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Contracts & Liabilities

AIA Small Projects Forum

AIA

PIA

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It's Common Sense: An Editorial

A Call to Arms

The Small Project Forum (SPF) serves to develop knowledge and information to benefit architects engaged in the practice of or interested in small project work. Last year we were the sixth largest PIA with approximately 2,500 members. This year, we expect to be near 3,000 strong.

The SPF mission for 1999 is:

- To present information, exchange knowledge and expertise
- To promote the welfare of its membership via interaction, publications, seminars, conferences, and fellowship
- To recognize the changes to the practice of architecture for small firms and the changes in the delivery of small projects into the next century
- To create a better awareness of the abilities and talents of the small project architect
- To find a means to publicize the work of small project architects
- To be the knowledge source and instrument of the AIA on issues dealing with small projects and small firms
- To develop a close relationship to AIA components through the continued establishment of SPF local advisors.

Your Advisory Group is well aware of the challenge, especially that of presenting to small project architects and small firm architects relevant up-to-date information that everyone can use.

Last issue, Master Spec started an ongoing article in the SPF Report. If you have questions regarding specification writing, call Angie Matinkhah at 800-242-5080. Their representatives will answer your question as well as write them up for the SPF Report.

Speaking of the reports, this year I am planning to do some additional outsourcing and ask individuals with expertise outside the SPF membership for articles. I have revised the rotation system for the local advisor contributions from 20 to 15. Previously articles that profiled firms were requested. Starting with issue 16, the allotted space can be filled with a profile, a case study, interesting architectural details or photos, or an item of special interest. Letters to the Editor shall also be added to enhance the ability to communicate to each other. Let us

hear from you when we are wrong and when we are right, where we are vague or where we are too concise.

To the new SPF members, I extend a hearty welcome. I hope we meet your expectations. The ability to address your needs can only be accomplished by your participation in the administrating of our mission.

To the many that have rejoined, I appreciate your continued support. SPF has the challenge to maintain your involvement by advancing and upgrading the information we deliver without losing the homespun relationship generated by small firms and small project architects.

The heart of this organization is in the exceptional work of the local advisors. Their dedication and commitment is unbelievable. I personally will attempt to communicate with each individually to truly understand the different needs of the various regions and chapters. If you would study the back sheet of this issue, you will note 27 local advisors. Did you know there are approximately 300 chapters in the AIA? Is your chapter missing? My *"Call To Arms"* is all about the need for volunteers to assume a position of local advisor for those components not represented. If you are a member of such a chapter and can devote a few hours a month, we need you. Laura Lee Russell, AIA is our Local Advisor Coordinator, (405) 943-2724 or *LLR@flash.net.* She would love to hear from you and can answer any questions.

Making A Good Impression

The abilities of small architecture firms vs. the big firms have always presented a difficult chasm to cross. Today, with the assistance of computers and other reachable technology, that gap can be narrowed. It's a well-known fact that many unknown architects possess great talent as designers, thinkers, and organizers. The size of a firm is no indication of the abilities one possesses. How then can a talented architect tell his or her story amid the glitz of a larger firm's promotional campaign?

Your brochure and resume usually register the first and the lasting impression a perspective client will have of you. It then becomes of utmost importance to prepare properly and painstakingly a presentation format that is succinct, informative, and sincere. Computer-generated graphics and text layouts can be as unique as those done by the most applauded public relations firms. SPF annually sponsors a program at the AIA National Convention called, "Brochure Exchange." Our members are invited to bring their public relations information to be critiqued by a select group of graphic designers who work in the PR field. This event has received strong acceptance by the participants each year as indicated by the annual increase in the attendance. Within this cooperative and sharing setting, architects get into small groups and critique each other or relate the suggestions given by the graphic designers. This openness and cooperative sharing of information is what SPF encourages, and it is also the objective of this SPF Report.

Another known fact is that most small firms and small project architects do not attend the National AIA Convention. During our last AG telephone conference call, we gave serious thought to the available opportunity of having our local advisors spearhead a small firm/small project architect "Chapter Brochure Exchange Program." I know that many chapters (i.e., local components) are mostly composed of small firms. For those representatives it could be a general meeting. Others could have it as a committee function. Either way, continuing education learning units, should be generated from this event. I would encourage you to open the event to the entire chapter as a good PR tool for both your local efforts and as an introduction to the benefits of belonging to the SPF PIA.

There are many ways this event can be accomplished with a small effort and the cooperation of a few local graphic designers. Graphic designers or PR firms would love to pitch you as perspective clients. *If this thought appeals to you, please let me know, as I would like to have a general consensus of its acceptance or rejection.* If you also need help in organizing such a program, call or write me as I am presently putting together a guideline that will be published and sent to you.

Welcome to the Electronic Age

SPF is entering the electronic age as was destined. Starting with Issue 16 "Residential Renovations," an abstract of articles will be sent to you with the full report appearing on our Web page accessed via AIAOnline. For those who prefer a hard copy or have no access to the Web, at your request the entire publication can be faxed or mailed to you in plain form. The AIA's intention is ultimately to put all report publishing on an Internet-based delivery system. For those without Internet availability, there is a program called "JUNO" that allows you to receive and print incoming E-mail, but you can't send. JUNO can be contacted by calling 800-651-5282. Best of all it's free.

For planning purposes and feedback, please complete the form at the end of this article so we'll know how best to serve you. As situations change we will keep you posted.

To Cindy Pozolo, AIA

To our parting chair, Cindy Pozolo, AIA, who will remain our Detroit local advisor, I extend my sincerest thanks for not only setting the fine example of what leadership is all about, but also for being an understanding friend. She maintained a delicate balance of responsibilities and remained the good-natured human being we all admire.

Hy Applebaum, AIA
1999 SPF Chair

Practice Tip

Charles G. Poor, AIA
AIA Potomac Valley

(Director's Note: this tip was inadvertently omitted from SPF Report 14—our apologies to the author)

Abstract

We all try to practice craftsmanship in our work. That goes without saying. But craftsmanship is always a subset of design. Our small projects usually have small fees, so we rarely consider custom products or have artisans on our jobs. *See the complete article posted online on the Small Project Forum web pages via the directory on the PIA homepage of the AIAOnline,* www.e-architect.com/pia, *for an approach on the selecting and filing of product literature.*

FAX BACK FORM

SMALL PROJECT FORUM PIA

Send to:
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Fax: (202) 626-7518
Email: hayesr@aiamail.aia.org

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❑ I would like more information regarding the local advisor opportunities.

Contract Tips

Heather H. McKinney, AIA
AIA Austin

The structure of the most recent AIA documents allows greater flexibility to tailor the Owner/Architect Agreement to suit the requirements of each project. We have found that this can prompt discussions with clients that allow all parties to enter the project with realistic expectations.

In our firm we have also found that because our contracts are becoming more varied in their structure, keeping track of the fine points is not as simple as in the past when projects were either hourly or fixed fee. Now, we may have certain phases that are fixed or discreet scope items that are hourly. To better keep track of the specifics of each contract, we created a Project Data Sheet that summarizes the pertinent information for each project in a simple, readable format that provides a quick reference to our bookkeeper or project manager.

Director's Note

Commencing with this issue of the Small Project Forum Report series, there is a format modification. Abstracts of selected article appear within this issue (noted in the content list), and the full text is posted on the Small Project Forum Web sites. Access these pages via the directory on the PIA homepage of AIAOnline, *www.e-architect.com/pia*. In future issues of the SPF Report, abstracts of articles will similarly guide readers to the full text online. Also, in the near future we will establish a schedule of when new postings will be made available in conjunction with the publication and distribution of the abstracts.

Should you have any thoughts or comments about this initiative, please contact me.

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Firm Profile

Architects' Guild
12 Depot Place, Box 9
Bethel, CT 06801

Eugene M. Hollander, AIA
AIA Connecticut

Architects' Guild offers construction services and assistance to the community in its five-year-old practice. Principal Peter Eckert works together with his wife Debbi and an emerging part-time staff. Peter's background in construction trades has provided him with a unique, practical perspective unlike that of the traditional architecture office. Schooled in carpentry, masonry, and finishing, this team puts practical knowledge of "how to do it" plus professional architectural training together to craft a practice devoted to residential clients—often those overlooked by mainstream firms.

Current interest in the American crafts movement and its impact on architecture has been good for the Guild. People are intrigued by the richness inherent in craftsmanship. It speaks of value and history, popular concerns of our time. Enter the Guild with projects in Idaho, Minnesota, and New York City, this practice goes were the need warrants, but most work tends to be located in Fairfield County, Conn. Included in their accomplishments is participation in The Habitat for Humanity Program. Its service minded practitioners have a community outreach philosophy and a very engaging mission.

