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XL CATLIN

A Practice Management Newsletter for Design Professionals

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MAY 18

Whose Project Is This, Anyway?

By Brett Stewart, J.D.
Risk Manager, XL Catlin

It's your right—and your responsibility—to know exactly who your client is.

Design firms report that, occasionally, the client entity signing the professional services agreement, directing the A/E's services, or issuing payment is different from the entity that solicited the services. The reasons for this vary, including efforts to:

- Limit corporate liability
- Segregate finance and construction roles
- Take advantage of tax benefits

As a general rule, you have the right to understand who your client is before a contract is signed, and your contract should reflect this understanding. If your firm encounters different client entities, you should find out why. Below are some tips that can help you navigate this issue:

If a Third Party Signs Your Contract

If you're interacting with a specific client entity during the proposal phase, you normally expect this entity to be your client. Make sure the agreement specifically lists the legal entity you negotiated with. If a different entity attempts to sign the contract, find out who it is and why. The failure to properly evaluate the client is one of our insureds' top non-technical causes of loss.

// Make sure the agreement specifically lists the legal entity you negotiated with. //

If a Third Party Pays You

While most design firms are just happy to get paid, make sure that by accepting payment from a third party, you're not waiving the contract's payment terms. If the third party stops paying you, you don't want your client arguing that you waived the right to collect from the client by accepting third-party payments.

If you agree to accept a payment from a third party, find out who it is, and inform your client in writing that you're not waiving any of the contract's payment terms. Also, consider adding a clause to the payment section of the contract, describing the procedure for submitting invoices and identifying the party expected to make payment, an agent of the client authorized by the client to pay the invoices.

If a Third Party Directs Your Services

The impact of a third party directing your services depends on the specific language in your contract. Your services for a third party could potentially fall outside your contract, and any liability protections you've negotiated, such as a limitation of liability or a waiver of consequential damages, might not apply. By taking direction from a third party, you may be creating an "implied in-fact" contract. Note also that the third party may not have standing to sue you under a breach of contract theory, but negligence theories may apply.

Prior to signing a contract, you should review it for the following:

- Does the contract have an assignability clause that allows your client to assign its duties and obligations to a third party? If so, make the client's right to assign the contract contingent upon adequate notice to your firm as well as your written consent.
- Does the contract have a confidentiality clause that will prevent you from discussing the project with anyone other than your client? If so, revise the clause to include the third party that's giving your firm direction.
- Does the contract mention third-party beneficiaries, which could create a contractual relationship between you and a third party? Don't let third-party beneficiaries make their way into the contractual indemnification. It's better to add a paragraph stating that the parties agree that the rights and responsibilities remain with the contracting parties and that no third-party beneficiary status is conferred on any individual or entity.

Your contract should contain an integration clause (sometimes called an "entire agreement" or "total agreement" clause) that confirms that the parties' contract has not been modified by any other oral or written agreement. Ultimately, you want your contract to accurately reflect the entire understanding of rights and obligations between you and your client. Don't forget to consult your lawyer and your insurance agent or broker about these issues.

For more information, see the "Assignment," "Confidentiality," "Entire Agreement," and "Third-Party Beneficiaries" chapters of XL Catlin's Contract eGuide for Design Professionals, *available on the Learning Management System (LMS).*

Questions/Comments

Contract Corner: Elevating the Standard of Care

Welcome to the next in our occasional series of columns focusing on onerous contract clauses. In this issue, we look at owners' attempts to elevate the standard of care.

The law requires design professionals to perform in accordance with the "standard of care," which is defined by the Engineers Joint Contract Documents Committee (EJCDC) as "the care and skill ordinarily used by members of the designer's profession practicing under similar circumstances at the same time and in the same locality."

The American Institute of Architects (AIA) provides a similar definition. The Royal Architecture Institute of Canada's new Document Six states, "The Architect and the Consultants engaged by the Architect shall perform the Services to the standard of care ordinarily exercised by other members of their professions under similar circumstances, at the same time and in the same or similar locale." An architect or engineer's failure to meet the standard of care is a deviation, which is one of the elements of a cause of action for professional negligence.

Many owner-drafted agreements recite the accepted standard of care, but add all sorts of inappropriate requirements to it. For example, owners often attempt to add the obligation to "comply with all laws, codes, regulations, ordinances," or require the A/E to "comply with all ADA and FHA requirements." One owner attempted to add the requirement to comply with the project hotel's branding.

An owner in British Columbia attempted to elevate the standard of care by including the following language in a contract presented to a consulting engineering company:

> *Consultant hereby represents and warrants to [the client] that Consultant and all employees it will assign to perform the Services possess the necessary qualifications, knowledge, skills, expertise and experience to perform the Services to the highest professional standards.*

An owner may also try to enlarge the locality that helps define the standard of care. One contract included the language, "greater North Carolina." Does that mean the design professional should be held to the same standard of care as those practicing in Virginia, Tennessee, South Carolina and Georgia? More compelling than this ambiguity, this "greater North Carolina" language allows the owner to retain an out-of-state expert to offer an opinion about the design professional's alleged deviation from the standard of care.

