

Chapter 1

Fundamentals

The Importance of Risk Management: Its Key Role in Professional Service Delivery

This introductory article for the series was actually our second article written as a team. We felt it important that the series lead-off piece convey the overall message of the integral part risk management plays in our daily work. The operative word in this article is “attitude.” Risk management is a way that we think about work that affects many things we do each day. We also touch on some topics we will be addressing in later articles, and for the first time we close with our now familiar monthly departure line, “be careful out there.”

There is no security on this earth, only opportunity.

—General Douglas MacArthur

Risk management is not a standard course in architecture school. It is not a topic on the Architect Registration Examination. Yet there are many seminars on the subject presented each year at the AIA Convention, and professional publications address the topic frequently. The AIA Risk Management Committee is one of the two most funded committees in the Institute.

Unfortunately, many architects believe risk management is a remote activity and should be discharged by the “technical guys” in the back room, out of sight of clients. Our profession is actually heavily influenced by risk management, yet there are no checklists or descriptive processes. Why is it so enigmatic? Why is it so important? Why should we be concerned with something so distant from architecture? Or is it so distant?

Only in the last 30 years have we had to worry about our risks. It all began about the time the request for information (RFI) appeared on the scene. Up until then contractors didn’t write down the questions they asked the architect. They didn’t keep track of what their questions were or how they were answered. They were only concerned with building the project, collecting their fee, and moving on to the next job.

Today, as you know, things are quite different. Our documents are scrutinized in excruciating detail for conflicting, duplicated, or missing information. The RFI process has become a struggle, with architects considering their answers to be “supplemental instructions” and contractors often claiming them to be added scope. RFIs and submittal tracking logs are now

viewed as the contractor's primary tools for making a case against the architect. As architects, we are condemned if we don't answer any and all questions quickly or correctly. We are also condemned if we answer correctly, with the presumption that the question was necessary because the drawings were deficient in some way.

The result has been an alarming increase in claims and litigation against architects. This has threatened the existence of many insurance providers, and premiums and deductibles have risen as they attempt to stay alive. Meanwhile, insurance companies and defense lawyers are preaching risk management. They tell us to proceed with great caution, and they warn against project types of higher risk.

It's an attitude

Risk management is not so much a subject as an attitude. It is more an approach to business than it is a part of business. Achieving success in architecture in today's treacherous industry is dependent upon how you apply relevant risk management as you go about providing your professional services.

Our topics will cover essentials such as good contracts and effective documentation. We will look at the risks that arise from our plans and specifications and the minefield of construction administration liabilities. We will review high-risk areas in project delivery, such as the broadly misunderstood aspects of fast track and the varying expectations of construction management. We will also examine risks associated with the contractor's work responsibilities and how easily the architect can assume them if not prepared and knowledgeable. In virtually every article, we will examine the benefits of communicating with and understanding your clients and their expectations of your performance.

The trouble with law is lawyers.

—Clarence Darrow

How did things get this way?

First, let's look at how we got into this fine mess. What happened to cause the contractor to start worrying more about keeping score than keeping in budget and on schedule? What caused us to start dissecting words and using those cover-your-assets phrases?

The worm began to turn back in the '50s when the courts ruled that you could sue someone although you were not contracted with them. The contractual relationship, known in legal terms as *privity*, ceased to be an absolute requirement for filing suit, and architects began to experience the joys of being served with legal papers. The climate quickly changed for architects from never being involved in lawsuits to almost always being involved.

As a result, architects began to worry more about semantics than about their services. Inspection and supervision gave way to observation and just being generally familiar with the work. Any certifications that were made

had to be based on the “best of our knowledge, information, and belief.” Architects had to start dancing with the legal aspects of their services because they were becoming targets in claims and legal actions.

Insurance plays a role

But architects didn’t really become a viable target for claims until they acquired professional liability insurance. The insurance policy gave the plaintiffs a measurable goal for claim damage awards. Professional liability insurance was created for architects and engineers by Victor O. Schinnerer in 1957 to protect against a very real threat. But one has to wonder if the policy itself has become the desired target. Could this response to a need have actually helped to seal our fate?

