have a duty to exercise reasonable care to avert harm to the workers, regardless of what their contract might say to the contrary.

B. Pennsylvania Court Refuses to Follow *Carvalho*

In contrast to the New Jersey court, a court in Pennsylvania, in the case of *Herczeg v. Hampton Township Municipal Authority and Bankson Engineers*, 766 A.2d 866 (2001), recently declined to impose liability on an engineer in similar circumstances. A construction worker (Steven Wagner) died while working in an unshored trench. The complaint alleged that the engineer ("Bankson") was the project representative for the owner, and had actual knowledge that Wagner was working in a dangerously unsafe trench "in that the trench had no shoring or bracing in violation of Bankson's own specifications, federal law and industry practices." It is further claimed that the risk of serious injury or death was reasonably foreseeable and that Bankson's representative took no steps to warn the workers or to correct the situation. Under those alleged conditions, the plaintiff asserted that the engineer breached a duty owed to the decedent and was liable for his resultant death.

In its answer to the complaint, the engineer asserted that it had no knowledge of an unsafe condition and no duty regarding the allegations. It also alleged that it had no authority to control the contractor's work and never assumed by contract or conduct any responsibility for job site safety. The trial court granted the engineer's motion to dismiss the complaint for failure to state a cause of action. On appeal, the appellate court affirmed the dismissal, stating, "The courts in this Commonwealth have consistently refused to impose a duty on design professionals to protect workers from hazards on a construction site unless there was an undertaking, either by contract or course of conduct to supervise or control the construction and/or maintain safe conditions on the site."

In this particular case, the court further explained the plaintiff's theory of liability as follows:

> Appellant argues the traditional principles of negligence law should impose a duty on an engineer to exercise reasonable care for the safety of the general contractor's workers when the engineer has actual knowledge of dangerous working conditions that create foreseeable risk of serious injury to those workers. She submits this is true even where the contract places the responsibility for safety on the general contractor and the engineer's plans and specifications did not create the dangerous conditions. We cannot agree.

With regard to the applicability of *Carvalho,* the Pennsylvania court stated, "We are not persuaded that the rationales expressed in these cases warrants the establishment of a new rule of law fastening liability based strictly upon an assertion of actual knowledge of unsafe work-site conditions." "We reject any notion that a duty arises based solely upon an engineer's actual knowledge of dangerous conditions…. If someone is under no legal duty to act, it matters not whether that person is actually aware of a dangerous condition…. Conversely, if someone by contract or course of conduct has undertaken the responsibility for worker safety that person may still be liable even in the absence of actual knowledge of the dangerous condition if they should have known of the condition." This decision by the Pennsylvania court provides a well-reasoned discussion of the different legal theories that may apply, depending upon the jurisdiction where the project is located.

Conclusions: In some jurisdictions, a design professional contract stating that the design professional has no responsibility for site safety will provide a legal defense against most suits by non-employees alleging site safety responsibility.

Courts in some jurisdictions have scrutinized the design professional's actions to determine whether the DP assumed responsibility and exercised authority for site safety that was not expressly given to it by contract. For this reason, it is important that the consultant exercise caution in its communication with the contractor with regard to safety concerns or other matters impacting the means, methods and procedures of the work. The written and oral communication should clearly maintain that the consultant does not have independent authority to make decisions concerning safety, and that only the contractor and the project owner can make decisions concerning site safety.

As a practical matter, the consultant's contract should expressly state the limitations upon the consultant's authority concerning jobsite safety responsibility and any authority to stop work. This should include a provision stating that the consultant is not responsible for the safety program and procedures of the general contractor or of the project site. It may be advisable to have the owner include a provision it its contract with the general contractor requiring the contractor to indemnify the consultant for any claim arising out of injuries or death of an employee of the contractor.

As explained in the recent Pennsylvania case, *Herczeg v. Hampton Township and Bankson Engineers* (quoting from another Pennsylvania case), "the great weight of authority supports the rule that an [engineer] does not, by reason of his supervisory authority over construction, assume responsibility for the day-to-day methods utilized by the contractor to complete the construction. The [engineer's] basic duty is to see that his employer gets a finished product which is structurally sound and which conforms to the specifications and standards. Any duty that the [engineer] may have involving safety procedures of the contract must have been specifically assumed by the contract or must have arisen by actions outside the contract. In determining whether the [engineer's] contractual duty to supervise the construction includes the safety practices on the jobsite, the [engineer] may intentionally, or impliedly by his actions, bring the responsibility for safety within his duty of supervision. The factors which would appear to be relevant in any case where an attempt is made to expand the [engineer's] liability beyond the specific provisions of the employment contract are set forth [as follows]:

(1) actual supervision and control of the work;

(2) retention of the right to supervise and control;

(3) constant participation in ongoing activities at the construction site;

(4) supervision and coordination of subcontractors;

(5) assumption of responsibility for safety practices;

(6) authority to issue change orders; and

(7) the right to stop the work.