Focusing on the new homeowner market, the Guild tries to demystify the architectural process, offering a practical and informational approach. If a client needs only design assistance, then that is all that is offered. An unusual development of this

approach has created "Consultation Services." With this service, a personal call is made to analyze and offer design guidance and technical advice. A flat service charge of $250 is the agreed upon fee. What's significant is that this service is not defined by a given time frame. A session could take an hour or a half-day or anything in between. At the end, what's important is that the client's need has been met. Considerable satisfaction is derived both on the part of the client and the architect.

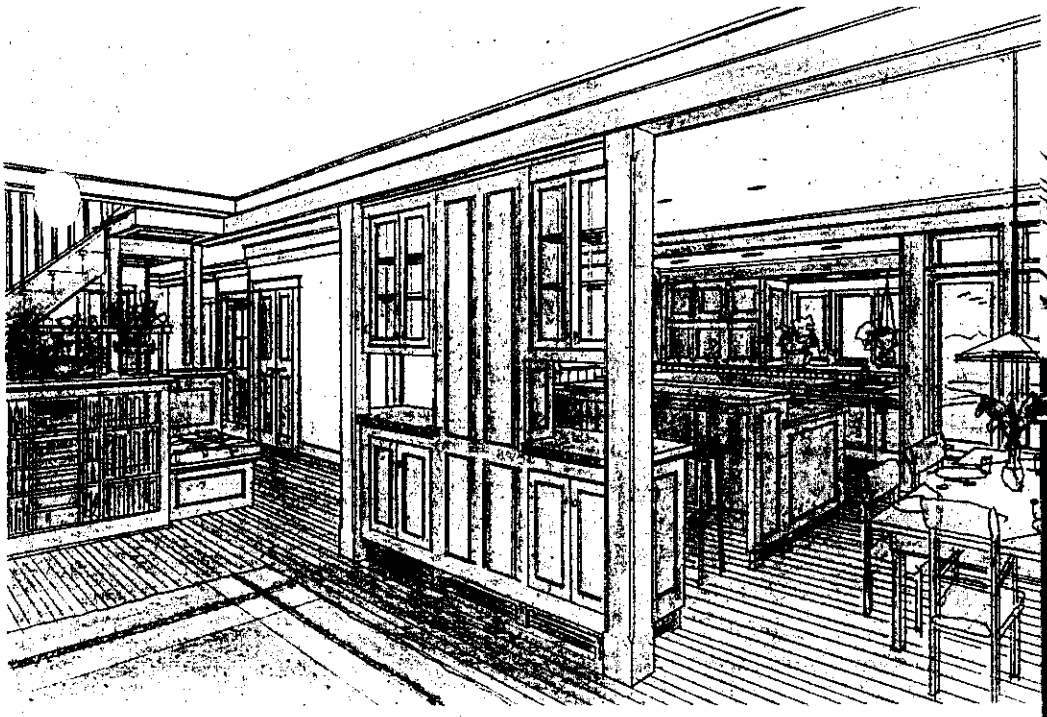
Custom residential work focusing on details, on the craft of construction, and on meeting their clients' needs has provided this young firm a distinctive niche from which to grow and prosper.

Profile

Keith Shuley: Attorney & Academic

Camilo Parra, Assoc. AIA
AIA San Antonio

Keith Shuley, on the first day of class, explains to his students that they may not make much money as architects. "Architecture is a profession high in psychic rewards and low in economic rewards," says Shuley. "Students entering the profession need to know this because as practitioners they are at risk and can not afford lawsuits." Shuley claims low pay is not the reason he



Architects' Guild Sample Portfolio: Above, from left to right: Wolf/Jondahl home, Independence, Minnesota, new construction, exterior photograph and interior drawing of family room/kitchen. Beekman Home, Danbury, Connecticut, patio and stone fireplace.

went to law school after graduating from Rice University with a Master's of Architecture. "I was working for the Rice Center dealing with communities regarding urban design problems. We would provide input and there would be a lawyer at the table who would say the same thing. The communities would listen to the lawyer and not the architect. I said, 'If that is what it takes, I can do that.'"

Shuley, who is a partner at the law firm of Brown McCarroll & Oaks Hartline LLP in Austin, is also a lecturer at the University of Texas at Austin. He teaches the professional practice class in the School of Architecture, and on occasion he teaches an environmental law class in the School of Law and marketing classes in the Graduate School of Business. Shuley received his MBA two years ago because he felt lawyers were getting out of touch with the business world. Shuley is currently working on the new Dallas Arena and developing contracts for the environmental clean-up of the site.

The ideal contract, according to Shuley, is one where "everyone leaves the table feeling they got a fair deal." He explains the fair deal as a reasonable reward for the risk involved. Shuley believes contracts are a great way to minimize finger pointing. "Fifty percent of the architects do not carry insurance and they can't afford to be sued. Contracts will allocate responsibilities to each party." However, there are always gray areas in contracts. As he explains, a contract will make one party responsible for mistake X and the other party responsible for mistake Y, but not every issue is resolved. When mistake Z happens, insurance can cover these risks or the likely "oops" that are not detailed in the contract. "However," says Shuley, "insurance can be viewed as too expensive and a lawyer magnet by some practitioners."

Shuley believes it is important that all architects sign contracts for their services. "AIA contracts are good," according to Shuley. "However, they are standard forms providing a typical way to deal with common projects. It is important to have a lawyer customize the form for each particular state and for any noncommon aspects of the project." Shuley recalls a story of an architect who sent a contract to an owner and never received a signed contract back. "The architect assumed he had an AIA contract, but didn't. Another architect I know had an agreement where he was to be paid per square foot constructed. When no square footage was built, the architect potentially received no fee."

When not in his office providing business assistance, Shuley can be found on the University of Texas campus. The student tip on his professional practice class is not to take the class until the last semester because it may make you reconsider architecture as your profession. However, if you survive his class, you will likely be a better practitioner.

The Paradigm Shift in Conflict Resolution Methodology

Elizabeth A. Tippin
San Francisco

Abstract

It wasn't long ago that if a dispute could not be resolved through direct negotiation, the next step was the traditional court legal system. At that time our courts were five to ten years backlogged and by the time the case was tried, memories were faded, witnesses were dead, and the passion was often gone from the dispute. Arbitration became a method of alternative dispute resolution. *Access the complete article via the directory on the PIA homepage of AIAOnline,* www.e-architect.com/pia *to see the issues of this paradigm shift.*

Using Proprietary Specifications for Small Projects

Buz Groshong, Arcom MASTERSPEC

Proprietary specifications can be very useful for small projects where public funds are not involved. They are brief but unambiguous, and proprietary sections can easily be created following a few simple rules:

- **Know what you want and say it.** If there is only one manufacturer and product that is acceptable, let the contractor know that substitutes will not be considered. If more than one product or manufacturer is acceptable list several of them in the specification; try to list as many as you can. Listing several products or manufacturers gives the contractor some room to shop around without guessing what you mean by "or equal." If a vast number of products or manufacturers are acceptable, use another specifying method rather than the proprietary method.
- **State what optional features you want.** If a particular color, texture, pattern, etc. must be used, be sure to include it in the specification. If you expect to select colors, say so, and let the contractor know what range of colors you will expect to select from. Color can affect the price of ceramic tile, and metallic colors or bold colors will cost more on prefinished metal items. Don't include products or manufacturers that do not offer the optional features you want.
- **Note proprietary specifications.** A proprietary specification can shorten the section and may eliminate product data submittals, but installation instructions will generally be no different than for any other specification—don't just say "install per manufacturer's directions." If the product is installed wrong no one will blame the manufacturer; they will blame you and the contractor. A good master specification will give you what you need to create your proprietary sections. Simply delete requirements that are standard for the named products and insert those of the proprietary product. Product descriptions and performance requirements for named products may be misconstrued as "salient features."

Agreement in the Small Office

Larry E. Johnson, AIA
The Johnson Partnership, Seattle

The small-office practitioner is usually on the front line of client education. Our firm is composed of myself as principal and three other licensed architects. Our practice is primarily residential, although historic preservation and adaptive reuse are also specialties. About 90 percent of my potential clients have never worked with an architect and have only a vague idea of the total scope of services we provide. Once we have decided that both the potential client and his or her project is a good fit for the office, our main goals are threefold: (1) thoroughly explain the range of services that we provide, (2) convince him or her that we are the firm that can best provide these services, and (3) get compensated fairly for these services as they are provided. We have developed a number of specialized tools to help accomplish these goals.

Our office completes nearly all of our schematic residential design under short letter agreements. Why not use the standard B-series from the beginning? We believe that the average residential client can be overwhelmed with the relative complexity of the 18 pages of AIA Document B-151, *1997 Abbreviated Standard Form of Agreement Between Owner and Architect.* As the risk factor during schematic design for both the client and the architect is relatively low, why not simplify the relationship by addressing only the pertinent issues? This letter agreement is never meant to substitute for a standard AIA B-series contract, but rather it serves as a transition from securing the job to provid-

ing services that may potentially incur liability. We feel that the simplicity of the letter agreement is beneficial in building the mutual trust between the client and the architect that is essential for a successful project.