Claims against design professionals typically allege negligence—that is, a negligent act or failure to act by the architect in the performance of professional services. In today’s design industry everyone keeps score. Contractors want additional general conditions costs if the architect fails to act quickly enough, and owners want to be compensated for anything that is added to the job after the contract is signed. This has grown out of the perception that almost everything is the architect’s fault. Any error or omission or duplication is perceived as caused in some way by the design professional. This topic is explored in “A Loss Cause: Drawing Discrepancies and Ensuing Damages” in Chapter 4. If you have ever been involved in a lawsuit, you have experienced firsthand that every mistake that can be divined from your services will be cited as evidence of a “pattern of negligence.”

They say that nobody is perfect. Then they tell you practice makes perfect.

I wish they’d make up their minds.

—Winston Churchill

Nobody’s perfect

This raises the question: Why do they perceive us to be the perpetrator? Why is it that for years the architect was never thought to be at fault, and now it is automatically assumed? The accepted definition of “Standard of Care” does not contain the word perfection—not for architects and not for any other profession. So how have contractors and owners come to demand such performance? Standard of Care as addressed in AIA Document B503, 2007, Guide for Amendments to AIA Owner-Architect Agreements, emphasizes that “The law . . . does not expect architects to provide perfect or flawless services or to guarantee or warrant the results of their services.” Nevertheless, the topic warns architects that “Use of words or phrases such as ‘highest,’ ‘best,’ or ‘most qualified’ in relation to the Architect’s standard of care, increases to extreme levels the standard of performance expected of the Architect.”

Perhaps architects have brought some of their trouble on themselves with lofty representations that have altered expectations. But there is also

a marked demand and expectation for perfect services that prevails in the industry. Clients want architects to sign “redraw at the architect’s sole expense” and “time is of the essence” clauses in contracts, and they frequently demand “100 percent complete” or “fully coordinated” construction documents. This has come about in part because architects do not concern themselves enough with what the general public thinks and knows about realities in their profession. Architects who practice as if they can do no wrong will likely create the same expectation from those with whom they do business.

So risk management in architecture is much more than just playing it safe by documenting decisions and securing a good contract. It is also about education, enlightenment, communications, and relationships. It is partly about improving your product delivery, but it also includes demanding the full measure of the obligations of others. These practice adaptations are necessary if we are to overcome the risk challenges that face us.

A good start

A good place to start is in your own shop. How good is your documentation? What’s in your laptop? E-mail has become perilous, and the trail that we leave behind us can be condemning. When you think of documentation, you must think in terms of your complete body of services. Remember, people are now keeping score on not only what you do but also when you do it and how fast. It is a lot like keeping a diary. In fact, many architects keep a personal journal of their projects that much resembles a diary. They document decisions, events, discussions, and any other information that chronicles the project delivery. We address the essentials of a project journal in detail in “To Document or Not to Document” later in this Chapter in Chapter 1.

A reasonable risk management objective is to have everyone in your office keeping records in a similar manner and with the same thoroughness. This will make training easier, and it will enable data research should you need your records for defending yourself. Your records should be clear and easy to understand. Remember that the person reviewing them later will likely not be an architect, so try to refrain from terminology and jargon that the layperson will not understand. You should also be careful to avoid self-criticism in project-related correspondence. At any given time, on any given project, we are likely to take actions that we could have done better, and there is no reason to make a case against yourself by identifying and emphasizing your shortcomings.

The “story” of the design and construction of a project is told primarily through meeting reports, site observation reports, and communicating correspondence such as letters, memoranda, and e-mails. Therefore, it is essential that you manage these media to the greatest extent possible. In addition to the site observation report, it is important that you also manage the project meeting report. After all, they are essentially tools for reporting project progress to the owner. If you issue the report, you will be able to recount the events as you have experienced them, and if you do not issue the report, you will likely read results or opinions that do not coincide with your own. If your contract or your project organizational structure does not

allow you to issue the project meeting report, it will be necessary for you to rebut in writing each and every issue and event that is not consistent with your experiences and understandings. Rebuttal is a laborious process that too frequently falls through the cracks of a busy schedule.