This list of factors provides a tool with which a design professional may evaluate whether may be assuming responsibilities for site safety either by contract language or by actions in the field.

VII. Insurance Issues

A. Typical Features of E&O Insurance

E&O policies are written on a claims-made basis. Occurrence-based policies have historically not been used in E&O insurance, since the liability tail (the period in which claims could be made for occurrences arising during the policy period) is too long for an E&O carrier to adequately underwrite and price. Thus, the claims-made policy requires that the claim—"a demand for money or services, or the filing of a lawsuit or institution of arbitration proceedings naming the insured and alleging an error, omission, or negligent act"—be made within the policy period, which may be extended by the retroactive date or tail coverage. As a practical matter, the claims-made nature of E&O insurance requires that these policies be renewed on an annual basis in order to effectively maintain coverage for prior acts.

Coverage under an E&O policy is triggered on a negligence-based standard of care. This standard measures the design professional's conduct against the degree of care and skill exercised by similarly situated professionals performing similar tasks on similar projects in the same geographic region as the project. If the insured contracts to provide a more severe standard of care—such as "the highest standard of care in the industry"—damages flowing from a breach of this standard will not be covered by conventional E&O policies.

As with all insurance policies, exclusions are dependent upon the underwriting philosophies of the insurer and custom in the industry. Typical E&O exclusions include the following:

- Warranties and guarantees beyond the negligence standard;
- Faulty construction workmanship;

- Services or activities not normally provided by a design professional;
- Failure to advise about insurance;
- Failure to complete drawings, specifications, or other instruments of service, or failure to process shop drawings, on time or within a defined period of time;
- Providing or revising estimates or statements of probable construction costs or cost estimates;
- Pollution; and
- Projects where the insured performs professional services and where construction is performed, in whole or in part, by the insured or an entity under common ownership with, or management and control of, the insured.

The last exclusion (commonly known as the "design-build exclusion") is just one of several exclusions that relate directly to issues that can arise under design-build projects. It can be particularly problematic if the A/E is in a lead position on the design-build team.

One of the reasons that E&O insurance is so important is that it not only covers personal injury and property damage arising from negligent acts, but—unlike the coverage afforded under CGL policies—it also covers economic losses. This can be important in a design-build setting, where the damages that might arise from professional negligence include the failure to (a) develop complete design documents that results in greater cost to the design-builder and (b) specify proper equipment to enable performance to be achieved. Each of these breaches may give rise to direct damages, such as the additional labor, material and equipment costs associated with the design deficiency, as well as to delay damages that may be payable as a result of the deficiency.

B. Professional Liability Coverage for Design Errors and Omissions

1. Coverage for the Design Professional

a) Standard Errors and Omissions "Practice" Policies

Professional liability insurance policies, written to cover a design professional's practice, require that in order to be covered, the damages must arise out of negligent acts, errors and omissions in the rendering of professional services. Some carriers have revised their policy language to delete the term "negligent" as a modifier of "acts, errors and omissions." Nevertheless, it appears that the intent of carriers is to use other provisions in the policy so as to continue to limit the policy to cover only "negligent" performance.

Don't assume that just because the word "negligent" has been removed from one place in the policy that there is no other language in that same policy limiting coverage. The standard policies contain exclusions for liability arising out of breach of express warranties and guarantees. They also exclude coverage for liability arising out of breach of contract if that liability would not exist at common law in the absence of the contract language. This "contractual liability" exclusion is sometimes misunderstood in the context of errors and omissions (E&O) policies. It is not uncommon to hear someone say that they have blanket contractual liability coverage, but later find out that the manner in which the exclusion is written provides for contractual liability coverage only to the extent that the liability arises out of the negligent performance of the named insured.

Indemnification provisions in the agreement between the design professional and its client (project owner or design-builder) sometimes require that the architect/engineer (A/E) indemnify the client for damages arising out of its performance regardless of whether that performance is "negligent." Such indemnity by the A/E is an uninsurable risk since the E&O carrier does not consider costs incurred by the A/E as a result of such indemnification to be "damages" as defined by the policy. Instead, those costs are excluded from coverage by the "contractual liability exclusion" and by the language of the Insuring Agreement.