Our office has two residential letter agreement templates that have been fine tuned over the last 20 years, one for remodeling projects and one for new construction. A template is customized to fit the client and the project. These letter agreements are in the form of a proposal to the clients. We define the project; we identify the proposed budget; and we estimate the project timeline, the responsibilities of the owner, the scope and general process of professional services, deliverables, and our proposed fee structure, including billings rates and charges. We also map out the future of our relationship in the coming phases by providing a list of potential professional services that we may provide as well as a blank copy of the AIA B-series contract that we intend to execute immediately following the schematic phase.

We provide nearly all of our professional services on a time and material basis, providing our clients an itemized breakdown of our estimated fees for each portion of the negotiated scope of services. Our clients pay only for the services provided. Nearly all our clients have appreciated this fee structure, and our past-due receivable accounts have been kept very low. In addition, two other simple tools are essential for the small-office practitioner: (1) the prudent use of meeting memos and (2) a timely itemized monthly invoice.

The use of a memo that reports the agenda of a client/architect meeting, as well as any action items that are to be undertaken by the client or architect before the next meeting, tends to keep everyone on the same page and avoids misunderstandings. We send these memos to our clients within a couple of days after the meeting.

We bill our clients monthly, and we use our invoices as an important form of communication, not only to itemize the services provided during the previous month, but also restate the agreement or contract under which our services were performed, including any amendments made to these. We recap the total expected budget of professional fees with agreed additions and ask our clients to notify us promptly if they have concerns about our invoice or the project.

Our clients are people who expect professional services throughout their project. A good set of professional tools will help ensure a level of trust in the architect and in the project.

Tip: Using America Online for Teleconferencing

Daniel J. Jansenson, AIA
AIA Los Angeles

Abstract
When communicating with distant clients, I often find it useful to conduct an online teleconference using America Online's "Buddy List" or chat features. *See the complete article posted online on the Small Project Forum web pages via the directory on the PIA homepage of the AIAOnline,* www.e-architect.com/pia, *for a tip on using this service to further your practice.*

Tip: In-House Contract

Donald R. Wardlaw, AIA
AIA Oakland

Like others, I've found an in-house contract to be the most succinct legal basis for a relationship between my clients and me. Each one is a little different because I tailor it to the circumstances of my prospective clients. Since it lays the ground rules for the relationship, I discuss it with prospective clients as soon as I can describe their project. While one of the advantages of an in-house contract is that the language can be plain and straightforward, it still addresses issues that some may not consider topics of polite discussion, like risk, responsibility, and money. This is normally not a problem since my clients are eager to move ahead with their project, and I am careful to see that everyone understands the underlying business aspects of the relationship. But once in a while I send out a proposal and that is the last I hear from the prospect. I feel slightly relieved when this occurs since another function of my contract/proposal is to quickly distance myself from people with whom I probably should not work.

Tip: Use It or Lose It

Edward Z. Wronsky Jr., AIA
AIA Long Island, East End Section

My standard letter proposal includes:

"Additional services will be performed at the project rates. Examples of additional services are: changes in the scope of the project and ***revision of previously approved drawings.***"

I don't like to bill for the first minor change. If the project is going well, I don't want to jeopardize things. I want to be a friend, and friends don't charge

friends for favors. I may even make additional minor changes on the same basis, i.e., without charge.

Inevitably, a modification is requested which takes several hours, and I feel that I must begin to bill for my time. Although good will has been established, the practice of architecture is my business. Unfortunately, by then I have modified both the contractual relationship and the client's expectations. I am the child in the schoolyard who bought friends by handing out candy. When the candy is gone, so are the friends. If I succeeded in buying friendship, the invoice will be a betrayal of friendship, not an earned professional fee.

Thus, the tip is to invoice the client for the first modification, even if the invoice states: "1.0 hours, no charge."

Publishing Opportunity

Forwarded from Cynthia Pozolo, AIA

The Small Project Forum PIA received a letter requesting submittal of articles for a new book written by Terry Paterson entitled, *Architect's Studio Handbook.* If members want to submit articles, they can respond to:

Terry L. Patterson, AIA, Professor
College of Architecture
830 Van Vleet Oval
University of Oklahoma
Norman, OK 73019
Phone: (405) 329-0970
Fax: (405) 325-7558

When Competition Exceeds the Bounds of Civility

Philip R. Croessmann, AIA

In today's world of merger mania it is easy to forget that there are limits on competing for clients. The hazards of engaging in unfair business practices was recently explored by the Virginia Supreme Court in *Advanced Marine Enterprises, Inc., et al. v. PRC Inc.* On June 5, 1998, the Virginia Supreme Court upheld an award against Advanced Marine Enterprises (AME) in the amount of $1,245,062 which pursuant to Code §18.2-500 was tripled for a total compensatory award of $3,735,186. The court also awarded $350,000 in punitive damages and $475,000 in attorneys fees.

These damages arose out of a plan between AME and certain PRC managers in which AME attempted to hire PRC's entire marine engineering department. The objective was to transfer PRC's entire marine engineering department to AME and thereby obtain PRC's customer relationships and all existing contracts. AME knew that that PRC's employees had executed an agreement, which contained a confidentiality and noncompete clause.

AME was aware that it faced a potential lawsuit by PRC under the employment agreement and that PRC could assert other causes of action against AME such as tortious interference with contract. After projecting the nature and amount of the damages that might result from a lawsuit by PRC, AME decided that the benefits of the plan outweighed the potential consequences of the lawsuit. AME agreed to indemnify the employees against the lawsuit and proceeded to develop the plan whereby the PRC employees would resign without notice and arrange for the surreptitious transfer of the clients' files from PRC to AME.

Shortly after the employees' resignations, PRC filed a Bill of Complaint in which they asserted counts for breach of fiduciary duty, intentional interference with contractual relations, intentional interference with prospective business and contractual relations, specific performance and breach of employment agreement, and violation of Code §18.2-499. Section 18.2-499 and 500 creates a cause of action where a conspiracy to injure another in his or her trade or business entitles the plaintiff to recover triple damages and attorney's fees.

The harshness of this decision was pointed out in the discussion of the damages. These damages were based on expert testimony as to the loss of good will despite the fact that PRC's marine engineering department made a profit of only $45,108 in the prior year. The Supreme Court upheld the decision on damages with respect to each and every claim including the employment agreements provisions not to compete.

The court specifically found that the geographical and time limitations of the covenant not to compete were sufficiently reasonable to support the award. The court, in determining whether the noncompete agreement may be enforced, considered the following criteria:

1. Is the restraint from the standpoint of the employer reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate business interest?
2. From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive,

curtailing legitimate efforts to earn a livelihood?

3. Is the restraint reasonable from the standpoint of sound public policy?

AME grossly misjudged its potential liability in the lawsuit. Obviously, this is clear message from the Virginia Supreme Court that it does not tolerate unfair practices in the hiring of key employees or practice groups and that covenant not to compete are enforceable.

Philip R. Croessmann, AIA, is an architect attorney practicing with the Washington, D.C., law firm of Bastianelli, Brown & Kelley.

Contracts and Liabilities: Three Observations

Anthony Cohn, AIA
AIA New York

Just over one year ago, I closed my office. The daily struggle to keep busy, solvent, and organized all conspired to reinforce my conviction that I needed a drastic change. I did not close up shop entirely because of financial concerns. By and large, in the 10 years of running my own practice I had few problems in the contracts and liabilities arena. Generally, I got paid for my work. In preparing this article, I reviewed my billing records and found that only 4 of nearly 100 clients did not pay their final invoices. The careful reader might have by now noticed the generous use of qualifiers ("generally," and "by and large"), and might be suspecting some dark underside to all of this. Nearly two years ago, a client brought suit against me. As this suit is still pending, I will not comment directly on it, except to say that it seemed baseless at the time and seems baseless still. Several years ago, I participated in arbitration over unpaid fees. While no real expert in contracts and liabilities, the range of my experiences qualify me to make three observations.

First observation: Letter agreements work just fine. During most of my practice, I used letter agreements with excellent success. While less than a perfect role model, I still believe in the nonstandard agreement for most small projects. The standard contract forms in use up until recently don't seem easily adaptable to small residential projects. Much of what is noted as part of basic services will, if included in the fee for basic services, raise the fee to a level that will make an agreement impossible. For example, I normally excluded consulting engineers from my agreements, in contrast to the standard contract. Many small (and some quite large) residential projects are built without a mechanical engineer, with the bidding based on a performance specification and contractors who will service the equipment responsible for the "design." Through the use of letter agreements, I could emphasize those aspects of a project I thought most important.