Managing communications and the 24-hour rule

Letters, memoranda, and e-mails must also be managed effectively. Though seemingly ludicrous, a good rule to follow is not to put anything in writing that you do not want to see projected on a screen in a courtroom. This includes criticism of yourself and your consultants, documentation of any breaches of responsibility, and any unprofessional actions or behavior. When managing sensitive subjects, it is usually a good idea to wait a while after you have written on the subject before sending it to someone. This is known as the 24-hour rule. This allows you time to cool down and think over the appropriateness of your response. An abrupt or rude e-mail “missile” cannot be recovered once it has been fired.

It is also important to administer your project management activities effectively through your spoken words and actions on the job. To achieve this goal, you should think of risk management as an integral part of the project management process. Ideally, this is done without affecting the outward appearance of your management activities. However, if you are too heavy-handed with your risk management behavior and activities, it could do more harm than good with your relationships and your effectiveness. It takes time and work to develop a balance that is effective without being inefficient or damaging.

As mentioned earlier, your success in managing your risks within your project will depend to a great extent on the understanding and perception of others. Owners, contractors, and subcontractors all bring to the table their own expectations of what architects are responsible for. Therefore, it can be greatly beneficial if the owner and contractor fully understand what your contracted services are and how you are required to do them. This may require frequent explanations and much patience because many aspects of architecture services are not generally well understood.

What we think, we become.

—Gautama Buddha, born 563 BC

A new way of thinking

The only way that you can truly eliminate risk in the practice of architecture is to close your practice, shutter the doors, and go home. If we practice as architects, we must take risks, and the objective becomes a balancing act. We must balance our risks with our rewards. The more we can control our professional risks without adversely affecting the level and quality of our services, the more successful we will be. The new way of thinking we espouse involves developing a reasonable attitude about effective risk management.

Effective risk management goes beyond what we were taught in architecture school. It is an influence on our practice that we must cultivate and accomplish effectively. It is a departure from the traditional design-draw-build process that we have been striving to perform throughout our careers. The many aspects of risk management that affect what we do as architects must be integrated into our practice so as to maintain our effectiveness and efficiency while still protecting ourselves from the threats and agendas that other parties continue to assert on our profession.

Many of the articles in this book will address the critical aspects of risk management as they relate to the many areas and activities of architecture practice. Our goal is to provide insights into how you can reduce your risks and increase your successes through constructive modifications to your project delivery process. The ultimate accomplishment will be to improve your professional practice technique as you do what you set out to do—practice architecture, make a little money along the way, and, hopefully, have a little fun doing it. Meanwhile, be careful out there.

Risk Management Basics: Essentials for Maintaining an Effective Risk Program

In this article, we address what a claim is and, drawing from our own experiences over many years, we outline a “quick response plan” for responding to and dealing with claims. Our intention is to give experienced managers a guide for managing claims, and for the uninitiated, we offer a glimpse of what to expect. We close with suggestions for hanging on to your client through the fray to avoid losing something much more valuable than the money sometimes paid to settle a single dispute—future business.

Expect the best, plan for the worst, and prepare to be surprised.

—Dennis Waitley

You don’t have to practice architecture very long before you encounter challenges to your work. These may come in the form of a simple disagreement over your opinions or the performance of your services, or they may come as a direct demand for compensation for alleged damages caused by your actions. Nevertheless, you will find that you are judged not only by what you do, but when, how fast, and why you do it. And the services you provide will be scrutinized by other professionals who almost certainly will disagree with your actions.

To understand this challenging process and defend yourself through it better, it is helpful to understand what a claim is: the vehicle for launching an effort to recover alleged damages. We are protected from claims against our services by our professional liability insurance policy. These policies typically have deductibles that you must pay up front to activate coverage; they contain policy limits, which are the monetary amounts that the policy provides; and they have rules for preserving the coverage, to which you must conform to keep your coverage intact.