Although a project owner gains no insurance proceeds from such an uninsurable indemnification provision or other contractual liability provision, there may be some legal benefit. If it is a negligent act, error or omission on the part of the A/E that causes the contractual obligation, it is possible that the statute of limitation for breach of contract may be applied instead of the typically shorter limitations period for tort actions.

From this presenter's point of view, this is not sufficient reason for a project owner to insist on these otherwise uninsurable provisions. Insurance carriers routinely advise their insured A/Es against agreeing to such provisions. Sound risk management principles mitigate against an A/E agreeing to liability for which it would not otherwise be liable at common law.

b) Project-Specific Policies

Instead of relying upon the standard practice policy described above, owners of large projects are increasingly requiring the design professional or team of design professionals to obtain a project-specific professional liability policy. During the past several years, the premium rate for project-specific insurance fell dramatically, and new markets competed aggressively for this business. As a result, it has become a cost-effective solution for projects that were previously considered too small for such a policy. This may be changing, however, as significant claims are being reported under some of these policies. The market for this insurance will surely harden as insurance carriers reconsider the wisdom of writing these policies and the rates that need to charged for them if they are to continue to write them.

Several perceived advantages of the project-specific policy have made them popular. Project owner's may prefer to have a single policy for the entire design team instead of having to look to insurance from multiple parties. Where there are teaming arrangements or joint ventures between multiple parties performing the work on the project, there is potential for the insurance carriers of the individual firms to exclude coverage under their policies for liability arising out of the jointly performed work or liability incurred by the joint-venture entity that was not a named insured under the policy. There is also the potential for finger pointing between different team members and their carriers. A well-crafted project policy that insures the entire team can go a long way toward eliminating this kind of tension.

Another potential advantage to the project-specific policy is that high deductibles under a number of different practice policies are not applied against the claim. When project owners seek to protect themselves by requiring their A/Es to increase their standard practice policy limits, the deductibles under the policies generally increase significantly as well. If this happens, it is more likely that a claim will fall within a high deductible, with no insurance proceeds being paid by the insurer.

One final advantage to be mentioned here is that the project policy gives the owner greater assurance that coverage will be in place several years after the project is completed. Many design errors are not discovered until several years after the construction is finished. By then the design firm's practice policies may no longer be in force. The owner can more easily require that a project policy be effective for a long period after project completion, to cover completed operations.

2. Insurance Provisions in Professional Services Agreements

a) **Issue #1 (What Is Covered?):** Professional liability insurance is intended to cover you for your negligent acts, errors and omissions. Breaches of warranty and breaches of contract are not covered—except to the extent the breaches result from negligent acts, errors, and omissions of the policy holder. Coverage for liability you assume under your contract for damages caused by anything other than your negligence is expressly excluded by the "contractual liability" exclusion. Always keep in mind that the policy is intended to cover only your negligent acts, errors and omissions. In one contract, the insurance Article stated that the Design Professional will obtain professional liability insurance "protecting from claims resulting from errors and omissions, or negligent acts arising out of the performance of professional services and operations under this Agreement." The way the above paragraph is written, it appears to expect insurance to cover all errors and omissions—regardless of whether they were negligent. The insured should clarify to the owner that the professional liability policy, consistent with all such policies by all markets available today, limits coverage to damages caused by the Design Professional's negligence.

b) **Issue #2 (Who Is Covered?):** The professional liability carrier is almost never willing to name an entity other than the design professional as an insured or additional insured under the policy. Reasons for this include the fact that the owner of a project is not a licensed design professional and is not likely to commit a negligent design error for which it will need coverage under the professional liability policy. In addition, the owner is the party that is most likely to have damages for which it desires to sue the consultant and recover under the consultant's professional policy.

A major problem with having the client as an additional insured is that it creates potential remedies against the consultant that the owner would not otherwise have. For example, consider a typical contractor claim in which the contractor alleges it is entitled to extra compensation as the result of changes it had to make in its work due to (1) differing site conditions, (2) failure of the owner to coordinate the work between multiple prime contractors, and (3) faulty plans and specifications. The owner may very well tender the claim to you and demand that you and your insurance company provide the owner's defense to this contractor claim. With contractor's submitting claims using the "kitchen sink" approach to allegations, it is likely that you, as the consultant, will be implicated frequently in being the cause, in whole or in part, for the contractor's damages. You may end up defending the owner against every claim filed by a contractor. By using up the insurance in defending your client against claims, you may seriously erode or exhaust the available insurance under the policy that you will need to protect you against claims directly against yourself.

c) **Issue #3 (Contractual Liability Coverage):** If the contract states that the DP will obtain contractual liability coverage and the provision in the contract pertaining to contractual liability was uninsurable because it made the DP responsible for costs and losses due to warranties, performance guarantees, specified liquidated damages delay without regard to whether caused by negligence, the DP may find itself in a breach of contract situation for promising something that it cannot deliver.