The preprinted forms also carry an air of unfriendliness with them that seems at odds with the spirit of most residential design. My letter agreements generally carried much of the language of the standard contract, without intimidation. At least one residential client complained that my letter agreement was too formal, with its arbitration clauses and apparent (to him) emphasis on what would happen if things went badly. This successful businessman said he became uneasy at the thought that I was thinking so hard about the possible failure of our endeavor. If things go badly, he reasoned, no agreement would make him pay his bill. Also, for the fee amounts involved, no architect in his or her right mind would pursue the matter through the legal system. Of course, he was correct.

Despite the forgoing (or perhaps because of it), I used the standard forms for all my nonresidential projects, largely to reinforce the formality of the transaction and the 'arm's length' nature of the relationship. This worked well for me.

Second observation: Know your clients. Most residential work comes about through referrals from happy and satisfied customers. I never hesitated to ask former clients about prospective clients. Every architect wants to know the answer to two questions when interviewing prospective clients: Can they afford the fees (and project cost), and do they honor their commitments? Many times, clients spoke with surprising candor about the level of honor I could expect from their friends.

Third observation: No contract will shield you from potential liability. The important corollary to this sad fact is that whatever happens is probably no one's fault. This may sound harsh and over simplified, but my experiences might shed light on the issue. No matter how carefully constructed your agreements, no matter how carefully and diligently and well you work, if someone wants to sue you they will. At that point, whatever mechanism you have in place to protect yourself will not really protect you at all. What I mean by that is that while liability insurance may protect you from the financial consequences of litigation, nothing can soften the emotional blow. If your clients imagine themselves wronged, or if they see litigation as a way of financing a project at your

expense, you cannot escape. You are, in most states (well, New York, anyway) responsible for your own legal fees, regardless of the merits of the case. That means that even if you win, and the suit is found to be without merit, you still must pay your attorneys.

Limiting your scope of services will limit liability. Knowing your clients; using simple, clear agreements; and remaining emotionally prepared for the worst outcome can protect you.

It's a Game, Let's Have Fun!

Lisa K. Stacholy, AIA
AIA Atlanta

Let's Play

Look at a blank piece of copier paper—it is likely 8½" x 11", blank on both sides, and some shade of white. Consider the world of possibilities for all of the ideas that may be conveyed on that single piece of paper. This unlimited range of possibilities could be why we chose this profession. When the paper collects some written items, the game begins.

The Rules—Side One

Aside from using paper to collect and convey our design ideas and intents, the paper can also set up the rules within which the game is played. Our standard AIA contracts, printed on either one or two sides of similar pieces of paper, are a prime example of this. The contracts set forth the relationships between the players and the sequence of play, defining how "turns" are taken and how play advances until the game is complete. The really great thing about these written contracts is that (almost) everything is defined and spelled out with a degree of certainty and impartiality. These contracts can really be the best tools we have to use. How and where else can we so eloquently communicate with our clients the boundaries of the playing field?

The Tools

Use of the Owner/Architect AIA contract is standard practice for all projects in our office. I say that and also need to acknowledge the encouragement of my insurance agent to also use the Architect/Consultant agreements, which rarely see the light of day in our office. The Owner/Architect contract is included in the process from the beginning. At the initial client meetings, we are already thinking: What is the size and scope of this project? Will this be a good (angel) or bad (evil) client? Will the B-155 be appropriate? Upon returning to the office to prepare a proposal for architectural services, we'll always pull out a blank (original) contract and review it. Placing comments on the contract via post-it notes yields something like a game board. The blank contract is on the desk the entire time while preparing the proposal. As a means to introduce contractual concepts and relationships, we attach a "Scope of Services Description" to our proposals. The scope page has been tailored and modified to include special circumstances relating to the project and/or client. The "scope" is a soft introduction to the contract. One additional benefit about using "standard pre-printed contracts accepted by many major nation-wide associations" is that they are rarely questioned or modifications requested. Especially when a blank is provided with the proposal for the client's initial review, do a little sales job on the idea of using a contract. It is surprising how easily the contracts sell themselves. But be forewarned: Know your contract, as you will have to live with it as well.

Peaceful Cohabitation

Once the proposal is accepted, the contract is filled out and sent out for signatures. We typically use the B-155, the small projects contract between owner and architect. We have found that this contract is especially useful for residential projects as well as small-size commercial projects. After the contract is fully executed, a copy is made along with the scope page and is placed in the file with the first piece of correspondence to the client—a schedule of anticipated dates tied to events cited in the scope. The scope then acts as our roadmap to the contract "game board." The really nice thing about this system is that almost at any point in time we can check our status, positioning, and progress because the critical pieces of information are defined and readily available. It does seem as though this process is very similar to the (new) two-part B141 contract. But, from my understanding of the B141, our process diverges because we define the scope to the client prior to the contract taking on its own life.

Liability—The Other Side of the Paper

Liability is spoken as though it is such a dirty word, or a necessary evil, but it doesn't have to be. Quite frankly, it is what it is, plain and simple. By creating a framework within which we perform our architectural services (i.e., by use of our scope statement) we hope to be as open as possible to potential liability issues from project commencement. Basically, we believe that everyone starts out their day to be as good, positive, and productive as possible. With that being said, we lead our design team (and yes, we firmly believe that our client is an integral player on our team) with the notion that the project will aspire to its high-

est level. In the process, we try to acknowledge all aspects where liability resides. Early detection is key to navigating the game board successfully. Don't forget liability issues are out there, practice self-defense, but don't let that consume the focus of the game or it won't be fun any longer.

The Final Moves

Sometimes during the course of game play it becomes apparent that even the best-prepared game board (contract) cannot shield the players from the liability of poor performance. We constantly remind ourselves and our team members to do the best that can be done and communicate (and document) clearly when the "other side of the paper" may rear its ugly head. After all, it lives in the project file too. With a little planning, the game can be successfully completed and you'll finish up with another happy client.

Every Contract Should Have...

Mark L. Robin, AIA
AIA Middle Tennessee

- A complete and well-defined scope of services, including additional services that might be performed
- A disclaimer for methods, means, techniques, sequencing, and jobsite safety, etc.
- A dispute resolution clause (i.e., should there be a dispute, agree to try to resolve it using alternatives to litigation that are more likely to save the relationship.)
- A disclaimer for existing conditions, especially in renovations and additions—often times small projects do not afford preconstruction soil investigations.

Small Firms Have Risks Too

Donald A. Friedman, DPIC Professional Liability Specialist, and Mark L. Robin, AIA

To assist in avoiding litigation, we are fortunate to have a local insurance agent who specializes in risk management for architecture firms. As a basic service with no additional cost, all our contracts can be reviewed by a lawyer and insurance specialists.

As small firm professionals, we have an ever-growing need to hone risk management skills. During the last decade, tort litigation costs increased from $40 billion to more than $120 billion. More than ever, a strategy for dealing with the liability crisis that avoids litigation is needed.

Certainly, the small firm faces liability similar to the larger firms—risks that are often ignored. To help us avoid litigation, we suggest focusing on three objectives:

1. Eliminate liability illiteracy in our firm. Architectural schools don't teach much about the real world problems associated with our profession, so we need to make it our responsibility to undertake are own education program in loss prevention.
2. Avoid unnecessary litigation by implementing an alternate dispute resolution (ADR) provision in out contracts. Many professional liability claims can be resolved fairly, quickly, and relatively inexpensively by resorting to formal mediation and other ADR techniques before attempting litigation.
3. Refuse to accept unlimited liability for services. We strive to include a limitation (LOL) clause in our contracts that caps the amount of liability we assume if there is a problem on the project. This may not be easy, but more and more architects are successfully negotiating LOL clauses.

The small firm professional must make a relentless effort to prevent losses and limit liability. The best loss prevention step of all is to avoid litigious clients. Another key element in managing professional liability risk is the development and negotiation of our professional service contract. The development and implementation of a carefully written agreement, and its negotiation process, offers an excellent opportunity to size up the client's potential for conflict and their attitudes on risk allocation.

The very real risk of a lawsuit that confronts even the most careful architect means that we must do everything possible to prevent claims. Having a claim-free record doesn't mean our contract is all that it should be. No matter how confident we may be in our standard contract language, we should meet with our attorney and review the provisions in our current contract. Certain contract clauses are so important to the protection of our firm that they must be included in each contract. These clauses include:

- Attorney's fees
- Construction observation
- Delays
- Dispute resolution
- Environmental and health hazards
- Jobsite safety
- Limitation of liability
- Scope of services
- Statutes of repose or limitation
- Termination.

Because not every clause will apply to all projects, there may be circumstances when it is appropriate to include clauses related to:

- Condominiums
- Fast track projects
- Preliminary site assessments
- Renovation/remodeling.