Professional liability insurance policies are known as *claims-made* policies. That is, policy coverage is triggered when you give notice that a claim has been made against you, and you are protected by the policy that is in effect at the time of the claim. This differs from your automobile insurance policy, which is triggered by the date the injury to a person or property occurs. Injuries done through professional services can be caused by an act or a failure to act. These can be caused by a design that may prove to be defective over an extended period of time. The claims-made process is used by insurers because of the potential difficulties in determining the date of origin of the action that precipitated the injury.

Since the claim triggers the policy coverage, it is important that a claim be defined to the extent that it can be sufficiently recognized. Accordingly, in most circumstances, an event must include three necessary elements for it to be considered a claim:

1. **An identifiable injury to a person or property.** If injury cannot be proven, legally there is no cause for claim.
2. **An allegation of wrongdoing.** It must be alleged that you caused the damages by your actions.
3. **A demand for money or services.** This is sometimes referred to as “damages,” and it is intended as compensation for the alleged injury.

Under the terms and conditions of the typical insurance policy, however, insurance companies are generally content to acknowledge a claim against you if only the first two elements exist.

It is important that you respond quickly and appropriately when a claim is made. Your insurance company may require you to report claims on “first knowledge,” and there are advantages that you have when a claim is first made that may not sustain over time. Therefore, it is advisable to develop a quick response plan that you can initiate immediately when a claim is made.

Seven steps to a quick response plan

1. **Report the claim to your insurer in accordance with the notice requirements of your professional liability insurance policy.** Policies have specific claims-reporting procedures, and you should become aware of your policy requirements and give notice to your insurer accordingly. Although insurance companies may accept a verbal notice of claim, it is advisable to document your notice in writing so that there will be no misunderstanding later.
2. **Retain legal counsel and request that they represent your firm in the claim.** If you do not know a lawyer who specializes in architect and engineer errors and omissions defense, your insurance company will provide you with a “panel” attorney. This is a lawyer who has been preselected by your insurance company based on qualifications. If you wish to use counsel that has not been preapproved by your insurance company, you must get your insurer’s prior consent.

Lawyers with experience in architect E&O defense are relatively rare, so it is important that you secure your representation early before someone beats you to the punch.

3. **Visit the project site, if appropriate. Gather necessary information and document relevant conditions.** Conditions that give rise to claims often mysteriously disappear or are corrected within a short time following an incident. It is wise to take photographs, make notes, and gather documents relating to the claim or circumstance while they are available. If necessary, have a third-party expert inspect the conditions and, in some cases, file a report. At a minimum, your own photographs can be beneficial. Wherever possible, you should coordinate these efforts with your legal counsel or insurer.
4. **Retain an expert acceptable to your legal counsel and/or insurance provider.** For a claimant to prove that you have breached your professional duty, that party must generally hire an expert witness who has appropriate credentials. Likewise, for you to defend against the expert's testimony, you will need a similar expert. In some cases, it may be appropriate for you or a member of your firm to serve as an expert in defense of the claim. If you do not know an architect who is qualified to be your expert, your legal counsel or your insurer can help you find one.
5. **Assemble your project team and plan how you will manage the claim within your office.** Someone in your office must be in charge of the claims management activities. These can include:
 1. Assembling in-house documents
 2. Reviewing in-house documents
 3. Reviewing documents in other offices (owner, contractor, sub-contractors, subconsultants)
 4. Developing a written chronology of events that led up to the claim
 5. Communicating with the insurance claims supervisor, your legal counsel, and your experts
 6. Attending depositions
 7. Giving depositions
 8. Making your documents available for review by others
 9. Being the "corporate representative" for your firm in legal proceedings.

Designate who will serve as the primary contact within your office. If this person did not work on the project, he or she will need the assistance of project team members for knowledge of facts and to review and manage documents. People who worked on the project that have since left your firm must be contacted to obtain their knowledge of facts. You should maintain a good relationship with them even if you have to pay for their time spent giving testimony or providing information.

6. **Contact subconsultants and advise them of the claim.** Your consultants will be required to defend claims made against their portion

of the work, and it is important that they follow a response plan as well. You must be certain that their insurance carrier is involved early to ensure that they are managing their portion of the claim effectively.