The professional liability policy will only cover "contractual liability" to the extent that the Design Professional would have been liable for the damages in the absence of the contract language. This means, that the policy only covers damages arising out of the Design Professional's negligence. The DP will want to negotiate out of the contract any requirement for contractual liability that exceeds what is typically insured under a professional liability policy.

For additional review and discussion concerning insurance, please see the outline and slides in Part II of this presentation, that address the following:

A) Underwriters' Red Flags and How To Waive Them/How Risk Management Plays a Role in the Underwriting Process

B) Practice Policies

1. The latest on who and what is, and is not, covered.

2. How to structure a cost effective policy in today's market place.

3. Creating seamless, integrated professional/general and pollution liability policies.

C) Project Specific Policies—What Can and Can't Be Structured in Today's Marketplace.

D) Alternatives to Traditional Insurance—From Contractual Limitations and Waivers to Captive Insurance Companies.

VIII. Significant Contract Terms and Conditions Affecting Risks

A. Americans With Disabilities Act (ADA)

The Americans with Disabilities Act (ADA), imposes liability upon the owner of a facility that designs and constructs it in a manner that does not meet the accessibility and usability requirements of the ADA. An exception is made if it is structurally impractical to meet the requirements, but that becomes a factual determination that is often left to a trier of fact (e.g., jury) to decide during a trial. The ADA also requires that alterations to existing facilities be readily accessible to individuals with disabilities to the maximum extent feasible. What precisely must be done to meet the ADA requirements is not clearly set forth in the law. It is, consequently, necessary for project owner and design professionals to exercise reasonable care in forming their determinations (and professional opinions) as to what is required in the given circumstances of a project. Although the law appears to focus on project owners, it has also been applied against design firms and contractors who have been found to have been in control of the design and construction of the facility.

By agreeing to "comply with all laws, ordinances and regulations," a design professional may be deemed to have warranted strict compliance with the ADA as well as with other difficult to interpret laws and regulations. Despite the exercise of due care, it is possible that the professional opinion of the design firm concerning what is required by the ADA may differ from what someone working for the governing agency may deem to be required. Generally speaking, courts are deferential to the determinations and opinions of government agencies when it comes to interpreting their own laws and regulations. This means that even if your interpretation were reasonable, a court could conclude that the government agency is entitled to assess penalties against your client, the project owner, based upon your failure to meet the more strict interpretation of the ADA applied by the government agency. Ordinarily, courts do not reverse a government agency unless it is proved that the agency acted arbitrarily, capriciously or in violation of the law. That rarely happens. Consequently, if a project owner is required to pay fines and penalties, plus redesign a facility and pay to rip out and replace construction work, you may find yourself contractually liable to reimburse your client all these costs if you have signed a contract that committed you to strict compliance with the ADA.

The insurance ramifications of this for the design professional are that coverage for these costs may be denied on the basis that they are not the result of damages caused by negligence in the performance of professional services. They may instead be found to be losses incurred as a result of a breach of warranty or guarantee. They may also be seen as arising out of "contractual liability." All such costs are excluded as damages under the professional liability policy.

Because of the uninsurable liability you will incur by agreeing to strict conformance with the ADA, it is appropriate to negotiate your contract so that it requires that you exercise the ordinary standard of care in complying with laws, including the ADA. This will give you (and your insurance carrier) a basis to defend you by proving that although you may have failed to comply with the ADA in the opinion of the government agency, and although fines, penalties and damages may have been incurred by your client as a result, you are not legally liable if it can be demonstrated that you met the generally accepted standard of care in your efforts to comply with the law. An example of a clause by which only the generally accepted standard of care has been agreed to, consider the following: "Consultant shall exercise the generally accepted standard of care to render professional services in compliance with applicable laws, ordinances and regulations, including the Americans with Disabilities Act (ADA)."

The AIA B141 form (1997 edition) deals with code compliance as follows: "The Architect shall review laws, codes, and regulations applicable to the Architect's services. The Architect shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project." This establishes the responsibility within the ordinary standard of care for how the Architect will be performing all of its services.

B. Cost Estimates

In the event that construction bids or costs come in higher than the engineer's estimate, owners are more frequently requiring A/Es to assume the risk (and cost) of revising plans and specifications. In some contracts, the owners are essentially demanding that the A/E warrant that the construction work will be completed for the estimated construction costs.

