



Practice Management Digest

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Features

Future Focused: Technology Leads the Way in Project Collaboration

No longer content to rely on traditional means of communication, leading architecture firms are already pushing the boundaries of online project collaboration?moving from expensive in-house documentation systems to 3D virtual building and online design collaboration.

Transfer of Documents and Electronic Information

To protect design professionals against improper use or reuse of documents by clients or other parties, we routinely recommend that ownership and use-of-documents issues be addressed in the professional services agreement.

Defusing Claims: Strategies for Design Professionals

The design and construction of capital projects, both small and large, have been likened to minefields. On many projects, the dangers are few and far between, but other projects can be explosive. Architects and engineers can guide themselves safely through the perilous minefield of capital construction and defuse explosive, damaging claims. Here's how.

Defending Against Mold Claims: Owners Can Minimize Risk on Their Projects Now

In the last few years, major media outlets have exposed the dangers of toxic mold in buildings. Despite a steady stream of articles in industry publications that describe cause-and-effect issues, few have identified what owners and project professionals can do to minimize the risk of mold-related claims arising on their projects.

Firm Identity Drives Strategy and Strategy Drives Profits

Without an identity, a firm is internally fragmented, working toward opposing ends. The market sees mostly a confusing blur. A clear identity, connected to a specific operating scheme, is exactly how a design firm can succeed beyond its wildest dreams.

Grade Yourself on Client Service

The ultimate judges of quality are your clients. To determine how well your quality program is working, you need to look at long-term trends in client ratings. To evaluate your firm's culture on the key factors in customer service, have your people take this survey.

Resources

Book Review

Architect's Essentials of Contract Negotiation

Ava J. Abramowitz, Esq., Hon. AIA (John Wiley & Sons, 2002)

Art Gensler, FAIA, in a thoughtful, glowing introduction, sums it up: "Ava Abramowitz has written a book that should be an essential part of every architecture professional's library and a must-read for every student taking professional practice courses." I couldn't agree more.

Miscellaneous

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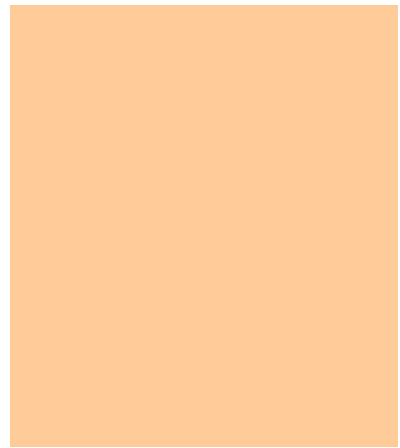
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Desert Practice Conference 2004: "Controlling Chaos: How Will Your Firm Survive?"

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The AIA California Council (AIACC) and the National AIA Practice Management Knowledge Community (PMKC) are excited to announce their partnership in offering the **2004 Desert Practice Conference**, to be held October 29-31 in Indian Wells, Calif.



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Future Focused: Technology Leads the Way in Project Collaboration

Editor's note: This article was prepared for Practice Management Digest by Aconex, which designs Web-based project collaboration systems.

No longer content to rely on traditional means of communication, leading architecture firms are already pushing the boundaries of online project collaboration. Increasingly, architecture firms are moving from expensive in-house documentation systems to 3D virtual building and online design collaboration.

The adoption of project-collaboration systems continues to gather pace as architecture firms reap the financial and operational benefits of streamlined information control. Online collaboration systems enable all project participants the freedom to view information at work, on-site, at home, or from the other side of the world. In addition to overcoming normal geographic boundaries and limitations, online collaboration allows specialist design firms to enter a broader international market.

How do they work? Online collaboration systems produce a searchable documentation record throughout the life cycle of a project, retaining a history of all document revisions and dramatically improving transparency and communication.

On a recent visit to the United States, David Sutherland, vice president of planning at Fender Katsalidis, an Australian architecture firm, noted, "With collaboration, all participants can interrogate and understand the information, where previously documents were locked away in individual practices, often on individual personal computers."

Advantages of Using Online Collaboration Tools

There are four key advantages to using web-based project collaboration tools. While it is arguable to what extent these advantages overlap, better project management leads to reduced operating costs, a better risk profile and, therefore, a competitive advantage.

1. Better Project Management

Information on a Web-based project collaboration system is always accessible and easy to access using a Web browser from any computer connected to the Internet.

Each organization controls who has access to that information within that organization.

Even the smallest industry participant can access information without the need for special software or powerful computers.

Collaboration systems minimize the chance of information loss by either the sender or the receiver through the delivery process (i.e., post or couriers). Collaboration systems also minimize the chance of information loss from hardware failures, poor backup procedures, poor filing, poor document tracking, or staff turnover.

Mundane processes such as double entry of information, filing, and updating of registers are done automatically, enabling staff to concentrate on more important tasks.

2. Reduced Operating Costs

Further savings are achieved through decreased volumes of printing, both in-house and through external printing houses, and also decreased use of the post, faxes, couriers.

No need for expensive external or in-house computer consultants to keep your systems operational and backed up (all you need is a computer with a Web

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browser and access to the Internet).

It is no longer an inconvenience having to find that elusive document in a warehouse full of mislabeled boxes. You can either access the data online or access a CD or DVD copy of your projects.

3. Reduced Risk

Loss of information from an office through accidental loss or fire is eliminated.

Audit trails minimize exposure to litigation.

Senior management staff can delegate more technical issues to subordinate staff and supervise those staff through workflow processes.

Senior management staff can overview projects at a time that suits them.

4. Competitive Advantage

All of the above points lead to an advantage over competitors.

As the future of architecture continues to evolve and the benefits of web collaboration become increasingly clear, the industry will look to solid partners who share similar values and can facilitate the changing needs and embrace the evolving vision of the industry. Forward-looking design firms that embrace these technologies will no doubt be able to influence the emerging standards.

Choosing Collaboration Software: Factors to Consider, Questions to Ask

Service Provider

How credible is the service provider?

How long has the provider been around?

How many customers does it have?

Who are some of its large customers (not related to the service provider) who are happy with the system?

How many users does it have?

How many projects does it have on the system?

Is the service provider independent?

Software Architecture

Is the software truly online, or do we need to download and update some software on our computers?

Is the service provider just a reseller of a series of modules from different software suppliers, such that later changes to the software could affect our business?