7. **Assemble your documents, develop the chronology, and organize your defense effort.** One of the greatest expenses in claims management is the expenditure of personnel time. A large, complicated claim can absorb many labor hours that otherwise would be billable, and usually these expenses cannot be counted against your deductible. The more efficient you are with your claims management effort, the less it will cost you in time.

A nickel ain't worth a dime anymore.

—Yogi Berra

Nuisance value

There can be times when you have been sued on a project and you did no wrong. Your insurance policy is a juicy target, and you may have been named in the lawsuit just because you worked on the project.

The following scenario is an example of what you may encounter.

You have been sued. You did nothing wrong. Your counsel and your insurance claims supervisor have reviewed your case, and they have determined that it will cost \$25,000 to defend, including expert witness costs, time for depositions, preparation for trial, and the trial itself. These costs do not include your time or your coworkers' time.

Your lawyer has recommended that you offer \$15,000 to settle out of the case early. You realize that you can save the \$10,000 plus the extensive personnel time required for claims management. This settlement number is known as the *nuisance value* of the case. It is a bitter pill to take because you are paying money when you did no wrong, but it is less bitter than the alternative of weathering a protracted and expensive legal action. There may be instances such as this when the nuisance value is a good deal compared to the inevitable legal costs. The point is that you should not let your knowledge and belief that you are “in the right” overcome a wise business decision.

It won't just go away

For many architects, just the potential threat of a problem or a lawsuit causes them to retreat into their shell and hope the matter will just go away. However, clients or contractors who believe they have been harmed by your actions seldom follow this course. For this reason, it is imperative that you keep lines of communications open with the parties, no matter how painful and intimidating it may be. Since claims rarely materialize without warning, a wise and effective claims management technique is to discuss and remain involved with any issues a party may have that could potentially lead

to a formal claim. This preventive project management technique should be a part of your work habit rather than just being your risk management reaction.

In discussing disputed issues with a potential claimant, be sure to review possible early actions or remedies with your insurance carrier representatives and solicit their advice on how to carry on the discussions. It is typically forbidden for you to admit fault or agree to pay a sum of money to avoid a claim without the prior knowledge and approval of your carrier. With that said, claims can sometimes be avoided by talking the matter out and making some form of concession, monetary or otherwise. If the claim turns out to be unavoidable, at least you and the offended party will have comfort in knowing that you tried.

I don't build in order to have clients. I have clients in order to build.

—Ayn Rand

Saving Private Client

The greatest loss that you can experience from a claim is the loss of a repeat client. Firms that depend upon repeat clients, such as developers or large corporations, can be devastated. Therefore, in many cases, it is important that, above all else, you must save the client. Many large clients have their own claims to deal with and they understand what you are going through and the defensive decisions that you are making. However, claims are often very emotional, and your client may choose to believe that you are now their enemy.

To counter this possibility, follow the rules of client care. They are quite simple, to the point of common sense. If you are managing your projects effectively, you may already be following most of them. The rules are:

1. **Frequent contact.** Call the client as soon as you are served legal papers. It may be difficult at first to stroke a mad dog, but think about the future. Good client contact during a claim can also go a long way toward an early and more beneficial settlement.
2. **Be candid.** Don't play games with your client. Sure it's war, but tricks will only get you in trouble and cause them to distrust you. In this case, honesty is the best policy.
3. **Join forces.** If at all possible, mount a joint defense. If the claimant happens to be the contractor, it may be logical to join up with the owner. Defense costs can be shared, and you are both in the trench together shoulder to shoulder; war buddies ready to do another project. By the way, it is also advisable to join forces with your consultants for the same reasons.
4. **Be reassuring.** Emphasize to the client that you are not running from the problem and that you will uphold your rightful obligations. Don't forget that you cannot admit fault or offer money without the prior consent of your insurance carrier. Such actions can void insurance coverage in some cases.

5. **Don't hold a grudge.** What good is it to pay money and save the client through a difficult claims process if you are going to stay ticked off over it? If the client senses that you are harboring ill feelings, they may choose to work with someone else. Get over it and move on.