An excellent reference tool for the above clauses is *The Contract Guide,* DPIC's Risk Management Handbook for Architects and Engineers, available by calling 800-227-4284.

Some clients prefer to use their own contract forms. Often these client-prepared contracts attempt to shift the client's risk onto our shoulders. The occasion might arise when our client hands us a contract with particularly onerous language. We should have our insurance agent and attorney review client-drafted clauses such as "liquidated damages," "indemnities," "certifications," and "guarantees and warranties." If our client refuses to delete or significantly modify such clauses, we must seriously consider refusing the project. Good clients will be aware of our concerns and will work with us to develop a fair and equitable agreement. Candor and objectivity very often establish the foundation on which lasting relationships are built.

The Contract Guide, DPIC's Risk Management Handbook for Architects and Engineers was instrumental in preparing this report, please reference this document for a full discourse.

Contracts and Managing Your Risk

Maggi Sedlis, AIA, New York City

Abstract

We all understand the importance and the value of having a smooth, professional, business-like quality in our design practice. Unfortunately, often, due to lack of time and/or interest, many of the mundane aspects of the business are left to chance, especially the project agreements. How many times have you started a project without a written and agreed upon understanding of the project scope and all the terms and conditions? Because most design professionals are focused on marketing and project execution, many of the critical issues involved in running a business are not addressed. *See the complete article posted online on the Small Project Forum web pages via the directory on the PIA homepage of the AIAOnline,* www.e-architect.com/pia, *for an approach to reviewing your contracts and managing risks.*

Document, Document, Document: Tips for Minimizing Risk

Kevin L. Harris, AIA, with John B. Dunlap III, Esq.

Real estate developers know well that the three most important factors to consider when predicting the success of a project are "location, location, and location." For architects interested in minimizing their litigation risks, construction industry lawyer John Dunlap has three tips he feels are most important to consider: "document, document, and document!" According to Dunlap, proper documentation is a vital element of every architect's risk management program.

Construction litigation involving architects is seldom design related. Most often, architects are found liable for errors and omissions that occur during the construction administration phase. "The most common mistakes made by architects are usually not related to their drawings, but rather, poor judgment during the construction administration phase," states Dunlap. While architects tend to be very detail oriented on paper, we often fail to record the little details, variations, and minor changes worked out on site during construction. When it comes to litigating a construction problem, it is often "the one who has the best records" who prevails. Thus Dunlap's recommendation to document. Dunlap advises, "Architects should always prepare written field reports. Record observed nonconforming conditions as well as your verbal instructions for changes. Write down and distribute any verbal changes or other modifications that have been affected."

The application for payment process is full of pitfalls. Although the architect can be liable to the owner for breach of contract if he or she negligently approves a payment application, he or she can also be liable to the contractor in tort. Some courts have found the architect liable to the lending institution or the surety for negligent approval of payment applications. Making the risk-infested waters more treacherous, some states found architects liable for consequential damages and mental anguish, and some states allow for punitive damages.

"One purpose of the contract administration process is to let the owner and the lender know the value of the work and material in place at

various points during construction," states Dunlap. When the amounts certified exceed the value of the work completed and on-site, the architect is exposed to litigation. If all goes well and the contractor completes the project as planned, there's no harm. But when things do go wrong and the contractor is financially incapable of completing the work, the architect could be held liable. This liability extends to the owner, the lending institution, and the surety.

Lenders can and do go after architects. This can occur when the owner fails to pay a loan or is insolvent and the lender discovers that it has paid for more work (based upon the architect's approved requests for payment) than the construction evidences.

For example, assume there is a project where the architect approves payments during construction. The lender, using the architect-signed certification for payment, allows a draw of funds from the institution. This process continues for some time. Later, but before completion, the contractor becomes insolvent, goes bankrupt, or otherwise is removed from the process. Sub contractors and suppliers then file liens on the project. The lender demands that the owner pay the loan, of course, but the owner does not have a completed building. The lender forecloses. If there were more funds released than construction completed, the lender can then seek for the architect to make right the results of a negligent approval and certification of applications for payment. If a surety were involved, it too may seek restitution from the architect under these circumstances.

Commercial projects pose the same risk as residential projects. "Frequently, commercial project owners are merely risk-taking conduits," notes Dunlap. "The loan is leveraged on the promise of the commercial viability of the venture."

Regarding the architect's duty to sureties (bonding companies), Dunlap reminds architects that the duty owed to the surety is similar to that owed to a lender. "Courts have held that an architect may be held liable for the release of a retainage to a contractor," he states citing *U.S. v Rodrigues and Rogers,* 161 F. Supp. 132 (D.C. Cal. 1958).

Dunlap points to four common areas where architects have been found liable to the contractor: Negligent preparation of plans and specifications, negligent "supervision" of the work, negligent certification of applications for payment, and negligent approval or intentional nonapproval of change orders. The AIA contracts have addressed the second item, and refrain from use of the term "supervise."

Architects may be tempted to succumb to rationalized requests from contractors for advances in order to purchase materials, or for work to be done before the next payment. Dunlap warns, "If the architect approves, say, an application for payment that covers the finished concrete on a project before it is in place, that architect is in trouble if the concrete truck fails to show up."

What is at stake and how much is the architect actually at risk? In the scenarios described above, the architect may be liable for the cost of correction. The cost of correction is the amount required to bring the project conditions into compliance with the plans and specifications. In cases where the plans and specifications are faulty, it is the cost that it takes to bring the project to a condition where it will function as intended. This applies to the building as well as to any system an architect draws.

Architects held liable due to negligence are subject to additional charges. One type is called consequential damages and covers damages that may have occurred as a result of negligence. For example, an architect could be liable for the value of lost bookings on a hotel project due to late comple-

Dunlap's Dos and Don'ts

DO

- Do make written field reports
- Do record nonconforming site conditions
- Do record verbal changes and modifications
- Do use AIA or other standard contracts and forms

DON'T

- Don't certify payments beyond the work and materials on site
- Don't release retainage before work is satisfactorily completed
- Don't use the term "supervise"
- Don't use home-made contracts or make "hand shake" deals

tion caused by the contractor having to correct design errors. One architect was held liable for a contractor's early completion bonus when construction was delayed past the negotiated date because of the architect's having to reengineer for a preexisting structural condition. In instances of gross negligence, some states allow for punitive damages.

Dunlap cautions architects, "Do not certify work or payments without first hand knowledge of their completion, and keep detailed records of all progress, changes, and instructions made on site. Architects may want to consider negotiating limitation of liability clauses in their contracts. For instance, an architect may limit his or her liability contractually to the amount of his or her fee." Dunlap notes, "this may not be enforceable in some states, however."

In our litigious society, small practitioners may be especially vulnerable to liability. The "document, document, document" mantra is not only simple, it is simply good business as well.

About the Author

John B. Dunlap III is a partner at Simoneaux Ryan Carleton Rowe & Dunlap in Baton Rouge. He practices in the areas of civil litigation, insurance law, and construction industry law.

AIA Contracts and Liability Tip

Diana K. Melichar, AIA
AIA Chicago

Copyright Note

Recently we have put an all of our drawing documents a copyright mark and date. We have also put on all of our larger drawings (24" x 36" or larger) a paragraph statement indicating that our designs are copyrighted and cannot be used without our written consent. This statement summarizes article 6 of the 1987 B141 Owner Architect Agreement. We learned the hard way that clients might take our preliminary designs and have them executed into construction documents by another architect, or, worse yet, a draftsperson, because he or she might be cheaper.

Our concern, besides the plagiarism issue, is a liability issue should structural or construction problems arise and the client believes that we are still responsible for the final product.

Fundamentals of Copyright Protection for Works of Architecture

Charles G. Poor, AIA
AIA Potomac Valley

A year ago Ben Lambiotte, a lawyer from the law firm of Haley Bader & Potts, Virginia, gave a presentation before our Potomac Valley Chapter Small Practice Special Interest Group. I wanted to review some of the information from that meeting. It is an important issue in that most architects don't know the limit of their protection, and, also, how it may affect their practices.

"Contemporary architects have always called for full protection of their works: Both plans and buildings. Three reasons are frequently cited: 1) limiting exposure to tort liability by ensuring that designs developed for one environment are not used in a different and inappropriate one; 2) enabling architects to obtain payment for reuse or derivations of their designs; and 3) prohibiting alterations in the design that would detract from the desired aesthetic effect.

The Senate, upon passing the Berne Implementation Act of 1988, commissioned the Copyright Office to do a detailed study of the problems of works of architecture and copyright law. The Report, which was the product of uncharacteristically heated and uncivilized discourse at the Copyright Office, led to the adoption of the 1990 Architectural Works Protection Act.