Online Storage Capacity

How does the pricing structure work for online storage?

Do we have to pay for additional storage?

Is there a set limit?

Will we have to keep deleting document history to maintain current documents?

Security

How does the system work, and who can view our information?

Does the system allow us to put information in a public area of the site for general access by project participants, i.e., a virtual plan room?

Where are the data stored?

Are the data monitored?

How secure is the data storage location?

How is the data backed up?

How is the data transmitted?

What redundancy exists in terms of data and power supply?

Does anyone on a project have the "God-like" power to see everything on that project? (If the answer is yes, find another service provider.)

Access

How is user access controlled?

Functionality

Is the system easy to understand and use?

Does it take long to set up the system for each project?

Do we have to put our information in a folder structure?

If we want, can we view our files in a folder structure?

Do we have to log on separately for each project?

How many projects can we manage at once?

Can we see an overview of all our projects in one place?

Can we send information out of the system to someone who is not a member of the system?

Does the system work equally well for all the participants in the industry?

Can we scan and file documents into the system so that the sequence of correspondence is not broken?
Can we fax documents out of the system?
Can we order copies of documents from external print companies through the system?
Within our organization, is it possible to configure the system so that we can control the levels of access and functionality of individuals, levels, or groups?
What file types can the system handle?
What platforms can the system run on?
Does the system work with Apple?
Can the system interface with various databases?
Can the system integrate with back-office software and other systems?
Can the system integrate with a fax service?
Can we redline documents online?
System Performance

Does the system search for a document in an acceptable period of time, subject always to our Web-connection providers and infrastructure?
Software Ownership

Can we confirm the ownership of our data?
Can we register a new project ourselves?
Who controls the organizational and user profiles and sets security levels?
Support

Does the selected service provider have a good reputation for customer service, including response times, hours of access, follow-up training, and whether any additional costs are involved?
Training

What is the initial cost for training our staff?
What are the ongoing costs?
Research and Development

Is the system constantly being improved?
What improvements have been implemented in the last three months?
When a change to the software is implemented, how does it happen, when does it happen, and how does it affect our business?
Will they listen to our feedback?
Is the service provider prepared to customize or extend the system to our requirements?
If we want, can the system be hosted on our own servers?
Pricing

How does the service provider calculate the cost of its service?
Does the service include the warranty period post-construction?
What is the forecast total cost for each service provider on a particular project?
What other functionality is included?
Is the system expensive for smaller operators?
Contract

Based on our review of the terms of the agreement, do we understand what we are responsible for and what the service provider is responsible for?
What happens if we are not happy with the service or functionality? Can we stop using and therefore paying for the system?
Aconex (www.aconex.com), launched in 2000, has fast become a global market leader in Web collaboration products for the construction and property industries. Designed and built by people with real industry knowledge, the result is an intuitive system that is easy to use; has tailored functionality; and provides a robust, secure, and reliable technology infrastructure.



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Transfer of Documents and Electronic Information

By Frank Musica, Esq., Assoc. AIA

Editor's note: Practice paradigms are changing rapidly in this electronic age, as the more courageous of us experiment with new delivery systems and new ways of thinking about the design/construction interface and how buildings could be better created. These changes create juxtapositions of traditional and new ways of practicing that sometimes leave the legal and industry leaders "playing catch-up" as they seek to both protect their clients and respond to the changes. The following article is excerpted with permission from Concepts in Managing Risk, a monograph published by CNA Insurance Companies and Victor O. Schinnerer & Company Inc. in 2002.

Experience has taught us that it is important to protect design professionals against improper use or reuse of documents by clients or other parties. We routinely recommend that ownership and use of documents issues be addressed in the professional services agreement. Most clients and design professionals do not understand the many property rights that exist in the instruments of service of a design professional. There are many possibilities that can be negotiated, including the transfer of copyrights, transfer of ownership of the instruments of service, and the creation of a license giving the client the right to use the documents for specific purposes.

There are also many issues involved in allowing a client to reuse documents. Documents, as instruments of the design professional's service, are not products. Allowing reuse on an uncontrolled basis may cause the documents to be treated as products generated by the design professional and may cause product liability exposures to the original design professional. No design professional is insured against such product liability risks. Thus, it may also be necessary for disclaimer language to prevent the possibility of the application of product warranties or guarantees, such as the warranty of fitness for use or merchantability.

The concerns of design professionals over the ownership, use, and transfer of instruments of professional service seem to have intensified. Now, design professionals are faced with such issues as:

Contractors' use of computer-aided design (CAD) information never intended for contractor use

Integration of CAD-based instruments of service into facilities management programs

Reuse of an electronic form of design documentation far beyond its original purpose or time of service.

Electronic transfer of information complicates the practice management considerations of a firm interested in both protecting its intellectual property and managing its professional liability risks. Special protections are appropriate whenever information is transferred, but it is especially important when CAD files are involved. It might be worthwhile to include a note on the documents or in the electronic information such as the following:

The delivery of this drawing should not be construed to provide an express warranty or guarantee to anyone that all dimensions and details are exact or to indicate that the use of this drawing implies the review and approval by the Design Professional of any future use. Any use of this information is at the sole risk and liability of the user.

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We also suggest that when instruments of service are transferred, design professionals reserve the right to remove the professional seal and title block.

Design professionals provide their services within a business context. To a certain extent, that business context can be managed and, in many cases, can become the basis for additional services. In the case of CAD files, for instance, such additional services may involve "delaying" the information, using the CAD information as the basis for a record set of documents, or otherwise adapting the information to meet the facilities management needs of a client.

While professional service firms see CAD as a tool to enhance the design process through better coordination of interprofessional services and through minimizing design conflicts, clients often see CAD simply as a way to produce documents that are fast, cheap, accurate, and reusable. Unrealistic client expectations have always been a problem; CAD use seems to exacerbate this problem and provides a whole new area of unknown risks.

Transfer of information by electronic media increases concerns that should exist whenever design professionals share intellectual property created for a project. With any transfer of electronic information, it should be made clear that a hard copy (kept in the design professional's archives) retains control over variances or changes that might be introduced in the transfer or reuse process.