For old times' sake

After the battle is over and the smoke has cleared, it is time to get back to business. It is also important to remember the words of George Santayana, "Those who cannot learn from history are doomed to repeat it." It is wise to remember all of the players and the parts they played in the claim.

If any of your consultants hid under a rock when things got tough, you must ask yourself if you want to work with them again. It is only right that they defend their professional actions. Consultants should be encouraged to understand two basic rules. First, if you get sued, you will sue them for their part. They can count on it. Second, if they hang in there with you, you will be more likely to feel comfortable working with them again.

When it comes to contractors, it is our opinion, after 30-odd years in the business, that there are two kinds of contractors in the industry: those who want to make money constructing buildings and those who want to make money taking names and making claims. These are two distinct groups because of the two distinct mindsets.

When it comes to owners, it is a little more complicated. As you begin to plan your claims defense, the first question that you must ask yourself is whether or not you expect to work with this client in the future. Future work is the ultimate claims resolution technique. Spending money to make more money is simply not as painful as just spending money. Remember, this is business. If future work is in the cards, then you must consider whether the future work will make up for the loss. Fees for small jobs may never offset a healthy deductible expense. The objective is to make your decision early, and then either do everything possible to save the client or go ahead and declare Armageddon.

Prevention is always less expensive than cure.

—Kofi Annan

An ounce of prevention . . .

Hopefully, these claims management basics will be beneficial to you should you encounter the big C down the road. You may wish to share this information with your loyal consultants so that they can benefit as well. There is one paragraph that you may wish to share with your contractor friends, if you are so inclined.

As we said in the previous article, claims management is not a course in architecture school. Many consider it to be foreign to the practice of architecture. But, instead, it is a real threat that you will most likely encounter if you continue to practice architecture. A little information and preparation

will go a long way toward assisting you in defending claims, and it is wise to become thoroughly familiar with the claims process.

Meanwhile, be careful out there.

To Document or Not to Document: Basic Documentation Requirements

In this article we point out that documentation is not only the best recourse for defending actions and decisions; but it can also be an effective management tool. While many may look upon it as cumbersome drudgery, intelligent design services should include an adequate measure of documentation. We feel that the real power in this article is the message that a little bit of documentation can be very effective and go a long way.

The discipline of the written word punishes both stupidity and dishonesty.

—John Steinbeck

Many architects think of documentation as an irritation that encroaches on their design efforts. They view documentation as a task of drudgery forced on them by the “technical guys” or the “lawyers.” Actually, documentation is as integral to architecture as are sketchbooks, renderings, construction drawings, and change orders. It is not a new concept, as history reveals that Leonardo da Vinci kept detailed notebooks in the 15th century.

The review of documentation in this article ranges from simple, handwritten “to-do lists” kept only for the purpose of organizing one’s workday to more complex contracts that have significant legal implications. All of these forms of documentation with which architects interact and are required to create, manage, and maintain form a necessary part of the culture and practice of architecture. For some architects, documentation is a naturally occurring habit; for others, it is a burden that is often resisted and sometimes avoided altogether.

Over the past quarter century, the sheer quantity of documentation generated through the design process has grown significantly. Projects that required only a few file boxes in the 1980s result in many times that amount today. Documentation has become a time-consuming endeavor in the design and construction process that must be understood and managed.

A management tool

Effective documentation habits are a necessary and valuable management tool, and the sometimes perilous path to a successful project always requires good, solid project management. Moreover, good project management always requires clear communication and careful coordination. From concise contracts that define the obligations of the parties involved in a project

to meeting agendas and meeting notes that facilitate effective project meetings, documentation is the essential fabric of project management.

The most effective managers develop personal documentation habits that incorporate it into their daily work. Documentation is not drudgery to them because it is essential to the way they manage their projects. Writing a meeting report, making handwritten notes, or sending a client a contract proposal becomes second nature to their design activities. On the other hand, attending a meeting without an agenda, or making a site visit without preparing a field observation report, creates angst for the effective manager. This is counter to the smooth flow of communications and information on a successful project moreso than concerns about risks.