This amendment protects both plans and, for the most part, structures and buildings. It adds a new category of protected works to the Copyright Act: The design of a building as embodied in any tangible medium of expression, including a building, architectural drawing, and plans. The work includes the overall form, as well as the arrangement and composition of spaces and elements in the design; it does not include individual standard features.

"Functionality" remains, in principal, as a limitation. A design is only protected when "the design elements are not functionally required." The legislative history envisions a two-step analysis: First, the works should be examined to determine whether there are original design elements present, including overall shape and interior architecture. If such design elements are present, a second step is reached to examine whether such elements are

functionally required. If the design elements are not functionally required, the entire work is protected, without regard to physical or conceptual separability.

The Act contains three important limitations:

- Once the work has been constructed, the copyright owner may not prevent the making, distributing, or public display of paintings, pictures, photos, or other pictorial representations of the work if the building is located in or ordinarily visible from a public place. To do otherwise would make all tourists thieves.
- Consent of the copyright owner is not required for the owner of the building to make alterations or to destroy the building.
- The Act preserves from federal preemption state common laws and statutes relating to local landmarks, historic preservation, zoning or building codes.

It is best to let clients know up front the copyright issues involved in using the work products of their project. AIA Architects/Owner contracts state that the "Architect's documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others, unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect." Many clients don't realize this. One should always ask permission to use as-built drawings, or other architectural documentation created by other architects.

Although it is not required any longer, one should place notice of copyright on the documents. Drawings should be periodically registered at the Copyright Office. Registration is a necessary prerequisite to commencement of a civil action in the federal courts for copyright infringement. Separate filings may be made for "Technical drawings," and/or "Architectural works."

As-built drawings are protected. The physical features of an existing dwelling or structure may be merely utilitarian, and not subject to copyright protection. The architectural drawings embodying and reducing those measurements to graphic scaled form clearly are. Architectural drawings are not subject to the "useful article" limitation contained in the pictorial, graphic, and sculptural work definition. An analogy Mr. Lambiotte describes is the preparation of a map. No one would argue that creating a scale map of a particular piece of terrain does not involve sufficient creative work of authorship to give rise to a copyright. This is so notwithstanding the obvious fact that the terrain itself is "utilitarian."

One may register groups of drawings. Information is available from the Register of Copyrights at the Library of Congress. Form VA is available on request and the Office will answer any questions.

Tip the Scales in Your Favor

Hy Applebaum, AIA

How often do you get involved with very small projects and you don't want to take the time to fiddle with an AIA Contract? Do you at least write a "Letter of Understanding" outlining the scope of work and your fee structure? My attorney warned me of the risks in this form of agreement. To overcome these potential hazards and secure a firmer binding contract with the owners, I was advised to include a sentence that references this contract to include the current A201 (1987) General Conditions and the B151 (1987) or any other AIA contract document that fits as a part of this agreement. However, please be cognizant that it is only second best to an AIA contract.

Small Project Forum Events at Convention Dallas, May 5–9

May 5
8:00 a.m.–noon
Workshop
W04–Sound Business Practices to Keep Your Firm Profitable (7.5 LUs)
Cost: $50

6:00–9:00 p.m.
Local Advisors Dinner
Free

May 8
5:30–7:00 p.m.
Brochure Exchange and Reception
Free

May 8
7:00–8:00 a.m.
E16–Sole Practitioners Breakfast
Cost: $20

May 9
8:30–10:30 a.m.
S118–Small Firm Marketing for the Next Century (4 LUs)
Free

1999 Advisory Group Profiles

From left to right: Jerald Morgan, AIA, advisor; Laura Lee Russell, Assoc. AIA, local advisor coordinator; Hy Applebaum, AIA, chair; Richard L. Hayes, PhD, AIA, AIA staff director; Edward Zigmund Wronsky Jr., AIA, vice chair.

Hy Applebaum, AIA

1999 Chair

Education:
Bachelor of Arts, 1954, Rice Institute (Now Rice University).
Bachelor of Architecture, 1955, Rice Institute

Recipient of a William Ward Watkin Traveling Fellowship, 1955, Rice Institute

History:
Established himself as a one-man firm in 1962. Joined with Perry Ressler, AIA to establish R&A Architects in 1963. Acquired sole ownership in 1994.

Past Credits:
Active member of the IES (Illuminating Engineering Society) since 1972. Presently on the IES Education Committee, which annually conducts classes on Lighting Design for Architects, Engineers, and Interior Designers. Has received awards for the Walden on Lake Conroe Yacht Club, the Marina, and the Harbor Village Condo. He also received awards for a private residence, and a large corporate headquarters facility. He is active in AIA affairs and is a past chair and active member of the Micro Firm Roundtable in Houston.

Edward Z. Wronsky Jr., AIA

Vice Chair

Became a corporate member of the AIA in 1985. In 1989 was one of the founders of the East End Section of the Long Island Chapter. He served as President of the chapter in 1996 and was a member of the Board of Directors of the New York State Association of Architects in 1997 and 1998. After completing his undergraduate degree from Princeton University, he earned a Master of Architecture degree with honors from the University of Pennsylvania. Currently registered to practice architecture in New York and New Jersey, he is certified by the National Council of Architectural Registration Boards.

His office is located in Southampton, N.Y. In addition to performing basic architectural services—schematic design, preparation of contract documents, contract negotiations, and construction phase administration—Wronsky/Architect will provide programming and planning reports, prepare building department applications and zoning board appeals, and introduce proposals to local planning boards, architectural review boards, and landmarks preservation commissions.

Projects range in size from small additions to one-family residences to 16,000 square-foot assisted living facilities. Clients include churches and retirement communities as well as individual homeowners.

Jerald Morgan, AIA

Advisor

Professional:
Presently owner of a sole proprietorship with an emphasis on small projects. Firm projects range from single family residential additions/remodels up to $5 million commercial projects. Prior to establishing the private practice, employment was with larger firms working on small governmental and commercial projects.

Extracurricular Activities:
Currently president of AIA Vancouver as well as serving on the Washington State Council. Leadership experience includes being on the local boards of Rotary International and Little League.

Laura Lee Russell, AIA
Local Advisor Coordinator

Professional History:
When working for others, my project history ranged from Federal Government projects to Retailer trade show booths. More recently, I operate a small firm with projects ranging from due diligence surveys to commercial design/build.

Education:
Master of Architecture, University of Oklahoma 1992, Subject: the Global Design Process
Graduate Studies in Regional and City Planning and Fine Arts–Sculpture

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If you would like to report on issues relevant to the Small Project Forum from your area on a regular basis, we invite you to join our network of Local Advisors. Please call Laura Lee Russell, AIA.

REPORT 15 • SUPPLEMENT

Contracts & Liabilities

AIA Small Projects Forum

AIA

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Contracts and Managing Your Risk

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We all understand the importance and the value of having a smooth, professional, business-like quality in our design practice. Unfortunately, due to lack of time and/or interest, many of the mundane aspects of the business are left to chance, especially the project agreements. How many times have you started a project without a written and agreed upon understanding of the project scope and all the terms and conditions? How many times have you started and finished additional services without an agreed upon fee? Do you understand and know all the terms of your agreement, especially the insurance requirements? Do you have expiration dates to your agreements, and, if you do, how do you keep track of them? Do you have agreements with your consultants? Because most design professionals are focused on marketing and project execution, many of the critical issues involved in running a business are not addressed.

You can and should take on the responsibilities of controlling your risk. There was time when you were able to do a project on "handshake;" those days are over. Not only are projects more complicated, with more scope and less fees, our society has become too litigious. With that in mind, you should not start a project without a written commitment from your client, even if it is just a letter of intent that spells out the fee and basic terms and conditions.

In developing your agreements, keep in mind some of the following issues:

- Understand that some projects are riskier than others, and understand why you have accepted the commission.
- Develop standards for precise agreements—avoid vague and imprecise terms like "etc," "time is of the essence," or "about." The vaguer the term, the more opportunity for interpretation.
- Do not restrict your scope. For example, the last thing you want is to have your client and the contractor interpret your drawings during construction when you do not have administration services.

- Provide alternate dispute resolution provisions. Whether it's mediation, arbitration, litigation, or a combination, you want to determine dispute resolution techniques before you have a dispute.
- Track your agreements. Develop a system to track signed/unsigned agreements and proposals with clients, exploration dates, and certificates of insurance. Include your consultants in this matrix.

There are two basic kinds of owner/architect agreements: the one that the client generates and the one the architect generates. If your clients are generating the agreement, be prepared to spend time reading and understanding what their expectations are of you. You will find as your practice expands that most large institutional clients develop their own agreements.