Technological safeguards for file security provide little real protection. Some firms, however, look beyond technological protections to legal remedies. Firms often demand separate agreements requiring indemnity for the time and cost incurred in disputes involving CAD information. This is in addition to affirmatively stating, in the contract or on the transferred documents, that any reuse is at the sole risk of the client or user.

We think it is important to state in a transfer agreement that the controlling instrument of service is a hard copy of what was transferred by CAD because no one knows how the information might be read under a different system, what unintended or intentional changes might occur, or if the electronic information will degenerate over time. Some firms do this by producing two hard copy sets of the transferred files and requiring the recipient to compare their reading of the CAD file to the hard copy. Once the recipient is satisfied the electronic and graphic versions are equivalent, one of the hard copy sets is signed and returned with a release from future claims. As with any transfer of record documents, an obligation to indemnify the design professional for claims resulting from use of the information is recommended.

In general, addressing the following five issues on projects involving electronic information should reduce the probability of claims:

Information contained in the signed and sealed documents should be deemed to be correct and superior to electronic information.

Electronic information is a component of the instruments of service and is only for the client's benefit on the specific project and for a specific use.

There is no representation of the suitability of the electronic information for other purposes, of the durability of the information, or the medium in or on which the information is furnished.

Any use for a purpose other than that for which the information is intended shall be at the receiver's risk, and the receiver shall protect and indemnify the sender from any claims, costs, losses, or damages.

Transfer of the information does not transfer any license to use the underlying software or extinguish the rights of the sender to reuse the information in the general course of a professional practice.

The AIA and the Transfer of Electronic Information

AIA Document B141-1997 does not provide significant guidance on the use and transfer of electronic information. While the new "Instruments of Service" provisions in the B141 terms and conditions clearly include documents "in electronic form" as instruments of professional service, the issue is left open. Subparagraph 1.3.2.4 of B141-1997 states the following:

Prior to the Architect providing to the Owner any Instruments of Service in electronic form or the Owner providing to the Architect any electronic data for incorporation into the Instruments of Service, the Owner and the Architect shall by separate written agreement set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations or licenses not otherwise provided in this Agreement.

The AIA does address the issues of transfer of ownership and the use of CAD information in AIA Document B511, Guide for Amendments to AIA Owner-Architect Agreements, a supplemental publication that includes suggestions for modifications to the AIA's standard owner-architect agreement forms:

The Owner shall not use or authorize any other person to use the Drawings, Specifications, electronic data and other Instruments of Service on other projects, for additions to this Project or completion of this Project by others so long as the Architect is not adjudged to be in default under this Agreement. Reuse without the Architect's professional involvement will be at the Owner's sole risk and without liability to the Architect. The Owner shall indemnify and hold harmless the Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of unauthorized reuse of Drawings, Specifications, electronic data or other Instruments of Service.

Comprehensive Treatment by EJCDC

The Engineers Joint Contract Documents Committee (EJCDC), in its 1996 edition of EJCDC 1910, provides extensive contract language that addresses the use and ownership of documents, and seems to do so in a fair and rational manner.

In Paragraph 6.04 of 1910-1, the documents are identified as instruments of service and the ownership and property interests of the design professional are clearly stated. Electronic information furnished to the client is provided "only for the convenience" of the client, who has a right to rely only on the printed copies of documents that are signed and sealed by the design professional. In addition, the design professional disclaims any representations as to "long term compatibility, usability, or readability of documents" when they are transferred to the client in electronic media format. The provisions in 1910-1 state the following:

6.04.D Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files. Engineer shall not be responsible to maintain documents stored in electronic media format after acceptance by Owner.

6.04.E When transferring documents in electronic media format, Engineer makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by Engineer at the beginning of this Project.

EJCDC gives the client the right to make and retain copies of the documents for information and reference in connection with use on the project. EJCDC 1910-1 states the following:

Such documents are not intended or represented to be suitable for reuse by Owner or others on extensions of the Project or on any other project. Any such reuse or modification without written verification or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner's sole risk and without liability or legal exposure to Engineer or to Engineer's Consultants. Owner shall indemnify and hold harmless Engineer and Engineer's Consultants from all claims, damages, losses, and expenses, including attorneys' fees arising out of or resulting therefrom.

EJCDC also positively states reliance on a hard copy of the information by the following provision:

6.04.G If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

Preventing Meritless Claims

It is clear that since any reuse of documents, such as a future modification, alteration, or renovation, or as the basis for a different project, may result in meritless claims against the original design professional, protective language should be used regardless of the form of the transferred information. While it should never be assumed that insurance companies can provide "magic" language that removes risk from policyholders, we can suggest language such as the following that can be adapted to situations in which ownership can be transferred or licensed:

Owner acknowledges that Design Professional's drawings, plans, specifications, and other similar documents, whether in written, graphic, or electronic form, are instruments of professional service and not products. Upon full payment of Design Professional's compensation for this Project, ([the ownership and copyright of the instruments of service and copyright to the design] or [a license to use the instruments of service] or [an electronic copy and use of the instruments of service]) shall be transferred to the Owner.

The Design Professional shall not be deprived of the right to retain reproducible copies of the instruments of service and the right to reuse information contained in them in the normal course of the Design Professional's practice. The Owner recognizes that the instruments of service shall not be reused for additions, modifications, or renovations on this Project or for any new project without an evaluation of the documents in relation to applicable codes and standards by a legally competent agent of the Owner.

In return for the Design Professional's ([relinquishment of ownership] or [approval of future use of the instruments of service]), the Owner agrees to waive any claim against the Design Professional and defend, indemnify, and hold the Design Professional harmless from any claim or liability for injury or loss allegedly arising from any reuse of the Design Professional's design or instruments of service by the Owner or any agent of the Owner.

The Owner further agrees to compensate the Design Professional for any time spent or expenses incurred by the Design Professional in defense of any such claim, in accordance with the Design Professional's prevailing fee schedule and expense reimbursement policy.

This language can be tailored to protect the design professional while transferring differing rights in the instruments of service.

Transferring Information to Contractors

The transfer of electronic information to contractors or subcontractors raises many additional questions. The three major questions seem to be:

For whose benefit are the files being shared or transferred?

Does the design professional have the legal right to transfer such information since the information may be owned by the client via contract or operation of law?

Does the contractor have direct rights generated by a transfer agreement or the argument of detrimental reliance should the information in the electronic file be incorrect or inadequate for the purposes of the contractor?