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To help counter your clients' attempts to raise the standard of care and increase your liability, here are a few suggestions for points you can make:

- Design professionals, like all professionals, are held to a professional standard of care. If I perform shoddy work, ignore building codes or design something that is substandard, I can be held negligent.
- This is the same standard of care the law requires of lawyers, doctors, insurance brokers, counselors and any other licensed professional you might engage.
- The law doesn't expect me—or anyone—to be perfect. Everyone on this project, including you and those not under your control, might make mistakes. It's everyone's job to identify these mistakes and correct them as soon as possible. Adding an unreasonable contractual obligation does not change that reality.
- The fact is, contract language that requires my performance to meet a standard of care that exceeds what the law requires only serves to complicate the dispute resolution process because my insurance provides coverage only up to what the law requires.
- Contract language that raises my standard of care not only heightens my risk but also jeopardizes my professional liability coverage, since the increased exposure represents an assumption of additional liability for which I would not otherwise be responsible. I won't be able to agree to such a clause.
- We all agree that the design must reflect the applicable codes, laws and regulations. But we should put this obligation in a separate sentence, not in the sentence reciting the standard of care, because inconsistencies in the codes, laws and regulations will be project-specific, and will require my interpretation and coordination.

When negotiating your project's professional services agreement, see that the stated standard of care recites the duty imposed by law, and doesn't set a higher standard.

For more on this issue, see the "Standard of Care," "Fiduciary Duty," and "Non-Negligent Services" chapters of XL Catlin's Contract eGuide for Design Professionals, *available on the Learning Management System (LMS).*

Questions/Comments

Safety Week Is May 7 – 11, 2018

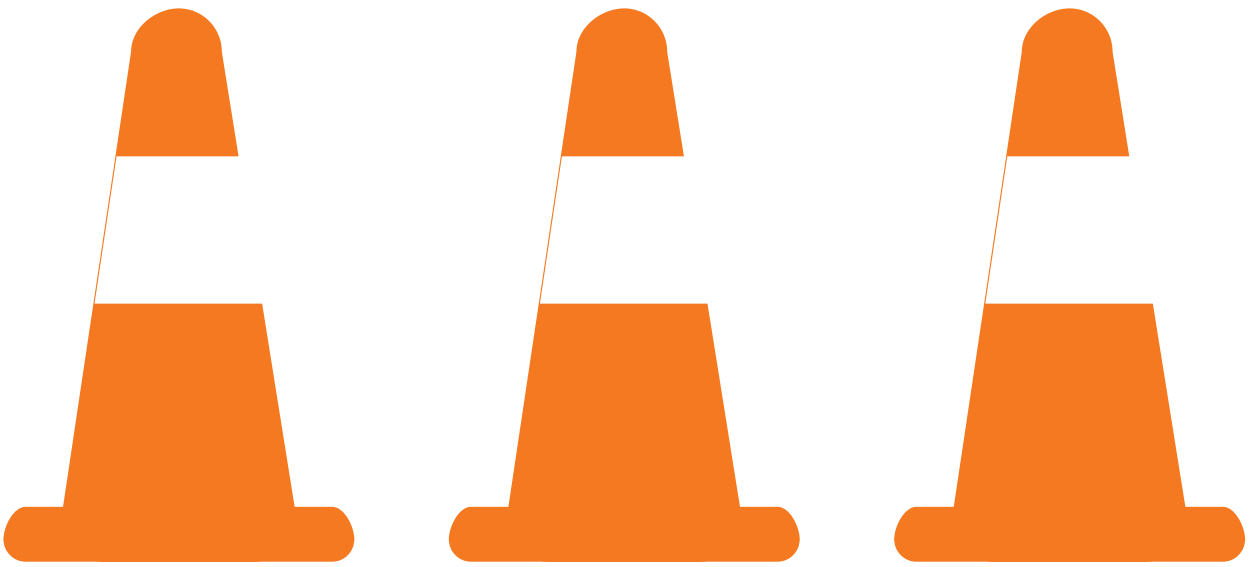
// Nearly 1,000 construction workers die on the job each year in the U.S. //

Nearly 1,000 construction workers die on the job each year in the U.S., equal to 20% of all private industry fatalities. As a design professional, you're usually not responsible for jobsite safety. However, if you see work being performed in an unsafe manner, you have an obligation to report it.

XL Catlin's Design Professional team urges each design firm to support the efforts of the organizations behind Safety Week, which takes place from May 7 to May 11. Part of the week's stated mission is "to collectively raise the awareness of the construction industry's continuing commitment to eliminating worker injury." The theme for 2018 is "The Power of Safe Choices."

We encourage you to spend some time with your staff that week to restate your firm's commitment to safety in the office, on the road, at jobsites and anywhere else your business takes you. And don't stop when Safety Week ends—make safety awareness a regular part of staff and project team discussions throughout the year.

To learn more about Safety Week, visit: www.constructionsafetyweek.com.