An example clause from an owner-generated contract is as follows: "As part of the Schematic Design Documents, the A/E shall provide to the University a construction cost estimate, the Probable Construction Cost shall not exceed the Project Construction Cost. In the event that it does, the A/E, without additional compensation, in conjunction with the Construction Manager and the University, shall re-design the Project as necessary to maintain the Project Construction Cost."

The problem here is that it is just the first clause among many in this particular contract that would make the A/E responsible for all cost overruns regardless of whether there is negligence by the A/E. Other clauses in the contract require the A/E to prepare construction estimates and state that any re-design that is required in order to get the construction bids down to the estimate will be performed at the A/E's expense. For example, another clause states if the cost model update submitted by the contractor during construction exceeds the project budget, "and if the A/E is unable to effect cost reduction revisions in the Construction Documents without deviating from the design and intent of the previously approved documents, the A/E shall … await instructions which the University shall issue to the A/E concerning future action to the taken under the Agreement. The instructions issued by the University at its sole discretion shall include redesign of the Project as necessary in conjunction with the Construction Manager and the University to meet the Project Construction Cost without additional compensation."

Even the AIA B141 (1997 edition) provision on cost estimates creates, in my opinion, potentially uninsurable risks for the design professional. It states: "If the budget for the Cost of the Work is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall: (4) cooperate in revising the Project scope and quality as required to reduce the Cost of the Work…. 2.1.7.6—If the Owner chooses to proceed under Clause 2.1.7.5.4, the Architect, without additional compensation, shall modify the documents for which the Architect is responsible under this Agreement as necessary to comply with the budget for the Cost of the Work…." This means that must perform services without being paid for them despite the fact that there is no allegation that its original services were performed negligently.

Since the professional liability policy will not cover cost overruns that the project incurs which do not directly result from your negligence, it is important that the client understand that they are putting the DP into a position of paying costs out of the DP's own limited assets, without the benefit of insurance coverage. It is preferable for the DP if the contract clauses clearly state that the cost opinion or estimate is not a guarantee of cost either as to the consultant's fee or as to the ultimate construction costs to be paid to others.

C. Dispute Resolution

Instead of litigating claims in court, or resolving them though arbitration as has been the preferred method in many standard form documents over the years, there has been an increasing use of alternative dispute resolution, such as mediation. Mediation of disputes may be facilitated by an independent neutral who assists the parties to communicate with each other and come to a meeting of the minds concerning responsibility for the matters at issue and concerning damages, if any. Mediation produces a nonbinding result. It is basically a form of settlement discussions   Although accepted wisdom has been that arbitration can be a more cost-effective and efficient means to resolve disputes than resolving them through litigation, this has not proved to be the case—particularly with complex construction disputes.

With complex construction litigation, it is often beneficial to obtain full discovery of the facts through interrogatories and depositions of witnesses and experts. The abbreviated proceedings in arbitration may not permit the parties to adequately develop and prove their case. Moreover, it may render it difficult for an insurance company to determine the basis for an arbitration decision. If a decision is rendered with no factual and legal explanation, and the claim was based on negligence, breach of contract and warranty, it may be impossible for the Company to ascertain the basis for the arbitration award.

Mediation has proved to be effective in resolving such a significant number of cases that professional liability insurance companies routinely encourage their insureds to try mediation before going to court. In fact, several carriers offer their insureds a credit on their deductible if they go through mediation. If the mediation fails to resolve the dispute, the parties then are free to proceed with other binding dispute resolution, including arbitration or litigation—as set forth in the contract agreement. The AIA B141 (1997 edition), at 1.3.5 states: "Any claim, dispute or other matter in question out of or related to this Agreement shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with Paragraph 1.3.4."

An example of a mediation clause is the following from AIA B141 (1997 edition), Article 1.3.4: "Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party."

Accelerated Arbitration. Some project owners have begun requiring the parties to the various design professional and construction contracts to agree to accelerated arbitration. This may result in a dispute concerning change order costs paid to a contractor becoming a claim presented by the project owner to the DP for resolution before the project is concluded. To the extent that the DP or its insurance company declines to accept professional liability responsibility for the change order costs, the owner may be able under the terms of the accelerated arbitration clause, to require the parties to submit the issue to negotiation, mediation and binding arbitration, immediately—long before the project has been completed. Moreover, it may be possible that multiple accelerated arbitrations could go forward simultaneously involving different issues and different parties.