Selective amnesia

Owners sometimes forget that they have made a critical design decision, such as authorizing the designer to proceed to the next phase of services. Contractors have been known to forget that they have advised the designer that a minor change in the work will have no cost or schedule impact. Consultants can forget that they agreed to have their drawings ready to issue by a certain date. Proactive documentation of decisions and reminders of commitments made by team members are essential management requirements and a definite advantage over the alternative of proving the facts after the fact without the fax (or letter, a request for information, or other written documentation) in hand.

The deepest sin of the human mind is to believe things without evidence.
—Thomas Henry Huxley

The need for tangible evidence

Another practical use of documentation counters more sinister activities. It has been established that disputes and claims typically are resolved by the most intact and explicit documentation. In short, he or she who has the best documentation usually wins. This quantitative and qualitative advantage of documentation in claims management has no doubt increased the overall amount of paper that typically is generated on a project.

During the design and construction process, many communications affecting time and cost are exchanged. Affirmative documentation, such as phase completion sign-offs, authorizations to proceed, site observation reports, meeting reports, and schedules, are efficient tools of management that facilitate a more efficient and effective project delivery.

As we move closer to “paperless project” methods, such as the building information model (BIM), which consists of data manipulated through 3D parametric modeling, this need for tangible evidence by our legal industry eventually may diminish. However, for now, documentation will remain the hallmark of good project management.

Types and adequacy of documentation

Documentation can take many forms. Because it can be generated by those who make decisions and those who react to those decisions, some forms of documentation by necessity must be more compelling than others.

Different individuals develop different habits for making and maintaining documentation. Just as there are messy desks and there are clean desks, there will be managers who produce clear, pristine documentation, and others who will keep files of ragged notes on whatever paper is at hand. Accordingly, the range of documentation considered to be adequate varies from almost nothing at all to an archive of properly filed and fully executed documents. Below are a few examples.

Agreements: Contracts are the basic vehicle by which the obligations of the parties to a legal agreement are set forth. Contracts can take many forms. When given a choice, the following are listed from most preferred to least.

↑ *Most Preferred*

- A fully executed AIA standard form of agreement
- A fully executed, customized agreement referencing AIA A201 General Conditions of the Contract for Construction and/or other AIA documents
- A letter of agreement referencing an applicable AIA form contract
- A confirming memorandum sent to the other party, but not signed and returned
- An oral understanding with no substantiating documentation

↓ *Least Preferred*

Although recognized by law as binding in many (although not all) states, oral agreements are disputable and difficult to substantiate, due to the lack of documentation. The old joke rings true when you consider that “oral agreements aren’t worth the paper they’re written on.”

Approvals, notices and phase completion sign-offs: These are forms of documentation that can be generated by the owner, the contractor, or the architect. The AIA documents contain many instances where such actions are required. The preferences for these types of documents are, again, listed from most preferred to least.

↑ *Most Preferred*

- A formal letter acknowledged in writing by the approving party
- Confirming correspondence, letter, or e-mail sent by the party seeking approval to the approving party
- An oral notice, approval, or understanding with an oral acknowledgment

↓ *Least Preferred*

Meeting Reports and Memos Some architects do not prepare meeting reports, and they believe they are a waste of time. If an architect attending a meeting does not prepare notes from his or her observations during the meeting—no matter how informal—we believe there is no justification for attending the

meeting. Meeting notes are most effectively used as a project management tool if they are issued to the project team in a timely manner. Reporting need not be a burdensome endeavor and can be useful in several formats.

