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## **AIA Members in Transition**

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### **Legal Considerations Course Outline**

There are three basic areas in which the law influences the design professions:

- I. Responsibility and Liability
- II. Regulatory Environment
- III. Personal Liability
- IV. Choice of Entity

#### **I. General Principles: Responsibility and Liability; Contract and Tort Standards.**

There are four standards that define a design professional's relationship with and responsibility to its client and third parties:

1. Common law, or tort standards, which have been and are continuously being defined by courts of law.
2. Contract standards, which are established by agreement between the design professional and its client.
3. Regulatory standards defined by the licensing authority.
4. Professional standards defined by private professional organizations

#### **A. Tort standard: Professional Negligence; Malpractice.**

There are four basic elements to any negligence claim (professional or not):

- 1) Duty. The professional must owe a duty to the injured party.
- 2) Breach. The professional must have breached that duty.
- 3) Causation. The injury must be caused by the breach.
- 4) Damages. The injury must be one that can be remedied by the court by ordering payment of money or action by the negligent party.

In the context of a professional negligence claim, the key elements are duty and breach.

**Duty.** The courts had traditionally found that the duties of a design professional are defined by its contract with the client and the design professional owed the duty to its client only. Third parties injured by the design professional had to seek their remedies against the client. Within the last twenty years, the trend has been for courts to find the design professional to be directly responsible to third parties. For example:

(a) A design professional may be responsible to contractors who were economically injured by the failure of design professionals to approve alternative products, on the theory that the contractors were foreseeable victims of the professional negligence.

(b) A design professional may be responsible to laborers who were injured on a job site due to a cave-in that could have been prevented by a design professional who observed but did not report an unsafe condition on the theory that the engineering license granted by the state gave rise to a duty to protect the public safety.

**Breach: Standard of Care.** A court will not find that a professional has breached its duty to its client unless the professional fails to exercise the standard of care required of that professional. Under the common law standard a design professional is liable for malpractice only if he or she fails to exercise the care, skill, and diligence that design professionals ordinarily exercise in similar circumstances. **City of Eveleth v. Ruble**, 302 Minn. 249, 255 N.W.2d 521, 524 (Minn. 1974). In other words, a design professional is only required to be as skillful as its colleagues. At trial, the standard will be established by expert testimony about the level of skill and care that can be expected from ordinary professionals, practicing in the same technical and geographic area. That standard may, however be altered by contract. For example, a design professional who promises to “exercise the highest level of skill and care in carrying out its obligations under this contract” will be judged against the best in the profession, rather than the “ordinary” professional.

**B. Professional Design Contracts.** The basic function of the design contract is to clearly define the duties and obligations the design professional and client owe each other and to allocate risk between the parties. As a general rule, the scope of the design professional's duty to the owner is defined by the contract. A design professional is responsible for all the duties described in the contract. Conversely, the design professional is generally NOT responsible for work that is not enumerated in the contract. A design professional can protect itself by specifically listing work it does not intend to perform. For example, standard design contracts usually provide that a design professional will not be responsible for site safety or means and methods of construction.

**Key Provisions:** Scope of Work; Payment; Indemnity/Insurance; Ownership of Documents; Dispute Resolution; Limitation of Liability

**Scope of Work.** The basic function of the Owner-A/E Agreement is to clearly define the duties and obligations of each party to the other. An agreement that does adequately describe the work to be performed by an A/E will almost inevitably lead to a disappointed Owner who will be surprised to learn that the A/E does not intend to provide a service the Owner thought was part of the contract or, worse, receive a bill from the A/E for additional services. A well defined scope of work may also protect the A/E from liability.

"It is the general rule that the employment of an architect is a matter of contract, and consequently, he is responsible for all the duties enumerated within the contract of employment . . . "

Moundsview Independent School District No. 621 v. Buetow & Associates, Inc., 253 N.W.2d 836 (Minn. 1977). It is also generally true that an architect is not responsible for duties not enumerated in the agreement. The Buetow court found that an A/E firm was not responsible for the contractor's failure to construct the building in accordance with plans and specifications under an agreement that required the A/E to provide periodic general inspections during construction. The contractor had failed to bolt down the roof structure as specified.

To be meaningful, the scope of work must also include a detailed definition of the project itself. If the A/E retained before the project is defined, as is often the case, the agreement should acknowledge that the project has not been defined as of the date of the agreement and the agreement it should require the parties to incorporate a description of the project in the agreement when a description is available.

**Allocation of Risk.** The other key function of the agreement is allocation of risk: What happens if the project is over budget? Who carries insurance for on-site injuries to the A/E? Who is responsible for site safety? Who bears the risk of nonpayment if the Owner fails to obtain financing for the project? All these risks can be allocated by agreement, and are allocated by the standard AIA and EJCDC agreements.

**Working without a signed agreement.** The fact that there is no signed agreement between the parties does not mean there is no legally binding contract. The common law recognizes oral contracts and protects the right of an A/E to collect for services actually performed at the Owner's request and for the Owner's benefit. Common law principles also provide the Owner with remedies if the A/E breaches its contractual duties. Mechanics lien laws also provide statutory protection to the A/E, while licensing laws and AIA Rules of Ethics provide additional protection to Owners.

Working without a signed agreement does, however, present a lot of problems for the A/E, including the lost opportunity to define the scope of its work and allocate risk. Absent a written agreement, the parties will have to work out the terms and conditions covered in a standard agreement, such as scope, payment and insurance. In the event of a dispute, a court will look at the conduct of the parties and industry standards to determine the terms of the oral agreement. To the extent either party believes it bargained to deliver or receive anything other than standard services under standard terms and conditions, that party will have to prove the other party accepted those nonstandard terms.