We caution firms that it might be worthwhile to make the rights and limitations of any transfer of electronic information to a contractor or other party specific and clear. For instance, a note should be included on the documents, the transfer medium, or in the electronic information such as the following:

The delivery of this drawing in electronic format is for the benefit of the Owner for whom the design services have been performed. Nothing in this transfer should be construed to provide any right of the Contractor to rely on the information provided or that the use of this electronic information implies the review and approval by the Design Professional of any drawing based on the information.

It is our professional opinion that this electronic information provides design information current as of the date of its release. Any use of this information is at the sole risk and liability of the user who is also responsible for updating the information to reflect any changes in the design following the preparation date of this information.

If a client thinks that it can simply reuse design solutions or documents without appropriate design professional participation, the client is ignoring the risks to itself, the public, and the design professional.

AIA B511 and other free downloads of selected documents are available on the AIA Web site at www.aia.org/documents. (Click on the green Download tab and select "Free Paper Documents.") If you want to discuss issues raised in this article, send e-mail to Frank Musica, Esq. Assoc. AIA, at the Institute's Commended Program of professional liability insurance, frank.d.musica@schinnerer.com.





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Are Your Heirs Apparent? Building the Next Generation of Firm Leadership

AIA Practice Management PIA Virtual Conference

Establishing a clear plan for succession and a clear business plan are basic tools to running a successful firm. However, said ZweigWhite's Kathryn Sprankle and Ray Kogan, surveys have shown that many firms have neither.

During their virtual seminar, *Are Your Heirs Apparent?*, Sprankle and Kogan explained how important it is to plan your business' future. Having a Plan B will carry your firm through unexpected events. It will also ensure that the next generation is prepared to assume a leadership role, and it will increase the firm's market value by showing that it has future goals.

A poll conducted during the presentation indicated that only one-third of firms had identified their future leaders; the rest left things vague. Kogan pointed out that leaving leadership transition to chance could be devastating to a firm's chances of success. For example, people who would have been perfect for the firm may end up leaving, not realizing they had a future there.

Sprankle presented several steps for identifying and developing future leaders. She said, "The next leader has to fill gaps that exist now and must align with future markets. 'Alignment' is the key word."

You can prepare future leaders by giving them an "in-trenches perspective," Kogan said. "Expect them to listen, learn, and contribute their time and creativity to the process."

You have to start early and dig deep to target your candidates, Sprankle said. Look for a decisive person who is action oriented. A future leader must be able to focus more on business than on practice.

Sprankle gave seminar participants advice to develop candidates:

Consider yourself role model number one
Provide early opportunities for real management and decision making experiences

Expose all employees to "the business of the business"

Provide constant, constructive, and accurate feedback
Strategic business planning is also critical to a firm's success-and to paving the way for tomorrow's leaders. It allows you to see what your firm is up against, what your firm stands for, and where your firm is going, Kogan said. And, it is important to communicate your plan to the entire firm.

Figure out what kind of business you run and how good your employees feel about coming in to work every day, Sprankle and Kogan said. Employees will stick through the rough spots if they know your plans for the future and see the long-term destination as worth the effort.

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Value Analysis and the Design Process

The analysis of value is intrinsic to the design process. Design professionals evaluate materials and systems as part of the process of responding to the client's needs. The resultant design is really a series of recommendations to the client that address constructability, program requirements, and life-cycle costs including operational and maintenance expenses.

Generating alternatives to produce the greatest worth for the client often takes skill sets beyond those of design professionals. A team approach can best incorporate the expertise of value and constructability consultants into any analysis that the designers of record provide. Used properly, value analysis can increase the return on investment and create greater overall project value for the client.

Assessing Functional Alternatives

The basis of value analysis is an organized effort focused on achieving the lowest life-cycle costs consistent with required performance, reliability, quality, and aesthetics. This organized effort should acknowledge that the design team's participation will result in additional time and liability exposures, and the professional service fee should be increased accordingly. Usually, the best results are achieved when value analysis begins early in the design process. Beginning at the schematic design development phase, initial and long-term expenses as well as construction costs can decrease through use of more cost-efficient materials and reduction in construction time, increasing the client's profitable use of the facility.

Avoiding the Cost-Cutting Mentality

Mere cost cutting is not true value analysis. Cost cutting that results in a loss of quality and functionality does not qualify as the systematic identification of a component's true function. And this does not provide a component's essential function at the lowest overall cost. Most value analysis ideas involve some compromise on quality, but performance, quality, and cost must be weighed against each other before agreeing on changes. If the solution is developed early enough in the design process, the overall benefit to the client will be greater.

CNA/Schinnerer studies have shown that changes made after the design phase—whether to ease the construction process or to reduce the cost of materials or systems—are more likely to generate professional liability claims. While such changes may save immediate costs, later problems can lead to client dissatisfaction and construction inadequacies, both of which lead to claims.

Achieving True Benefits

Reducing project construction costs, improving project schedules, and decreasing operational and maintenance costs can be a significant challenge. The first step in meeting that challenge is to make sure the client has a well-prepared budget and a clear program. Then the value analysis process, conducted early in the design phase, can have positive results. Gaps in the client's program or insufficient funding can lead to significant problems during construction if not addressed up front.

Value analysis should not be a one-time effort, however. The design team must review and evaluate each proposal on the basis of project goals, technical considerations, implementation consequences, and both initial operations and life-cycle cost savings. The design team also is responsible for defending quality to the client and explaining the downside of any value analysis ideas. A client must be able to express informed consent when deciding on design team recommendations.

All stakeholders in a construction project must understand the procedures and timing of value analysis if the process is to achieve a true benefit rather than

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illusory savings to the client.

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Defusing Claims: Strategies for Design Professionals

By Ernest Holmes, AIA

Editor's note: This article is adapted from a paper presented by Ernest Holmes, AIA, and Lee Schumacher, PE, at the Design Professionals Risk Control Group's 2001 annual convocation in Palm Springs, Calif.

The design and construction of capital projects, both small and large, have been likened to minefields. Navigating through this minefield can be perilous for the untrained and uninitiated and challenging even for the battle-seasoned veteran. On many projects, the dangers are few and far between. Yet some can be explosive.