I believe insurance companies should discourage their insureds from agreeing to enter into a contract that contains such a clause, and that insurance companies should consider declining to insure projects that include such a procedure.

Here is what the accelerated arbitration does on a construction project. It may require that any claim between the project owner and the design team and/or contractor go to step negotiations, then mediation and then binding arbitration—all prior to completion of the project. This means that the insurance company does not get to wait until the project is completed to determine the full amount of the aggregate claims. Instead, one or more claims could go through accelerated arbitration and require the insurance company to pay the claims piece meal along the way.

One of the things I don't like about this procedure is that the parties may end up wasting valuable time in the dispute process while their time would be better spent on the project itself. I fear this may even exacerbate the claims by causing their inattention to the project. It would also seem to have the potential for causing greater legal fees for the plaintiffs and defendants since there is potential for more negotiation/mediation/arbitration proceedings over a longer period of time.

D. Indemnification

Indemnification provisions in contracts may require the design professional to indemnify, hold harmless, and defend its client against claims, damages, and allegations. If a DP agrees to indemnify its client for anything other than damages arising out of its negligence in the performance of professional services, it will have a contractual liability making it liable for damages that it would not have been liable for at "common law." In other words, the courts would not impose liability on the DP since it did not violate the standard of care, yet the DP may be found contractually liable without regard to whether you were negligent, since that is what you agreed to by virtue of the contractual indemnification clause.

There are typically three parts to an indemnity clause. The DP may agree to (1) indemnify, (2) defend, and (3) hold harmless the client. By "indemnifying" a party is agreeing to reimburse its client for its losses after those losses have been determined by litigation, arbitration, or settlement. By "defending" the client, a party is agreeing to pay for the client's legal expenses as it defends the claim brought by some third party. By agreeing to "hold harmless" the client, a party is agreeing to protect the client against harm from suits by third parties or yourself. Insurance will not cover its Insured's costs of defending its client arising out of the agreement to defend and indemnify the client. This is important to remember. No matter how innocuous an indemnity clause may appear, if it requires the DP to "defend" the client for any reason, it may create uninsurable losses for the DP.

Indemnity clauses fall into three groupings. These are commonly called "broad form," "intermediate form," and "narrow form." Broad form indemnity, as its name implies, requires the consultant to indemnify its client for all damages arising out of the project whether caused by the consultant, a third party, or even the client. There is not much to say to the DP about such broad form indemnity other than, "Don't agree to do this!"

Intermediate form indemnity also shifts much risk to the consultant—but not as drastically as does the broad form. It may state, for example, that the consultant will indemnify the client for all damages caused "in whole or in part" by the consultant. This language can be deceptively subtle. Many, if not most, courts interpret it to mean that if the consultant contributed even just a little bit to causing the damages, it will be required to indemnify the client for ALL of the damages, including those caused by the client's negligence.

An example of such a clause is as follows: "The Architect shall indemnify and hold harmless the Owner for all damages, losses, or claims that arise as a result, in whole or in part, from the negligence, or error, omissions, or failure to perform by the Architect, his employees, his agents, or his Consultants."

This is an exceptionally bad clause. It is interpreted by most courts to require the DP to indemnify the owner for 100 percent of the damages incurred by the owner even if caused only in part (e.g. less than one percent by the DP). This is an unreasonable term and condition. It creates uninsurable risk for the DP. The only damages that could be covered by the insurance would the damages to the extent caused by the negligence of the DP.

Narrow form indemnity requires the consultant to indemnify its client only for those damages caused by the consultant's negligence. Of the three forms of indemnity, this is obviously the most reasonable. Keep in mind that consultants' professional liability policies are intended to respond only to damages caused by the negligence of the insured Consultant. Exclusions in the policy generally bar coverage for contractual liability in which the consultant has assumed liability for which it would not have been liable at common law because it performed services negligently.

Caution: Be careful about clauses that look like they are narrow form indemnity but actually contain ambiguous language or even deceptive language that create greater liability than might be expected. Consider, for example, "DP will indemnify the Client for all damages arising out of acts, errors or negligence of the DP." This may require indemnification for damages arising out of non-negligent acts and errors. It would be prudent for the DP to revise and amend the clause in the contract to include the word "negligent" as a modifier to the words "acts, errors." Likewise, if the contract language states that the DP will indemnify for "damages arising out of its performance of professional services," it would be prudent to revise and amend the language by inserting the word "negligent" as a modifier to the word "performance."

Because of the potential to create uninsurable contractual liability through the indemnification language, it is a good idea to have this language of the contract reviewed by legal counsel and insurance professionals.

