# Risk Management For The Design Professional
By: Christine E. Drage, Esq.

I was recently asked to provide a presentation for design professionals on "How to Avoid Litigation." I responded that the presentation would be very short, as *avoiding* litigation was not within the control of the design professional. Fearing that my response would likely incite a riot (yes, design professionals riot in their own special way), I explained further that although *avoiding* litigation (only to feel failure and defeat when the process server arrived with a complaint) was not something within the design professional's control, certainly *minimizing* exposure to such litigation and *minimizing* exposure once in litigation, was indeed within the design professional's control.

Minimizing Exposure To Litigation – Client Selection.

Although the days are gone where a good relationship with your client and a handshake were enough to ensure staying out of the courtroom, certainly client selection is extremely important in minimizing exposure to litigation, especially on certain types of projects which may be higher risk than others.(i.e., condominium projects are very high risk and prone to litigation, whereas, statistically, commercial projects are less likely to result in litigation etc.) If it is discovered that a potential client is litigious, or some other red flag is raised, then a business decision needs to be made about whether to provide services for such a client or project.

Minimize Exposure Once In Litigation – Written Contract.

As many of you are likely aware, anyone can file a lawsuit. The best design professionals in the world have found themselves in litigation, on award winning projects no less. When litigation happens, the first question the design professional asks (after a few expletives are likely uttered), is – How do I get out of this thing – immediately?!

One of the first things I ask for when a design professional client of mine is sued is a copy of their contract for the project at issue. I look to see if there are any clauses which limit the design professional's exposure to the litigation at hand. For example, is there a Consequential Damages Waiver, a Limitation of Liability clause or a Third Party Beneficiary exclusion? What does the Indemnity clause say? Depending on what clauses exist in the contract and what they say, exposure can be greatly reduced.

I also look to see what the contractually agreed to scope of services were. If I have a written agreement identifying the scope of services provided, and the litigation has nothing to do with the scope of services provided, then chances are far greater that I can get my design professional "out" of litigation fairly quickly. (And yes, I have a number of cases each year where I am arguing that the claims have nothing to do with the scope of services provided.) Conversely, if my design professional client does not have a written contract and only his or her recollection of what the scope of services were, it is going to take me longer to convince opposing counsel and a judge that my design professional client should be "out" of litigation. One of the favorite arguments of opposing counsel is that the scope of services of the design professional were far broader for the project. (Yes, all of a sudden, limited site observation services by a design professional are claimed to have been full-time-8 hour-per-day inspections and supervision of means, methods, techniques, sequences and procedures of subcontractors - miraculously for the same fee.) I can easily refute this argument if my design professional client has a written contract defining such terms and the scope of services to be provided. (Standard AIA contract documents have such clauses.) Now, it is important to actually follow the scope of services in the contract, and not go beyond said scope without some type of documentation reflecting the additional services provided and linking that additional service back to the original contract. Otherwise the argument will be made that many things were provided beyond the scope of the contract, so why would it be hard to believe that the supervision of means, methods, techniques, sequences and procedures of subcontractors didn't also happen? You can see that it is a slippery slope. Help me help you when litigation happens, by having a written contract that defines a scope and is consistent with the services actually provided.

I am limited by space in the amount of information I can provide in this article. The above obviously raises additional issues from a risk management standpoint, including but not limited to the various types of "good" versus "bad" contractual clauses, key words to avoid in contracts, standard of care issues and various scenarios experienced in litigation. Hopefully I will be able to address all of these issues, and more, as this article will be one in a series of articles geared toward risk management for the design professional.

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