Having analyzed scores of these bad projects, we have witnessed how experienced yet unwary architects and engineers let small problems become large claims. We have also witnessed how architects and engineers have been set up by crafty, opportunistic owners and contractors and how these design professionals struggled to show they met the industry standard of care. That being said, we have also observed the following ways that architects and engineers can guide themselves safely through the perilous minefield of capital construction and defuse explosive, damaging claims.

Be Vigilant and React Quickly

"No method nor discipline can supersede the necessity of forever being on the alert."

--Henry David Thoreau

In the last 15 years, forward-thinking and proactive professional liability insurance carriers, professional organizations, and others have provided architects and engineers with tools and maps to help them deal with the risks of their missions. Among other things, these have included better contracts, seminars, books, and incentives to use loss-prevention techniques. As a result, architects and engineers now generally know the challenges inherent with poor client selection and inadequate fees. They have learned how to recognize unclear or poorly drafted contract language and have guidelines to draft better contracts available to them. Design professionals have been taught the consequences of unclear, poorly coordinated, or unconstructable plans and specifications. Most also now know that their failure to properly execute construction-phase services can result in large, complicated delay claims against them.

For these reasons, it can be said that ignorance is no longer an excuse for bad practice by architects and engineers, but design professionals beware: Good practice alone is not sufficient armor in the minefield of capital construction. You must do more.

Recognize and Cope with the "Bad" Project

Most bad jobs should come as no surprise to the design professional because they share many of the same characteristics. Often, the warning signs begin at project inception, long before construction. Were the negotiations with your client difficult concerning contract terms and fees? Did your client impose unrealistic deadlines for your work or the contractor's work? Were you, as a result, forced to staff your design team with unproven or underqualified staff? Did the owner limit your construction-phase services? Does the owner have a construction manager? Were you forced to use "owner-oriented" General Conditions in the construction contract documents? If the answer to any of these questions is yes, the design professional should expect a challenging project; be vigilant and prepared to cope with a claim.

Often, there are also clear signs of trouble after the design phase and during construction. For instance, the contractor's bid was excessively low. The contractor submits a schedule showing completion of the project months before the contract completion date. The contractor's communications are

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antagonistic and one-sided. The contractor makes picky requests for change orders, price negotiations are difficult, and the contractor insists on reservation of rights language in the change order. The contractor bombards you with trivial requests for information and complaints about your response time. The contractor documents shop-drawing approval delays. There are excessive shop-drawing rejections, quality problems, delays, and slow construction progress. Each of these is a clear signal of an aggressive, opportunistic contractor who intends to take advantage of any error, omission, or misstep of the design professional.

How should architects and engineers respond to these difficult situations to minimize their exposure to claims? We suggest the following:

- Establish reasonable owner expectations, define your deliverables, and document the basis and adequacy of your fee
- Do only what you were contracted to do, do not deviate from the contract document without sound justification, and do not perform services outside your area of expertise
- Establish effective early warning systems that allow you to recognize and deal with problems within your control as soon as possible
- Focus on recordkeeping to make sure the written record is accurate, complete, and contains your side of the story
- Do everything possible to avoid getting behind in construction phase services; particularly, answering design questions, issuing clarifications to your drawings, reviewing shop drawings, and dealing with change order requests

Involve your insurance company and consider seeking expert and legal advice earlier rather than later.

Bad projects generally generate disputes among the owner, contractor, and design professional? a three-front war. Architects and engineers should be wary of attempts by the contractor or construction manager to drive a wedge between them and the owner during the project. Stay actively involved and constructive in the change order and claims resolution process. Be concerned and react quickly if the owner becomes curt, refuses to take your calls, stops inviting you to meetings, or is uncharacteristically slow in paying your invoices. In these situations, architects and engineers should generally do everything possible to identify and resolve the owner's concerns as soon as possible.

Create a "Quick Response" Corporate Culture

This strategy should be a key component of every design professional's loss-prevention program because it will prevent many unnecessary and avoidable claims. Far too often, we have seen architects and engineers look for cover, rather than a solution, when confronted with an apparent problem with a design. Even in situations when the problem has been minor, we have seen this attitude evolve into a protracted defense of tenuous positions that damage the credibility of the design professional in the eyes of the owner? causing critical and costly project delays.

Principals of design firms should create a corporate culture that minimizes this very human response to problems. This begins with education for everyone in the firm about the potential value and effectiveness of addressing problems when they occur. Teach them that most problems can be quickly resolved when people communicate, work together, and focus on the solution, not the problem. Make them acutely aware that disputed costs have a way of growing with time; that is, it is generally much less expensive to recognize an error and correct it for \$500 or \$10,000 than to pay 10 to 20 times more in an escalated dispute that may also grow to involve the owner. Encourage everyone, if at all possible, to resolve disagreements before tempers flare, personalities take over, and everyone spends a lot of money.

Successful implementation of this strategy requires more than just teaching the benefits of quick and constructive responses to problems. It also requires effective management and leadership by the firm's principals. Specifically, the principals must make sure internal systems are in place to flag lingering, unresolved project needs or otherwise be vigilant to early warning signs of distress. It is up to the firm's management to facilitate open communication, both internally and externally, by eliminating the fear of admitting mistakes and rewarding constructive solutions. Most important, the principals must lead by example and practice what they preach. If staff see principals taking the bull by the horns, willing and anxious to address difficult issues with the owner and contractor, they will be more willing to do it.

Capital projects will remain minefields for architects and engineers. With that

said, however, many mines can be sidestepped or defused completely by those who are forward thinking and proactive. Forever being alert and reacting quickly is one of the best strategies design professionals can use to help guide them safely through the perilous landscape of the design and construction of capital projects.

Ernest Holmes, AIA, NCARB, NRCA, is a senior consultant and forensic architect with PinnacleOne and has more than 30 years' experience in the construction industry. As principal of a 140-person A/E design firm for more than nine years, Holmes has designed, coordinated, and managed a variety of projects, including airports, jails, medical research facilities, hospitals, multifamily housing, courthouses, and municipal dock facilities. Since joining PinnacleOne, he has performed many forensic analyses of construction defects and deficiencies, and has testified on architect-engineer standard of care issues in a variety of cases, both in arbitration and in court.



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Features

Defending Against Mold Claims: Owners Can Minimize Risk on Their Projects Now

By C. Bradley Cronk, RA, and David J. Pfeffer, Esq.