E. Limitation of liability

A tool for limiting the amount of liability undertaken by the design professional is the limitation of liability (LoL) clause. By including LoL clauses in your contracts you can better predict the potential liability and you can obtain coverage appropriate to cover you.

A typical clause may look like the following from EJCDC Document 1910-1, Exhibit I:

> Engineer's Liability Limited to Amount of Engineer's Compensation. To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, partners, employees, agents, and Engineer's Consultants, and any of them, to the Owner and anyone claiming by, through, or under Owner for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied of Engineer or Engineer's officers, directors, partners, employees, agents, or Engineer's Consultants, or any of them, shall not exceed the total compensation received by Engineer under this Agreement.

In this clause the language specifically identifies the various legal causes of action that are included in the limitation. There is a good reason for this. There are some cases that have held that if the LoL states that it applies to damages arising out of "negligence" and does not mention "breach of contract" an owner might sue for breach of contract and thereby avoid the limitation altogether.

Waiver of Consequential Damages. Even a client that does not want to include an LoL clause in the contract may be willing to include a waiver of consequential damages. The AIA B141 (1987 edition), Paragraph 1.3.6. provides: "The Architect and the 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 in accordance with Paragraph 1.3.8."

A few common themes for your consideration when drafting an LoL clause include the following:

1. If the contract will also include an indemnity clause, keep it separate from the LoL clause. This will minimize the likelihood that a court will void the LoL clause based upon the state's anti-indemnity statute, if any, or for public policy considerations. You might reference the LoL clause, however, in the separate Indemnification clause. Review with your attorney what will and will not be enforceable in your state.

2. Clearly identify the liability limit in the clause and provide a limit that is reasonably proportionate to the risks. The liability limit should not be a de minimis sum. It could be linked possibly to the liability insurance requirements of the contract or to the total fee earned by the design professional firm or some reasonable amount. (If you base it on insurance, do not refer to "insurance proceeds," since this could expose your entire insurance program, which may be far in excess of the insurance required by the contract. Be careful to base it on the amount of insurance required by the contract only.)

3. Do not bury the LoL clause in fine-print boilerplate language in the contract. It should be prominently featured—at least equal to the other terms and conditions of the contract. Refer to the LoL clause in subsequent task agreements or work orders or be sure that they specifically incorporate by reference all terms and conditions (including LoL) of the Agreement.

4. Provide an opportunity, either in the clause or in another part of the contract, for the client to negotiate a higher limit of liability, either for a predetermined sum or otherwise.

5. Provide a space for the client to initial the clause—demonstrating that it knew of the clause and negotiated it.

6. Identify types of claims to which the clause applies, including negligence, breach of contract and breach of warranty.

7. Include a separate clause in the contract stating that the LoL was mutually negotiated and that, but for its inclusion, the fee would have been greater or that the design profession would not have entered into the agreement.

8. Include a clause stating that the A/E's services are being provided only for the party in privity with the A/E and that the services are not for the benefit of any third parties.

It may not be necessary to do all or even any of the above eight (8) items in order to have an enforceable LoL clause, but the more of them that you do, the greater confidence you might have that the clause will be enforced. Find out from legal counsel what will work best in your state.

F. Scope of Service

One area of risk that can be effectively managed is defining the scope of the services to be performed so that there is not misunderstanding and unmet expectations by the parties. When the agreement is not clear concerning what is included in the basic service for basic fee, and what will be paid for as additional service with additional fee, disputes arise that often end up in court.

Basic Services should be specified in reasonable detail in the contract or as an attachment to the contract. Services that might reasonably be provided for the project but which are excluded from your Basic Services may be listed as "Additional Services" that are to be paid for as requested by the Owner. See, for example, AIA, Form B–141, Article 2.8.3 (1997 edition). It may even be prudent to list services that will be specifically excluded when you know those services may need to be done but it is agree by you and your client that you will not be performing them.

A sample clause for scope is as follows:

Scope of Services

1. Basic Services. Consultant shall furnish the labor, material, equipment and services ("Services") set forth in Appendix ____ of this Agreement. The scope of services (and related plans and specifications) may not be modified or amended, unless the changes are first agreed to in writing by Client and Consultant. The parties shall adjust compensation to Consultant to reflect such changes in the Services.

2. Additional Services. The general category "Additional Services," referred to in Article ___ may include services due to changes in the scope of the PROJECT, including, but not limited to, changes in size, complexity, schedule or character of the work, and also may include revisions to studies, reports, design documents, drawings or specifications which have previously been approved by the Client, or when such revisions are due to causes beyond the control of the Consultant. All changes in scope and revisions shall require the written authorization of the Client, and be agreed to by Consultant, prior to commencement of work, as provided in Article ____ of the Agreement.

