

Contract Review Checklist

Agreed Remedies to Limit Design Professional's Liability

- Entitle "Agreed Remedy" rather than "Limitation of Liability"
- Particularly important when Design Professional's fee is relatively low
- Limit to Design Professional's fee or amount parties agree upon
- Limitation should include Design Professional's officers, directors, employees, agents, and consultants
- Limitation should include all causes of action, including but not limited to, negligence, strict liability, breach of contract or breach of warranty

Assignment

- Assignment by either party acceptable with consent of the other party
- Consent to assignment should not be unreasonably withheld
- If Client assigns the Agreement, add language that the Design Professional does not have to execute any documents that might increase Design Professional's contractual or legal obligations or the availability or cost of its professional or general liability insurance

Billing and Payment

- Upon payment for services rendered, Design Professional should not release all claims, only claims for payment

Building Information Modeling (BIM)

- Include appropriate negligence-based standard of care language
- Disclaim any warranties
- Design Professional is only responsible for accuracy of information that it or its consultants provides and/or inputs into the model
- Design Professional has no control over and is not responsible for accuracy or completeness of information inputted by other parties

Certifications, Guarantees, and Warranties

- Delete guarantees and warranties
- If have to give a certification, modify with "to the best of Design Professional's knowledge, information, and belief" or "in Design Professional's opinion"
- Avoid use of words such as "all"; "every"; "insure"; "ensure"; "assure"



- Do not certify contractor built in compliance with code or in strict accordance with plans and specifications (modify to include "in general" compliance and "to the best of Design Professional's knowledge, information, and belief")
- Do not certify project will achieve any LEED standard

Code and Law Compliance

- Agree to comply with "applicable" codes and regulations in accordance with standard of care, not "all" codes and regulations
- Include language that Client recognizes possibility of various, and possible contradictory, interpretations of codes and regulations
- Delete warranties

Condominium Projects

- Include provision limiting Design Professional's liability (generally to \$50,000)
- Include broad indemnify in Design Professional's favor, except for liabilities and damages arising from Design Professional's sole negligence or willful misconduct
- Include maintenance provision requiring Condominium Association to perform all necessary maintenance as recommended in Maintenance Manual and to indemnify Design Professional if maintenance is not performed

Confidentiality

- Ensure Design Professional's obligation to maintain confidential information is not absolute
- Include exceptions if information is in public domain; if disclosure is in compliance with legal orders; and if disclosure is reasonably necessary for Design Professional to defend itself in a claim

Construction Phase Services

- Design Professional's obligation is to "endeavor to guard the Client against defects and deficiencies"
- Site visits are for "observation" and not "inspection"
- Specify the number of frequency of site visits
- Do not perform continuous or exhaustive site observations
- Review of submittals is for limited purpose of checking for conformance with information given and design concept and not for determining accuracy of details (dimensions, quantities, installation, or performance)
- Design Professional is not responsible for means, methods, sequencing, techniques, etc.



- Design Professional is not responsible for safety programs
- Design Professional cannot, and should not, accept authority to stop work, but can reject or recommend rejection of work
- Payment applications should include appropriate qualification on certificate that "to the best of the Design Professional's information, knowledge, and belief" payment is warranted
- Ensure sufficient time to review and respond to Requests for Information (RFIs)

Delays

- Delete any liquidated damages provisions
- Allow for delay due to *force majeure* events
- Design Professional only responsible for delay costs to the extent those delays costs are caused by the Design Professional's negligence

Dispute Resolution

- Recommend non-binding mediation as a condition precedent to litigation
- Discourage the use of arbitration
- In AIA 2007 documents, "check the box" for litigation as the binding dispute resolution mechanism, rather than arbitration
- If client insists on arbitration, require some limited discovery and adherence to the rules of evidence and limit the scope of arbitration to those claims that do not exceed \$100,000, inclusive of interest and attorney's fees
- If client insists on arbitration, require both parties' consent to any joinder and consolidation

Estimate of Construction Costs

- Do not guarantee cost of work or budget
- Include disclaimer that any evaluation of budget or estimate of the cost of the work is based on Design Professional's judgment, but Design Professional does not warrant or guarantee budget or cost of work

Hazardous Materials

- Design Professional not responsible for hazardous materials
- Design Professional can stop work if hazardous materials discovered until Client abates and warrants that the job site is in full compliance with applicable laws and regulations