// Perhaps the most important guidance provided in the B509 is the addition of several non-standard obligations of the owner. //

Condominium Risk, the AIA and You

This article was written by M. Brandon Waddell, a lawyer and shareholder of the law firm Vincent Serafino Geary Waddell Jenevein, PC, based in Dallas and Houston. Waddell concentrates his practice on the representation of design professionals and resolving construction and business disputes. He also serves as approved defense counsel for XL Catlin's Design Professional unit. In his article, Waddell writes about the increase in condominium claims and the project contract support provided by the AIA's B109 agreement and accompanying guide.

One result of the economic recovery has been the expansion in residential condominium construction, especially in urban areas experiencing population density growth. As any designer who's ever worked on a condominium project might expect, this expansion has brought with it a significant increase in related litigation. In fact, claim frequency and severity have escalated to such a great degree that several jurisdictions have enacted laws to require certain pre-suit actions be taken by the owner in order to promote the resolution of any claim before litigation ensues.

These requirements may include notice to the design professional and general contractor of alleged defects with an opportunity to inspect and cure, mediation, and super-majority votes of the homeowners association members to institute litigation. Some jurisdictions even limit the extent to which an attorney can be involved in the pre-suit process.

Other jurisdictions have experienced adverse legal rulings detrimentally affecting the design industry. For example, the California Supreme Court recently held (in the Beacon Residential Community Association v. Skidmore, Owings and Merrill, LLP case) that a principal architect designing a residential building owes a duty of care not just to the client but also to future homeowners.

Given the unique risks posed by condominium construction and the evolving laws regarding these projects, the American Institute of Architects (AIA) has provided a framework in the *B509–2010 Guide for Supplementary Conditions to AIA Document B109™–2010 for use on Condominium Projects* for design professionals to obtain appropriate protections in their contracts for condominium projects. Specifically, the B509 guide provides model language that may be used to amend or supplement the AIA document *B109™, Standard Form Agreement Between Owner and Architect for a Multi-Family Residential or Mixed Use Residential Project* in order to adapt the agreement to address the unique condominium aspects of the project.

As an initial matter, the guide defines a condominium as "the multi-family or mixed use residential property comprising all or part of the Project, the

Resources:

The AIA guide referenced in the article is available as a free download here.

See the "Condominiums" chapter of *XL Catlin's Contract eGuide for Design Professionals*, available on the Learning Management System (LMS).

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Units of which are individually owned by Unit Owners who share in joint ownership of any Common Elements." Recognizing that acoustics and building envelope claims are specifically problematic in condominium projects, the guide provides model language to promote the utilization of mock-ups of critical building systems to be prepared by the owner or contractor and tested in accordance with the standards set forth in the contract documents with the results of such tests being provided to the architect. Additionally, acknowledging that risks increase if the owner limits the scope of architect's construction phase services, the guide provides that the architect's services shall not be modified or reduced except by written agreement of the owner and architect.

Perhaps the most important guidance provided in the B509 is the addition of several non-standard obligations of the owner. Specifically, the guide offers model language for requiring the owner to retain a building envelope consultant to provide design and inspection services, coordinate the services of its consultants with those of the architect, and to indemnify and hold harmless the architect for any damages arising out of the services performed by the owner's consultants and contractors. Further, the owner may be required to prepare a maintenance manual and provide the manual to the homeowners association. Alternatively, the guide offers language for the architect to prepare the manual as an additional service.

In this spirit of recognizing the importance of ongoing maintenance and inspections of building systems in order to reduce the frequency and severity of claims, the guide also provides for the homeowners association to develop a maintenance and repair budget sufficient to provide for the maintenance identified in the maintenance manual as well as a contingency for repairs and annual inspection of major systems.

Additionally, the guide provides model language for the architect to include a limitation of liability, although due to the various jurisdictional requirements related to the enforceability of such provisions, an architect should consult local counsel regarding the specific local requirements so that such a limitation can be drafted in a manner that will afford the greatest likelihood of enforceability.

Further, recognizing that potential claims can be avoided if marketing materials provided by the owner provide a realistic expectation of building performance and quality, the architect may, pursuant to the guide, require the owner to submit its proposed marketing materials to the architect for review and comment. If the owner fails to revise the marketing materials in a manner acceptable to the architect, the owner is then required to indemnify, defend and hold harmless the architect from damages arising from any representation of the owner about which the architect has made a timely objection.

While the foregoing points will not eliminate the risks unique to condominium projects, the utilization of such recommended contract clauses, as well as others included in the guide but not addressed in this article, will help promote the mitigation of risks and assist in managing the expectations of the owner and homeowners association related to building performance, quality, maintenance and repair obligations. If your firm provides professional services on condominium projects, a review and implementation of the B509 Guide in your practice is certainly advisable.

M. Brandon Waddell may be contacted at 214 979 7420 or bwaddell@vinlaw.com.

Questions/Comments

Design Professional

Published by the Design Professional unit of XL Catlin

30 Ragsdale Drive, Suite 201, Monterey, CA 93940
800 227 8533
CommuniqueUSA@xlcatlin.com • xlcatlin.com/dp

100 Yonge Street, Suite 1200, Toronto, ON M5C 2W1 Canada
800 820 2721 x8682
xldp.communique@xlcatlin.com • xlcatlin.com/dp-ca