Editor's note: This article is adapted from a presentation given in October 2003 at the AIA South Atlantic Region Convention in Savannah.

In the last few years, the New York Times, USA Today, 60 Minutes, and other major media outlets produced significant stories exposing the dangers of toxic mold in buildings. Industry magazines and journals have also published a steady stream of articles describing cause-and-effect issues, but few have identified what owners and project professionals can do to minimize the risk of mold-related claims arising on their projects.

Owners, contractors, design professionals, and insurers face liability exposure from mold-related claims. Such claims generally fall into one of three categories: property damage, personal injury, or insurance claims (sometimes arising out of claims of bad faith by the insured). Design professionals face malpractice claims that often arise from alleged failures to provide the proper standard of care while designing a facility or to properly inspect building and system components during construction.

Since most claims against design professionals must be supported by expert evidence and testimony proving the professionals breached their "standard of care," it is likely that such a finding would not occur until after those named had expended significant time and resources to defend what may or may not be a valid claim.

Predesign Safeguards

Owners and project team members can safeguard themselves and their projects from mold and water infiltration in several ways. First, all project agreements should contain a coordinated mold and water infiltration prevention plan that obligates team members to specify materials, construction techniques, and project phasing to reduce the risk of water infiltration or mold growth. Project agreements should also contain specific requirements for dealing with mold (e.g., confidentiality, insurance notification, and cleanup methods).

Second, all project agreements should contain fully integrated indemnity and insurance requirements that protect the owner and property from water infiltration and mold growth during and, in some cases, after construction. Agreements should also insulate team members from liability caused by other entities, individuals, and major weather events. Construction counsel should be consulted to incorporate provisions that specifically guard against mold-related liability that is not related to your negligence.

Third, all projects should be carefully examined. Drawings and specifications are frequent sources of design errors and omissions that lead to water infiltration and subsequent mold growth. Common site and building envelope issues to focus on include the following:

- Building orientation to natural topography and drainage, the effect of new and existing landscaping, and water tables and subsurface conditions
- Climate, especially exposure to wind and driven rain
- Tall buildings' vulnerability to higher wind-load pressures at upper stories
- Benefits and liabilities of different wall systems for each project and an evaluation of whether contractors have a proven installation record
- Materials that can withstand natural building movement and thermal

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- expansion without cracking or tearing
- Incompatible adjacent materials such as dissimilar metals (especially fasteners) where corrosion can occur and allow water infiltration
- Weather-resistant barriers (beware of self-sealing products that cannot breathe and allow condensation buildup)
- Details that demand perfect contractor workmanship (consult with product representatives on any unusual roof or façade details to ensure proper detailing and warranty coverage).

Design Matters

A safe assumption in building envelope design is to accept that water penetration will occur. The architect, therefore, can provide redundancies and second lines of defense.

While water leaks in wet areas like bathrooms and kitchens are obvious sources of mold growth, high humidity is a more invisible contributor to mold growth. Common interior design factors that will minimize this vapor buildup include:

- Air-conditioning and humidifying equipment of sufficient size to keep relative humidity levels at 30 percent to 60 percent
- Location of HVAC diffusers, especially if adjacent to exterior walls and corners where temperature and humidity differentials can be greatest
- Coordination of built-in and workstation furniture with HVAC drawings to avoid blocking diffusers
- Easy serviceability of HVAC equipment
- Collection of dirt and dust in internally lined ductwork (so-called Super-duct can easily suffer water damage)
- Sufficient insulation wrap at air-conditioning ducts, piping, walls and ceilings, and thermal breaks at windows and doors to prevent condensation
- Firestopping, required by code, to prevent warm, moist air from rising the full height of the wall cavity, which can cause condensation
- Carpeting and other organic materials that mold feeds upon wherever there are perpetual moisture problems, e.g., drinking fountains, sinks, and uninsulated concrete floors.

Construction Manager and Contractor Requirements

In addition to the drawings, the project specifications should include a water infiltration and mold prevention management plan in the General Requirements. Such provisions should require the construction manager and/or general contractor to do the following:

- Tightly control, sequence, and coordinate phased work where interior finishes are installed prior to the building being made weather-tight
- Provide moisture intrusion protection for work areas and materials susceptible to water damage before the building is made weather-tight
- Provide and follow specific instructions on storage of materials susceptible to water damage
- Maintain a clean site, free of uncontrolled running water
- Identify any other contractor responsible for care, custody, and control of specific work areas
- Prequalify mold abatement contractors with proven experience and mold-inclusive insurance policies
- Strictly adhere to the contract documents, especially with respect to value-engineering and material substitutions that could alter the design
- Provide for and immediately respond (within 24 to 48 hours) to any discovery of water intrusion or mold with appropriate action
- Coordinate any assessment, remediation, and reconstruction should water infiltration or mold growth occur during construction
- Reference and require adherence to an industry standard guideline on mold assessment and remediation, such as the one published by New York City.

In addition to tightening up the drawings and specifications for complex projects or those building types in which you have limited construction experience, it is advisable to consult with a technical expert for a peer review no later than at 75 percent completion of the construction documents. A review at this stage of the design should allow the architect enough time to make any necessary revisions before issuing the project for bid.

Construction Administration Services

Architects who play only a minimal role in the construction administration (CA) phase, whether by their choice or the owner's, could eventually face struggle to win the client's heart and mind should problems arise during or after completion of the project. The benefits of architects' increased site presence during the CA phase will far exceed their fees since problems are likely to be caught before they derail the owner's budget and schedule.

Our office sees a direct relationship between the architects' level of involvement during CA and their ability to minimize claims, mold-related or otherwise, because the architects benefit from a trusted relationship with the client and more direct knowledge of the project. Architects' expanded CA role should begin by increasing the number, frequency, and vigilance of site visits where they do the following:

- Examine materials delivered to the site, reject moisture-laden materials, and inspect windows and curtain walls for poor fabrication or shipping damage (e.g., torn gaskets)
 - Require nonconforming work to be uncovered if similarly completed nonconforming work was not previously inspected and approved
 - Examine exterior enclosure systems for poor workmanship such as blocked weep holes, unsealed joints and penetrations, incomplete flashing details at windows and doors, and inadequate slopes and drainage
 - Provide weekly photographic reports, which are especially useful when an incident occurs.
- In addition to any required controlled inspections, it may be prudent to retain outside experts to provide quality assurance inspections at milestones on the critical path.
- The frequency and intensity of the architects' site visits may be partly determined by who builds the project. While a general contractor may typically require more on-site observance than construction managers or projects with an owner's representative, do not be lulled into complacency by the latter's presence on the project. Be clear on what every team member's responsibilities are, as determined by the agreements, so it will be clear to you if team members attempt to abdicate or forego their contractual responsibilities.