3. Excluded Services. Without attempting to be a complete list or description of all services or potential services that will be excluded from this Agreement and not be performed by the Consultant, the following services are specifically excluded from this Agreement: (list here). In addition, the Consultant shall have no responsibility for discovering, handling, removing (or disposing of) any hazardous materials or wastes.

G. Standard of Care

Design professionals are not held to a standard of perfection by the courts. Unless the contract between you and your client states otherwise, your standard of care is defined as the ordinary and reasonable care usually exercised by one in that profession, on the same type of project, at the same time and same place, under similar circumstances and conditions. Only if you breach this normal standard of care are you deemed to be "negligent." On almost any construction project, there will be some errors and omissions in plans and specifications. Some of these will cause the owner or the contractor to incur additional costs in completing the job. Not every mistake, however, is a negligent one. It is possible, consequently, that the owner may incur additional costs due to your error (e.g., change order costs paid to the contractor), and not be entitled to recover those costs from you. Unless the mistake resulted from your "negligence" you will not be legally responsible to your client for the increased costs it paid to the contractor.

Expert witness testimony is typically required before a design professional can be found negligent. The expert must testify as to the applicable standard of care, and must testify to how you breached that standard and caused the client to suffer damages. The client may not prevail against you unless the jury (or judge in the event there is no jury) decides, based on the expert testimony, that you were negligent.

Where a contract contains an article holding the Design Professional to the "highest professional standards for the profession of architects and attaining compliance with applicable local, state and federal law…," this may constitute a warranty or guarantee. It also may create contractual liability for damages that do not arise out of the negligent performance of the insured. Such damages are expressly excluded pursuant to the exclusion section of the insurance policy. An additional problem with the "highest standard of care" is that it is confusing and ambiguous. No one can know what the highest standard of care is. The insured has agreed to perform beyond the generally accepted standard of care. This means that he will be unable to defend himself with expert testimony to prove he was not negligent. Such expert testimony, even if successful in proving him non-negligent, would not necessarily prevail against the breach of contract cause of action brought by the school district based on the insured's failure to perform to the highest standard. Thus the insured could be found liable and not have the benefit of insurance to cover its liability.

A more reasonable clause establishing the standard of care is the following: "The consultant will perform its services using that degree of care and skill ordinarily exercised under similar conditions by professional consultants practicing in the same field at the same time in the same or similar locality."

The EJCDC 1910–1 (1996 edition), Paragraph 6.01 also establishes the standard of care for the engineer and expressly disclaims any express or implied warranties. And AIA B141 (1997 edition) addresses this at Paragraph 1.2.3.2.

IX. Conclusions

This presentation presents an overview of risk management issues and techniques that frequently arise in design professional services. It is hoped that the written materials will become a valuable desk resource for you. For a more detailed discussion, with examples of the concepts discussed in this paper, see *Construction Law & Risk Management: Case Notes and Articles,* a book by Kent Holland. A free monthly electronic newsletter, *Construction Risk.com Report,* is also available from the author at http://www.ConstructionRisk.com.

One of the most important keys to good risk management is good communication. The contract serves as a communication tool to help assure that the parties understand each other and share the same expectations for the project. Documenting the communications, and issuing reports that contain appropriate language is another vital aspect of sound risk management.

When it comes to the contract language and allocating the risk through the contract terms and conditions, the goal should be to allocate it to the party that has the best ability to manage that risk. The contract can give ownership of the risk to any party. But if the party that accepts ownership of that risk does not also have the ability to manage that risk both legally and in fact, there can be serious consequences, both in terms of problems that actually develop as a result, and in terms of the legal consequences of that risk allocation. A reasonable contract is one that is reasonable for all parties involved. And, finally, acquiring professional liability insurance for the risk that is appropriately allocated to the design professional is of utmost importance.

Responsibility for risk management needs to be instilled in all levels of personnel involved with a project.

Disclaimer on this Presentation

This risk management paper, presentation, and the information contained herein, is distributed with the understanding that Arch Insurance Group, Inc, and J. Kent Holland Jr., J.D., and the distributors of the presentation, are not engaged in the rendering of legal services. Further, the content and comments in this presentation are for general distribution and general educational purposes only, and cannot apply to any single set of specific circumstances. If you have a legal issue to which you believe this course relates, we urge you to consult your own legal counsel. The author and distributors of this course expressly disclaim any responsibility for damages arising from the use, application, or reliance upon the information contained herein.