Incorporation by Reference of another Contract or Document

- If Client incorporates any document by reference, review and confirm the terms and conditions of that document are acceptable and consistent with your Agreement
- Include provision in your Agreement that in the event of discrepancy between the documents, your Agreement shall govern
- If client refuses to allow your Agreement to govern, list in detail in your Agreement which provisions of the referenced document are not incorporated OR list in detail those provisions that you agree are incorporated (Note, this is risky and requires thorough review and evaluation of referenced document)

Indemnity Obligation to Client

- Delete duty to defend
- Delete "claims"; "suits"; "causes of action"; "actions"; "demands"; "allegations" since these words suggest a duty to defend
- Limit the indemnity obligation "to the extent damages are caused by the design professional's negligence"
- Avoid broad definition of Indemnitees and limit the indemnity obligation to the Design Professional's Client, the Client's employees, officers, and directors and delete "agents"; "parent company"; "subsidiaries"; "related and affiliated companies"; "assigns"; "lenders"; and "subcontractors"
- Limit the indemnity obligation to Design Professional and the Design Professional's consultants for whose actions the Design Professional "is legally responsible" and delete language obligating the Design Professional to indemnify for the actions of those for whom the Design Professional "may be liable" and those whom the Design Professional "directly or indirectly retained"

Instruments of Service

- Try to maintain copyright and ownership (or joint ownership)
- Limit Client's use of instruments of service to the completion, use, and occupancy of the current project
- Any reuse without written consent of Design Professional on other projects or modifications to the current project should be at Client's risk without liability or legal exposure to Design Professional
- Include document defense and indemnity protection running in favor of Design Professional for re-use and modification of instruments of service, regardless of who has ownership rights
- If Client requests electronic documents, include language that electronic documents may be unintentionally altered; are for informational purposes only and not intended as an end product; Design Professional makes no warranties regarding fitness or suitability; and Client will defend and indemnify Design Professional for claims relating to unauthorized use, reuse, or alteration of the electronic documents

Insurance

- Design Professional cannot name additional insureds on workers' compensation or professional liability insurance
- Professional liability insurance is per "claim" not "occurrence"
- Waiver of subrogation provisions should be mutual
- Delete requirement that professional liability insurer provide notice to Client if aggregate limit available for claims decreases or erodes
- Confirm with broker you have coverage in place conforming to contractual insurance requirements

Record Drawings

- Design Professional can provide the record drawings to Client, but is not responsible for errors in information provided by others in the record drawings
- Avoid use of "as-built" terminology and replace with "record drawings"

Scope of Service

- Ensure scope is sufficiently detailed and defined
- Delete broad language requiring "any and all services necessary"; "complete design services"; and "adequate to meet the needs of the project"

Standard of Care

- Make sure reasonable and negligence-based
- Should be limited to the skill, care, and judgment ordinarily exercised by similarly situated design professionals performing same services
- Delete any guarantees, warranties, and certifications
- Delete language that elevates standard of care beyond ordinary, reasonable standard, such as "highest"; "best"; "first-class"; "first rate"
- Delete "to the satisfaction of the client"; "in the client's sole judgment"; "non-negligent manner"

Termination

- Design Professional should be paid for expenses if terminated by Client for convenience
- If terminated, do not deliver instruments of service until paid for services rendered
- Design Professional should have right to suspend performance if Client is in default, including untimely payment for services rendered
- Require Client to provide reasonable notice of termination (ex: 7 days)

Third Party Beneficiaries

- Delete any third-party beneficiaries
- Contract should explicitly disclaim any third party beneficiaries

Time Limit to Bring Claims (Statute of Limitations)

- Establish specific point in time when statute of limitations begins to run (ex: date of Substantial Completion)
- Delete references to the discovery rule ("discovery of the harm complained of")
- Delete language unreasonably limiting Design Professional's time to assert claims
- Delete any "under seal" language in signature blocks since this language significantly extends applicable statute of limitations and repose in many states

Timeliness of Performance

- Design professional should perform as expeditiously as is consistent with the professional standard of care
- Delete "time is of the essence" provisions
- Time limits established by agreed upon schedule can be exceeded under reasonable circumstances

Waiver of Consequential Damages

- Particularly important in projects relying heavily on stream of commerce (casinos, shopping malls, restaurants, hotels, etc.)
- Waiver should be mutual