Project Closeout

In addition to enacting a mold prevention plan during construction, a water infiltration and mold-response plan for continued operation of the building should be implemented with the facility manager following construction. The owner benefits in two ways. First, many insurers now require a loss-control program to qualify for coverage of mold-related cleanup and remediation. Second, a risk management policy and water infiltration plan can limit liability in future mold-related claims. Provisions of a water infiltration and mold response plan should accomplish the following:

- Prequalify an environmental engineer (if possible, create a relationship with a firm through a retainer or service contract before cold-calling them in an emergency)
 - Prequalify mold-remediation contractors with mold insurance coverage (IAQCouncil.org and IAQA.org offer lists of qualified contractors)
 - Enact procedures for contacting prequalified contractors to ensure their quick response
 - Educate facility personnel about mold and water infiltration issues to ensure timely and appropriate responses
 - Develop and follow a preventive maintenance and regular inspection program, especially after major weather events
 - Regularly inspect for leaking pipes, wet exterior and basement walls, cracking, and material erosion or deterioration
 - Regularly clean and clear the roof and ground drainage systems
 - Regularly maintain the HVAC system
 - Develop written forms for thorough recordkeeping of all events, inspections, and work orders (keep camera or video equipment on hand)
 - Develop and implement an immediate dry-and-repair response plan for minor water damage and mold occurrences.
- Although the prospect of facing a mold-related claim is growing for owners and project team members, proper planning, diligence, and trusted working relationships among team members can minimize mold-related claims on your projects.

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Features

Firm Identity Drives Strategy and Strategy Drives Profits

By Jack Reigne and Ellen Flynn-Heapes

Do you know a few colleagues in the profession who enjoy bragging about their firm's record revenues for the year? You've heard their boasting: Everyone is busy, staff is being added, they've entered three new markets, and their employee stock ownership plan is thriving. What's wrong with this thumbnail of a picture? On the surface, absolutely nothing is wrong. Scratch that generic surface, though, and many uncertainties can be discovered.

As it turns out, the firm is not only busy, it's running full out. The firm is chasing markets, jumping into new project types, stretching to meet deadlines, panicking over production quality and resources, and wondering whether the markets that are feeding it will maintain the strength they currently exhibit. Sound familiar? It's a common "healthy" situation but, in truth, it shows how summarizing a few performance statistics can create an illusion of success. This illusion isn't bolstered by strategy. In fact, it points a finger to an even worse problem: a firm that truly lacks an identity.

Identity drives strategy. Period. So what is identity?

Identity is the choice a firm makes that allows it to weave a framework or operating model that fits. It aligns the business design from top to bottom. It's the ultimate integration tool. Without an identity, the firm is internally fragmented, working toward opposing ends. The market sees mostly a confusing blur. A clear identity, connected to a specific operating scheme, is exactly how a design firm can succeed beyond its wildest dreams. It drives strategy, market choices, backroom operations, fees, recruiting success, recognition in the marketplace, marketing and public relations plans, leadership requirements, and everything else you can think of. If architects and engineers have one silver bullet, this thing called "identity" is it.

The Commoditization Factor

There's a veritable tidal wave of talk these days about design services becoming more of a commodity, and too many firms seem glumly accepting of this fate. With design-build trends, tight margins due to rigorous bid processes, increased competition, and more global uncertainty than ever, how does one fight back?

Some architects feel undervalued and underappreciated and are seeking an antidote to what seems to be the final slippery slope. The first line of defense for many is to cut costs, branch out to new (unfamiliar) markets and project types, and mostly slug it out to make ends meet. Architects paying their bills? Is that what the profession is coming to?

Tools for Transition

The operating models that feed a firm's identity development are fairly straightforward and understandable. The investment (or hard part) is the transition, which calls for a clear and steady hand in culling out the myriad implications, changing old habits, and putting new structures and thinking into place. These transitions can take a couple of years to fully mature.

Become an Einstein, and you'll deliver one-of-a-kind new ideas to clients most willing to take risks and most in need of broad recognition. Become a niche expert, and you'll be doing leading-edge design work, mainly focused on one project type, and traveling nationwide or worldwide. Become a market partner, and you'll be immersed in two to three related markets, with clients who see you as a long-term source of a full range of services to take projects from conception through, say, construction management. A community leader is more local or regional in terms of geography, politically well connected, and

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seen as the go-to firm for much of the standard work required in the public arena. An orchestrator will be known for great strength in delivery, such as excellence in production and project management systems and skills, and will work nationwide in support of the lead design firm. Finally, the builder rounds out the identity choices. Its role is to focus on speed and cost while possessing the highest capabilities to roll out large volumes on a tight and predictable budget and schedule.

The clarity achieved by choosing an identity provides the momentum to develop and maintain a good strategy for 10 or more years. Once it's decided, the actual transition can be 12 to 24 months. During that time, you're honing your market positioning message; hiring on a more targeted basis; learning to say, "No, thank you," to the numerous projects that can pay the bills but don't strengthen the firm or its legacy; and otherwise learning how to be disciplined in your commitment to a true strategy supported by a logical operating model that really works.

Gone will be the days wondering if you should chase this, be doing that, hoping to attract the right staff, and, in many firms, undergoing a constant reinvention that saps energy and focus. Here will be the days where the recruits you need and the clients you desire are taking three giant steps closer to your door—a door that now is clearly visible. The flag that flies over the firm's roof communicates with certainty: "This is who we are, this is what we do, and this is why we're right for you."

Achieving the Potential Benefits

The real questions are, "Why should we change? What is the price for chasing markets and projects like gangbusters?"

First is the loss of time. An operating model brings the firm its own time machine, keeping many unproductive and inefficient discussions and efforts persona non grata inside your walls.

Second, think about your profit margins. Without a commitment to a well-designed identity, how can you leverage the market? You can't. Being sought out instead of chasing work is what drives margins on a sustained basis. Those who are needed by their clients and noticed by prospective clients can bask in the knowledge that they are getting more than the going rate without even trying.

