
The Best Foundation for a Great Design is a Good Contract

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As a design professional, you are part of an elite group. You undergo years of schooling, state-required training under licensed mentors, and grueling examinations in order to attain the distinction of becoming licensed in the fields of architecture or engineering. Yet despite the education and perseverance required just to be able to practice in these fields, design professionals are often less equipped to handle the tedious and less-enticing tasks involved with running their day-to-day business affairs.

In an age where construction-related lawsuits are becoming a normal part of the cost of doing business, the contract becomes a vital tool in protecting the design professional from the imminent dangers of litigation. The contract between you and your client is often the one and only opportunity for you to lay out the terms, clearly, completely, and in writing, upon which you will provide design services. A good contract will outline, with specificity, the scope of services, fees, and the responsibilities of both you and your client. Just as important, a good contract will contain clauses pertaining to indemnity, limitation of liability, and insurance. Amazingly, as important as these issues are to the success of a design firm, most design professionals are either not aware of these issues, or decide to ignore them and keep their fingers crossed.

The following are three very important elements that should become a basic requirement in any client/consultant agreement:

Indemnity: Indemnity is basically the shifting of risk from one person or entity to another. A fair approach is typically to have each party be responsible for his or her own work. However, if this is not clearly stated in a written agreement, all bets are off, and you run the risk of the client suing you for, among other things, implied (or assumed) indemnity. Even if the contract contains an indemnification clause, the language of the clause is often vague and confusing, and when it comes down to it, has minimal shielding effect.

Take, for example, the following sample clause:

Consultant agrees to indemnify Client for any allegations or claims made in relation to the services provided by Consultant.

At first this language seems reasonable – the design professional is only being held responsible for the services he or she has provided. But what is meant by “allegations or claims”? Does it mean a lawsuit? Or could it include any grievance by a homeowner or tenant? Or perhaps a subcontractor was not clear on a note in the drawings and had to correct a portion of his work, putting him at a financial loss? The language is too broad. Anyone can make an allegation or claim about anything, and this clause potentially holds you, the design professional, responsible.

The words “in relation to” are also a recipe for disaster. Does the phrase refer only to a mistake or oversight in the contract documents? Or does it also include the faulty work of a subcontractor who used your drawings in performing his or her services? Again, the language is vague and could potentially put you at risk of assuming liability for services well beyond what is reasonable.

Limitation of Liability: Hand in hand with indemnity is limitation of liability. A limitation of liability clause puts a cap on the amount of liability you will assume. The rationale for a limitation of liability clause is to allocate the risk according to profits made. Without a limitation of liability clause, an architect, who may charge \$100,000 for a set of drawings for a residential development, may assume a disproportionate amount of liability as compared to the developer of the project, who stands to make a multi-million dollar profit.

Remember that a limitation of liability clause is only operative between the contracting parties, i.e., the design professional and the client. It will not protect the design professional from claims by third parties. That is where the importance of indemnity comes in – you should insist that the client reasonably indemnify you for claims made by third parties. However, including a limitation of liability clause in every contract is a great step toward limiting your exposure when faced with a lawsuit.

Insurance: Regardless of their experience and training, no design professional is perfect, and the potential for errors and omissions is present in every project. It becomes crucial, then, that you protect yourself from impending disaster by obtaining proper insurance coverage. Many contracts, in fact, require that the design professional maintain professional liability coverage. Insurance brokers offer a wide variety of policies, and the design professional has the right and responsibility to negotiate the terms of the policy before purchasing.

Importantly, a professional liability insurance policy typically will not cover certain items. For example, a policy will not insure against claims of fraud or certain illegal acts. It may also exclude coverage for workers’ compensation, auto, and general liability. Nevertheless, it can be an invaluable safeguard against claims of professional negligence and breach of contract.

It is important that you review your policy carefully, and make sure it meets the criteria set out in the contract. There are innumerable resources available to the design professional to decipher the terms of a policy, including the insurance broker, insurance agent, attorney, and professional associations. Take the time to learn about insurance coverage, and understand the scope and limitations of your policy.

The opportunities for design professionals abound in times of booming construction. But along with the added work comes added exposure. Chances are, no one ever told you while in school that the practice of architecture or engineering would involve such legal intricacies that have now become fundamental to the vitality of your firm. The truth is, your future depends in great part on your understanding of how best to protect yourself. Build on a good foundation and you will be on your way to professional success.

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