Everyone knows its a bad idea to proceed with the work before the agreement is signed, but everyone does it because it is even a worse idea to turn the work away. There are few things an A/E can do to protect itself between the time the A/E commence work and the time the Owner and A/E sign an agreement:

Write a letter. Provide the Owner with a written description of the work you propose to perform and the terms under which you propose to perform the work, including standard hourly rates and the terms under which you expect to be paid.

Present an agreement. Provide the Owner with a standard form agreement. Tell the Owner in writing that, until the agreement is returned, you will provide services in accordance with the terms of the agreement.

Get a retainer.

**The Forms that Function.** The AIA and EJCDC standard form design agreements were prepared for design professionals and are naturally favorable to the A/E. These forms also provide certain advantages to the Owner, including a clear description of the design and construction process, a set of standards recognized by the construction industry and a coordinated set of documents covering all aspects of that process. In almost all cases, the A/E and Owner will want to modify the standard agreements to fit the specific project.

## II. REGULATORY ENVIRONMENT

**A. Licensing.** Regulation of the profession. States regulate the practice of the design professions to protect the health, safety and welfare of its citizens.

- Licensing ensures a minimum level of competence by establishing educational and practice standards.
- Licensing provides a board of review for complaints against professionals
- Licensing ensures that a trained individual will be responsible for the project.

**Unauthorized practice.** All jurisdictions require prohibit practice of the design professions without a license. Definitions of “practice” will vary from jurisdiction to jurisdiction. Many, for example, exempt residential design from licensing requirements.

**Plan Stamping.** Minnesota, like most other jurisdictions, requires design professionals to certify that the documents they sign were either prepared by them or under their direct supervision. Minn. Stat. § 326.12. A design professional is in “direct supervision” of a document’s preparation his or her professional skill and judgment is embodied in the document, directly supervises the work of the persons assigned to the work, and assumes responsibility for the adequacy and accuracy of the document. Minn. Rules 1805.1600, Subp. 2; Minn. Rules 1800.4100, Subp. 1. “Plan stamping” occurs when a Design Professional signs plans or specifications which were not prepared by the Design Professional or under his or her supervision.

Minnesota recognizes an exception to the rule prohibiting plan stamping. Minnesota design professionals may review plans of standard design prepared by design professionals licensed in other states:

Plans and specifications for buildings, structures, or projects of standard design which have been designed outside the state shall bear the certification of the design professional licensed in another United States licensing jurisdiction. In addition, a Minnesota licensed architect, professional engineer, or landscape architect shall review the design and certify that it is appropriate to the site on which the construction is proposed and is in compliance with state building code adopted by the department of administration where the building code is in effect.

Minn. Rules 1805.1600, Subp. 1.

**B. Zoning and Building Codes.** Regulation of the Work. States and municipalities regulate development and construction through zoning ordinances and building codes.

Code compliance is required by the licensing laws and is part of the Design Professional’s exercise of professional skill and judgment. Noncompliance with codes in the preparation of plans and specifications constitutes negligence per se. Approval by a building inspector will not necessarily absolve a design professional of liability.

### III. PERSONAL LIABILITY.

#### A. A Design Professional is personally liable for his or her professional negligence.

Persons harmed by the Design Professional's error can sue the Design Professional, the Design Professional's employer, or both. An injured party can hold the Design Professional personally liable if it can prove, among other things, that the Design Professional failed to perform the Design Professional's professional duties with the care, skill and diligence normally exercised by engineers in similar circumstances. If someone else in the firm committed the error, on the other hand, the Design Professional will be personally liable only if the firm is a partnership and the Design Professional is a partner.

#### B. PROTECTION OF PERSONAL ASSETS.

If someone is harmed by a Design Professional's professional negligence, the Design Professional's personal assets may be at some risk. Fortunately, most Design Professionals have some practical protections from that risk. Unless the Design Professional has significant assets, for example, the injured party may well choose to sue only the Design Professional's employer.

1. **Insurance.** Most design firms carry errors and omissions (E & O) insurance. If the firm's E & O policy names employees as insureds, then the insurance will generally protect the Design Professional to the extent it would had the Design Professional purchased the insurance itself. Of course, not all firms carry E & O insurance. Fewer firms "go bare" now than did during the insurance crisis of the 1980's, but a few still do. Unfortunately, E & O insurance does not eliminate all risk to the Design Professional's assets. E & O policies, like most other forms of insurance, exclude coverage for specified types of professional errors. For example, many E & O policies exclude coverage for liability arising out of construction cost estimates. E & O policies are also subject to deductibles and policy limits that expose the Design Professional to liability for the amount of the deductible and any liability over the policy limit.

#### 2. **Indemnification by employer.**

a. **Corporation.** A Design Professional who works for a corporation is generally entitled to be indemnified for negligence by the corporation as long as the Design Professional acted in good faith and reasonably believed his or her actions were in the best interest of the firm. Minn. Stat. § 302A.521. A corporation, however, may eliminate that obligation in its articles of incorporation or bylaws. If the corporation has eliminated the obligation, the Design Professional is entitled to be indemnified only if the Design Professional has entered into an indemnification agreement with his or her employer.

b. **Partnership.** If the Design Professional works for a partnership, on the other hand, the Design Professional is entitled to be indemnified for negligence by the partnership if: (1) the Design Professional was acting in performance of the duties of his or her position, (2) the Design Professional is not guilty of intentional misconduct, willful neglect of his or her duties, or bad faith, (3) the Design Professional has not been indemnified by another party (such as an insurer), and (4) the Design Professional has not signed a contract with the Design Professional's employer which provides a lower level of indemnification.