Another key benefit is achieving true expert levels. The best way to do this is by attracting the right staff. Many firms who clean up their "identity issues" see this as an immediate benefit. The story they have to tell is tighter and more compelling, and taps into the dreams of skilled folks who are seeking more than employment as an architect or designer.

There's never a bad time to make this move, to begin this process of necessary change. If you're worried about a downturn in business, who do you think will be getting the projects when the downturn occurs? Will it be those who committed to a strategy and identity or those who have achieved a mediocre patchwork of success by running harder and faster trying to keep up? The question answers itself.

Jack Reigle is president of **SPARKS, The Center for Strategic Planning**, with offices in Alexandria, Va., and Palm Beach Gardens, Fla. He has 15 years experience in facilitating strategy and project partnering sessions throughout the world. Ellen Flynn-Heapes is founder of SPARKS and wrote *Creating Wealth*, the acclaimed book on principles and practices for design firms. The authors can be reached at jack@forSparks.com or ellen@forSparks.co



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Grade Yourself on Client Service

The ultimate judges of quality are your clients. To determine how well your quality program is working, you need to look at long-term trends in client ratings. To evaluate your firm's culture on the key factors in customer service, have your people take this survey. Have them rate each statement below on the following scale:

1 = Never 2 = Rarely 3 = Sometimes 4 = Usually 5 = Always

Customer Orientation

1. We listen carefully to our clients' needs through a formal feedback system and act on this information.
2. When we lose a client, we know why or we find out.
3. Our repeat business exceeds the industry average.
4. Our day-to-day activities are in harmony with our values and goals about client satisfaction.
5. Our clients have advocates in our organization.
6. We see ourselves as customers and suppliers in our work relationships with each other.
7. My manager's concerns and activities have convinced me that care of internal customers is important.
8. We have a formal process in place to determine our internal customers' wants, needs, and expectations, now and for the future.
9. We have clear measures and tracking systems to tell us how we are meeting our customer's requirements?in every department.

Management Climate

1. Our managers "walk what they talk."
2. The predominant attitude around here is seeking opportunities rather than acting defensively.
3. Managers give workers the responsibility and authority to take care of clients and internal customers.
4. People think "competition" means other companies, not the person down the hall.

Cooperation/Integration

1. People at all levels can participate in decision making.
2. Supervisors and managers in different departments work well together.
3. Very few things fall through the cracks because the left hand doesn't know what the right hand is doing.
4. Our systems make clear who has responsibility for various activities.
5. The organization's goals are set at the top, based on our mission, and are

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clear and achievable.

6. Results and goal achievement are rewarded both formally and informally.

Attitude, Skills, and Results

1. What happens in the organization really matters to all our people? executives and workers alike.

2. People feel responsible, needed, and empowered to do what needs to be done to take care of our customers and keep them satisfied.

3. Our senior managers know how to identify and solve customer service-related problems.

4. Problem-solving skills are used in every department and are standard operating procedure.

5. Our managers and supervisors have the skills to influence others, communicate effectively, and motivate and lead subordinates, particularly through periods of economic challenge and change.

6. Our focus is on preventing problems rather than fixing them after the fact.

7. We concentrate on exceptional care of clients, rather than cost cutting, to increase our profits and earnings.

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Resources

Architect's Essentials of Contract Negotiation

Ava J. Abramowitz, Esq., Hon. AIA (John Wiley & Sons, 2002)

Reviewed by Charles Nelson, AIA

The operative word in this third volume of Wiley's Architect's Essentials series is in the title: "essential."

Art Gensler, FAIA, in a thoughtful, glowing introduction, sums it up: "Ava Abramowitz has written a book that should be an essential part of every architecture professional's library and a must-read for every student taking professional practice courses." I couldn't agree more.

My first reaction to this book is as a technical writer. Abramowitz has produced, quite simply, the most accessible technical book I have ever read. If you have been in one of her workshops, you will remember that she knows how to keep a room full of architects awake for two hours after lunch and that most of them will give her presentation the highest rating.

Well, she writes like she talks. We architects are famously words-averse; we prefer pictures. Abramowitz paints rich word pictures, then cannily grabs you by the necktie and puts you in the middle of the picture. Reading her book is as close as you can get to a face-to-face conversation in print. Her writing style is what the thriller publishers call a page-turner?but you won't read more than a dozen pages without putting it down and thinking about some aspect of your practice.

For those of us who write for the severely right-brained, the bar has just been raised about a foot. She's a tough act to follow.

As for my reactions as an architect, this is primarily a book on contract negotiation, as the title says?particularly about professional services agreement negotiation. But it is much more than that. Contract negotiation is just a doorway to her vision of the future of practice.

Every authoritative writer in our field that I know of agrees that our profession is in the midst of the most profound change in its 4,000-year history. If you sense these winds of change and believe that your practice and profession are being victimized and marginalized, then don't buy her book. You are a buggy-whip maker looking at a Model-T Ford, and you might as well keep practicing until your business dies of irrelevance.

On the other hand, if you sense these winds of change and are sure there must be a new and better way, her work is the Swiss Army knife that will get you out of the James Bond torture chamber. She marches you step-by-step from the mentality of a service provider whose output can be bought as a commodity to one who is the client's trusted adviser, whose value can't be measured. She calls this "assertive practice." I won't attempt to summarize the details; buy the book.

Her principles of negotiation are as clear and easy to understand as the best. Her section on communication is short, sharp, and precise. Her five phases of dispute resolution and six steps for managing change are without equal for simplicity and clarity.

Throughout, she richly illustrates her points with personal anecdotes from her years as deputy general counsel to the AIA, vice president of Victor O. Schinnerer & Company Inc., and her current involvement as owner, developer, and restorer of some 30 buildings on a Virginia farm.

If you are a young architect starting out in business and can afford only five

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books in your professional library, this has to be on your short list. If you are a seasoned veteran of the practice wars, you will agree with Gensler: "I truly wish I had had the opportunity to read The Architect's Essentials of Contract Negotiation years ago." If you are in between?say, an associate-level architect with aspirations for leadership?the skills Abramowitz teaches so eloquently will propel you to partnership faster than anything else you could do short of marrying the chair's ugly son or daughter.