The request generally comes from a client that is small and has not done much work. It may be a residential or small-business client. In that case, you should always be prepared to respond in a quick, efficient manner. There are basically two approaches to this. First, you can use an AIA document, and second, you can create your own. Using an AIA document is a good starting place. There is a large range of documents that are offered, including long, abbreviated, small projects, and construction management formats. Regardless of which document you use, do not take for granted what's in the document. You might find that it needs to be amended in some way. Read it, understand it thoroughly, and relate it to the specifics of your practice. Develop standard terms and conditions that you can use with the different agreements. The more standardized the information you develop, the fewer inconsistencies you'll have. Some of the issues include:

- A standard fee, structure, and hourly rates
- An understanding of what your target goals are and where your flexibility is
- A decision on whether you can mark up on the reimbursable
- A project schedule and termination date.

Another type of document you can create is called the letter of proposals agreement. This proposal format, used to get the project, can be very easily converted into an agreement by attaching a one- or two-page terms and conditions that you have standardized. This kind of format can be very useful for small projects. Clients with small projects and/or small fees will not be frightened by this document, which is more user-friendly. By going with this approach, you can usually avoid lawyer intervention. This can be helpful because often the client's attorney has little or no experience with design and construction, and will not understand the more complicated nuances of an AIA agreement. However, be sure that you work with your attorney and insurance agent to develop the standard terms and conditions. Once you've established a typical format, put it on your computer as a template for immediate access.

It seems as though every architect has problems collecting fees for providing additional services. It can be a touchy subject, but, as the architect, you need to be assertive. The best thing to do is develop an easy format, a template on your computer that will encourage project manager use. Remember, it is extremely difficult to negotiate and get paid for additional services after you have performed them. It is also difficult to deal with your consultants if you have given their services away without having them agree to it. Obviously, you need to understand the culture of your client and decide the most effective way to approach additional services. You might even decide to give it away the first time, but you should let your client know that is what you are doing. If not, your client will expect you to continue to provide services that are not in the scope for no additional fee. By developing this simple format, you can respond quickly before the services are provided. You might also consider developing a similar format for your consultants to authorize them for additional services.

Consultant's agreements are generally left to chance and are often never executed. You should not rely on the consultant's proposal to be the "agreement." You are often obligated contractually to have the same terms and conditions with your consultant as you do with your client. Even if you are not, it is a good idea to do so. Leaving the agreement in the hands of your consultant will not cover you. Here are some of things you should look out for in the development of their agreement:

- Be sure that the consultants have the same level of insurance that you are required to have. If they don't, get approval from the client to deviate. If the client isn't concerned, do the consultants have enough insurance for the type and amount of work they are performing? Can you risk it if they don't? Remember, because you are the one with the contractual relationship with the client, you are responsible for the consultants. Be sure you feel comfortable.

- Are the consultants' hourly rates compatible with the prime agreement? You certainly do not want to be obligated to pay them more than you are getting paid.
- Be sure to attach a copy of the prime agreement and make it the basis for the consultant agreement. Don't forget to delete fee information and any other information you might not want to share with your consultant.

There are several important items to include in the agreement:

- The consultant gets paid only when the architect gets paid
- Clearly spell out scope and responsibility for work
- Indemnity clauses protect the architect from the consultant's work
- The percentage of fee distribution does not have to be same as yours. If you find that your consultants are often not around during the construction administration phase because they claim they do not have enough fees, try back-loading the distribution so that there are more fees left.

Without a signed architect/consultant agreement that the architect generates, none of the above can be achieved. Having an agreement is a good way to avoid potential conflicts with your consultants.

Now that you have done all the right things, you are ready to negotiate with your client. The most important thing is to understand what it is you are negotiating and how important it is to you. This is accomplished by having a thorough understanding of the client's concerns and letting the client know that you understand.

Practice Tip

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We all try to practice craftsmanship in our work. That goes without saying. But craftsmanship is always a subset of design. Our small projects usually have small fees, so we rarely consider custom products or have artisans on our jobs.

Because we always try to design space that improves the quality of life, we are continually looking for both creative ways to use standard products and new products that allow us to create some effective detail or design solution.

We like to spend a few hours hour a week going through journals and recent publications. We skim through trade journals like *Masonry Construction* by the Aberdeen Group, *Glass Magazine, Metal Home Digest, Fabrics and Architecture, Traditional Building, Journal of Light Construction*; professional journals like Architecture and Architectural Record; and chapter newsletters. We use the "reader service product information cards" and request interesting products that may be used for current projects, pending projects, or future applications.

When literature arrives in the mail it goes in a "pile to be filed at a later date." We have upright folders that are organized by specification divisions. Eventually this literature winds up in these files. The following are a few examples of products that recently caught our eye for future as well as current projects: *Nana Doors; Firelite by Technical Glass Products; Balcon Inc. interlocking concrete pavers; Julius Blum and Co. Stock components for architectural metal work; Nova brick mortarless technology; Arizona Oxides color pigments for cement; Pergo the Revolutionary Laminate Floor from Sweden; Heat-n-glo; Stadler Radiant Floor Heating; Kentucky Wood Floors (the Sky's the Limit); Timberframe; Trusses by Harmony Exchange; McNichols Co. (gratings and floorings); Suburban Dynaline Gas Thru-Wall heat pumps; domotecK Heat Mat; Revere—the Copper Connection; the Maya Bamboo Fence; Vimco shading and light control systems; Roto Roof Windows Sweet Sixteen.*

This is one of the routines we use to improve the craft of our architecture and to work freely in design.

Tip—Using America Online for Teleconferencing

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When communicating with distant clients, I often find it useful to conduct an online teleconference using America Online's "Buddy List" or chat features. Once all participants have logged on to AOL at the predetermined time and I have connected with everybody, we can all take part in the conversation by typing within a window on our computer screens. The responses that are typed in are instantly displayed on everybody's screens, with each response preceded by the participant's name. A kind of sequential dialog follows, one typed response after another, with the text scrolling down the screen in a manner reminiscent of printing calculators. Anybody can scroll back up at any moment to review the conversation and its progress.

Although this method is considerably more awkward than a personal meeting or a telephone conversation, it does cause participants to think a bit

more carefully about their responses, because words can be easily misinterpreted if not written clearly.

At the end of each teleconference, I save the text of the chat—actually a transcript of the meeting—and email a copy to all the participants. Then I paste the text of the chat into a document containing the texts of previous chats. This allows for a quick topic or word search without needing to set up a complex database.

The Paradigm Shift in Conflict Resolution Methodology

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It wasn't long ago that if a dispute could not be resolved through direct negotiation, the next step was the traditional court legal system. At that time our courts were five to 10 years backlogged, and by the time the case was tried, memories were faded, witnesses were dead, and the passion was often gone from the dispute. Arbitration became a method of alternative dispute resolution. However, over the past 20 years there has been a paradigm shift in conflict-resolution methodology. Today courts are mandated to schedule most trials within one year of the filing of the complaint, and arbitration is often as expensive and elaborate as a court trial. Even more paradoxical is the consistent use of mediation as the preferable method of dispute resolution in almost every case today.

Conflict between people is a natural, dynamic phenomenon and will always exist as long as there are two incompatible forces and passion. Conflicts can be unilateral when only one side has a complaint, such as a disgruntled employee dispute; an injured construction worker claim; an Americans with Disabilities Act claim; or a breach-of-contract claim, when a client fails to pay for services rendered. Unilateral conflicts become bilateral conflicts when a cross-claim is asserted, such as a contention that services rendered did not comply with the standard of care, or in a partnership dispute where both partners have different ideas about how the partnership should be dissolved. A conflict becomes multilateral when numerous people and businesses are involved, such as a situation where the owner of a home sues the developer, who in turn sues the architect, the general contractor, the engineers, the subcontractors, the manufacturers, and the suppliers of materials.

So what is it about mediation that has allowed it to gain such a foothold in the dispute resolution repertoire today? The principle behind mediation is to provide a process, with the assistance of a neutral third party, of communication to reach a resolution in less time and expense than would be found through a trial or arbitration. Mediation assists in defining the facts, issues, and feelings—and managing communication about the conflict—which ultimately leads to a better understanding of each side's point of view. No matter how many people, businesses, or issues are involved, mediation is the dispute resolution method that is most often turned to when direct negotiation fails. There are many benefits to using mediation:

1. It usually leaves both participants with a sense of satisfaction because it gives them an opportunity to express their views and participate in a mutual resolution.
2. It offers an appropriate option to resolve disputes in a short session, at a minimal cost, with privacy and confidentiality.
3. It allows for creative, rational resolutions to disputes not available in the traditional legal system, such as structured payment plans, performance of additional services, or an exchange of goods.
4. It provides an avenue to resolve a dispute while enhancing the possibility of continuing a business relationship.
5. It allows the parties to maintain control of their dispute by resolving it themselves, thus avoiding the uncertainty of a jury, judge, or arbitrator's decision.

Thirty years ago, when the word mediation was mentioned, people thought it was akin to meditation and dismissed it as a method of dispute resolution appropriate for commercial cases. Today mediation is used in almost all cases, including the most complex commercial cases. In fact, many courts now mandate mediation prior to setting a trial date for the case. The Department of Justice is using mediation to resolve many of the Americans with Disabilities Act complaints. The Equal Opportunity Employment Commission is mediating most of the employment discrimination complaints filed. Many contracts, including the AIA Standard Form Contracts, mandate mediation as the first step in the dispute resolution process. Even some insurance companies give rebates on deductibles if the insured agree to participate in a mediation to resolve disputes.

Selection of the appropriate mediator is an important step. There has been a lot of criticism of contracts that mandate a mediator be selected from one provider because of the potential

for bias. These days, though, there are numerous organizational and individual providers of mediation services. In fact, the shifting focus toward mediation has encouraged judges to become mediators. In addition, lawyers are providing mediation services, as are a plethora of people from other professions, including architects. To be an informed consumer of mediation services, you need to first be aware that there are no regulations or licensing procedures for mediators. Furthermore, you should ask questions of potential mediators regarding their background, education, and training in mediation; their area of expertise; their style of mediation (facilitate communications or evaluate the case); and any potential bias (have they previously mediated with the parties, attorneys, etc.). You should also ask such questions as how much they charge for their services.

After a mediator is agreed upon, you need to make sure that the principal parties and any person whose approval is needed for resolution are invited and agree to attend the mediation session. If you do not have the decision-makers at the mediation table, a resolution most likely cannot be reached. Additionally, prior to the mediation session, you may want to agree with the other parties that there will be an exchange of documents or other information to make the mediation more meaningful. An exchange of briefs summarizing the facts and positions of each side prior to the mediation can be helpful in understanding each point of view. Any particularly confidential information can be provided to the mediator under separate cover, or at the mediation during the private caucus.

There are many ways of structuring the mediation process. The mediator will probably suggest a process of communication, such as who goes first and for how long. It is important to understand that the basic premise of mediation is that it is a voluntary process, and how the mediation is structured is up to the parties involved. Generally, the mediation will begin with a joint session attended by all participants. The mediator will usually give a short introduction, followed by the opportunity for each party to give a presentation and discussion. Private, confidential caucuses often follow the joint session between the mediator and each party. In caucus, you can discuss information that may assist in working toward a resolution but that you would prefer not to disclose in direct negotiations. The mediator will help all parties gain the most balanced possible evaluation of the matter. Finally, the caucuses provide an opportunity to assess realistic options for resolution, without endangering any party's negotiating posture. Caucusing will generally continue until an option has been developed that all sides feel is acceptable. If a resolution is reached, it is advisable to draft and execute a memorandum stating the key terms of the settlement. If a resolution is not reached in the initial mediation session, the parties may elect to authorize follow-up, which can consist of telephone caucusing, further investigation, and/or an additional mediation session.

Ensuring a successful mediation requires adequate preparation. Gather whatever information you can and be prepared to present the facts in a positive manner, utilizing whatever presentation you believe most effective, including charts, audio-visual, and oral presentation. Always talk on a level that the other party can understand. Develop a negotiation strategy that has flexibility to adjust to changing conditions. My favorite negotiation strategy tips are:

1. Define and analyze the issues
2. Identify the needs and interests of both sides
3. Define the facts, ideas, attitudes, motives, and values of each side
4. Identify the strengths and weakness of your position
5. Define the strengths and weaknesses of the other party's position
6. Show credibility by determining how a jury, judge, or arbitrator might view the case
7. Define alternatives for both sides if negotiations fail
8. Assess short-and long-term consequences of alternatives to settlement
9. Know your financial range and what you think the other side's range will be
10. Analyze the personalities involved in the mediation and anticipate human behavior
11. Show the other side that you can solve this problem fairly
12. Never engage in personal attacks.

In preparing to negotiate you need to marshal the facts and the law, but you should also develop a strategy with a thorough analysis of the interpersonal dynamics that will motivate the actions in the negotiation session. People think, comprehend, and conceptualize differently, which leads to variations in needs, values, motives, purposes, goals, attitudes, and resulting behavior. These fundamental differences in the face of a conflict impact the dynamics of the negotiations and create barriers to conflict resolution. The struggle within individuals to reach an understanding of their needs, wants, and how to com-

municate or behave is grounded in their personal image of themselves. Are they confident, unsure, prepared, or do they feel that they lack power or position? Understanding the interpersonal dynamics of all of the players in the mediation and developing a strategy that shows you are not trying to assert power over the person will assist dramatically in reaching a resolution.

Success of the mediation is measured by attaining some or all of the goals set by the participants. Sometimes mediation takes several sessions to reach a complete resolution. Sometimes a change of location after a session will cultivate a new perspective and assist in the resolution. Even when it involves a corporation, a mediation is really dealing with individuals with feelings, goals, and values.

Clear contract drafting and conscientious communications will avoid many disputes. Early identification of potential disputes and communication about those disputes, along with prompt investigation and development of solutions, can go a long way. But for those disputes where direct negotiations are not successful, mediation is a proven dispute resolution methodology that will continue to be used with greater precision. This is not to say that the traditional legal system will be abandoned; it will be used when precedent is required and when the legal advocates are unable to resolve the dispute through mediation.

Elizabeth A. Tippin is an attorney in private practice in San Francisco and a commercial mediator on the panel with the San Francisco Bar Association. She has extensive experience in representing design professionals, and she is an allied member of the AIA, actively participating on the Small Business Committee.

The AIA's Small Project Family

In the year 2000, The American Institute of Architects will begin the revising the Small Project Family of documents. As the AIA begins this process, they will solicit input from members who have experience with small projects.

So what type of projects would the use of a document from the Small Project Family be appropriate? When determining whether or not your project is a "small project," don't look at just the square footage or cost. Use the following criteria to determine if the Small Project Family is appropriate for use on your project:

- **Is the project a renovation, addition and in some cases new residential construction?** Kitchen and bathroom remolding, family room or bedroom additions, detached garages, pool houses, where other criteria are met, are all examples of the types of project suitable for the Small Project Family.
- **Is the project straightforward in design and construction?** If the project design is simple, requiring the use of basic construction techniques and equipment, then a document from the Small Projects Family may be appropriate. If the design is complex, requiring special construction techniques and equipment, then a document for a different family of AIA documents may be appropriate.
- **Is the project blessed with established good working relationships among the members of the project team?** If the project is one in which the owner, architect or contractor have worked together before and have a good working relationship, then the chances of conflicts arising that may require a more "expansive" document are less and the provisions in the Small Project Family of documents are adequate to handle any difficulties that may arise.
- **Is the project one of short duration—less than one year-from start of design to completion of construction?** Usually the longer the project duration the more complex a project is likely to be, which increases the chances of conflicts among the members of the project. A less complex project is likely to be short in duration which increases the likelihood that the project will be done on time and on budget with little or no conflicts among the project members.
- **Is the project one without delivery complications such as competitive bidding or design/build?** Project involving competitive bidding or design/build have special requirements that are omitted in the Small Project Family in an effort to keep the documents condensed.

The Documents

- The A105, *Standard Form of Agreement Between Owner and Contractor for a Small Project and the A205, General Condition of the Contract for Construction for a Small Project.* AIA Documents A105 and A205 are intended to be used in conjunction with one another. They have been developed for use where the payment to the Contractor is based on a stipulated sum (fixed fee) and where the project is modest in size and brief in duration. The A205 is considered to be the keystone document of the Small Project Family and is a vital legal document in that it is used to allocate proper legal responsibilities

among the parties while providing both a common ground and means of coordination within the Small Projects family. In order to maintain the condensed nature of this document, arbitration and other ADR provisions have been omitted but may be included under Article 6, Other Terms and Conditions, of AIA Document A105.

- A105 and A205 are two of the three documents that comprise the Small Project Family. They have been developed for use with AIA Document B155, *Standard Form of Agreement Between Owner and Architect for a Small Project*. The B155 adopts by references A205 as it pertains to the architect's responsibilities in administration of the construction contact between the owner and the contractor. Like the A105, in order to preserve the condensed nature of the B155, arbitration and other ADR provisions have been omitted. ADR provisions may be added under Article 7, Other Provisions.

These three documents are specifically coordinated for use as a set. Although A105, A205 and B155 may share some similarities with other AIA Documents, the Small Project Family should not be used with other AIA Documents.

If you are anyone you know used the documents from the Small Project Family or have projects that meet the criteria for using the Small Project Family, please submit the name of the person to your PIA Advisory Council. As the AIA begins the revision process of the Small Project Family, the Documents Committee will be soliciting input from those who have used the Small Project Family and from those who have projects that the Small Projects Family would be appropriate.

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