↑ *Most Preferred*

- A formal typed report, with a list of attendees, recounting in narrative form the discussions and decisions made during the meeting—this form of report is issued with attachments of all handouts reviewed during the meeting and generally contains an “aging statement” indicating that it is assumed that the attendee agrees with the statements therein if he or she does not respond within a certain period of time
- A formal typed report in “action item” format, generally continued from a prior meeting, containing many items, with only items of new discussion documented—this form also typically contains an aging statement
- Handwritten notations, often with attendees’ initials in lieu of names, describing the discussions and decisions made during the meeting
- A memo or e-mail listing summary bullet points
- A handwritten note

↓ *Least Preferred*

As was observed in the first article of this book, the meeting report is essentially a tool for reporting project progress to the owner. If you issue the report, you will be able to recount the events as you experienced them. If you do not issue the report, you will likely read results or opinions that do not coincide with your own. If your contract or your project organizational structure does not allow you to issue the project meeting report, it will be necessary for you to rebut in writing each and every issue and event that is not consistent with your experiences and understandings. Rebuttal is a laborious process that too frequently falls through the cracks of a busy schedule.

Don't get it right, just get it written.

—James Thurber

Acknowledgment

A complete documentation process consists of two parts. The first part is the creation of a particular document to chronicle a decision, understanding, or event. The second part of documentation is to acknowledge that a particular document was sent or received or to confirm a decision or an act. There are four fundamental issues in acknowledging documentation. Make sure:

- You can identify your document and that you have retained a copy in your files.
- You have a record of when the document was prepared.
- You have a record of when the document was distributed.
- The receiving party received the document.

The nature of informal options for communication and documentation can be challenging when proving these four points, especially in proving that you sent the documentation and the other party received and agreed with it. In the event of a dispute where you have no documented acknowledgment, you can sometimes solve the problem if you can find the recipient's copy in his or her files during the legal "discovery" process. However, a formal documented acknowledgment is preferred to a passive acknowledgment in all cases.

Registered mail or other forms of "return receipt" are effective in establishing acknowledgment of your correspondence. In any case, some form of receipt record is the only way to be assured that the other party is in receipt of the document. Simply knowing that they received the message is no guarantee that they understand or agree with it.

E-mail records

Because e-mail is a primary medium for communications today, it is worth mentioning that e-mail can be an effective means of documenting information in the actual format or as the distribution method. You must remember, however, not to copy or store your e-mail before it is sent. You generally must copy or store from the "sent" file in order to have the date included. Also remember that your e-mail records do not *necessarily* go away by pushing the Delete button.

Identification

For your documentation to be relevant to your project, it must reference the project in some way. Architects typically accomplish this through the use of a project name and number. The name may have limitations if the project contains multiple phases. Therefore, a unique project number is more effective. Make sure all documents, either sent or received, identify a project name or a project number. Documentation that cannot be identified as relating to a specific project and event is useless.

Father Time

The basic rule for establishing when a document was prepared, sent, or received is simply to place a date on everything. You should date all documents you prepare as an integral part of the format of the document. You should date all documents that you receive with a handwritten notation or a date stamp. Documentation will not be effective if it cannot be placed in the context of the project schedule.

Transmittals

Transmittal forms or letters are useful for documenting quantities such as multiple drawings or submittals. Rather than prepare an enclosure letter for each item, you can use a transmittal form to indicate many items and the actions taken such as approvals or reviews. Be sure to include the date sent and appropriate project identification on all transmittals.

Transmittal letters can also be useful in describing why a bundle of mixed items have been issued. For example, a roll of drawings with different dates might be transmitted for purposes of making a building permit submittal and may be transmitted on a date that is different from the one shown on the drawings.

Journals

A very important part of being an effective design professional, whether you are a manager or a designer, is keeping a journal or sketchbook. Journals and sketchbooks present opportunities that cannot be supplanted by other forms of record keeping, including personal history and fulfillment. Journals provide a contemporaneous trail through the daily activities of your practice. They place your work, thoughts, and ideas in time and context. They provide a venue for keeping notes as well as business artifacts such as business cards. A journal provides a convenient palette for sketches as well.

The modern equivalent of the journal may be considered to be a handheld personal digital assistant (PDA). These devices record schedules, schedule archives, and contemporaneous notes, and can even send e-mail at an architect's fingertips.

The restaurant napkin

No discourse on documentation can be complete without giving proper attention and recognition to the classic design canvas, the restaurant napkin. The folklore of great designs and ideas created over the dining table is without limit. But the real point is that when it comes to documentation, something is better than nothing. When the defining moment comes, and your PDA or journal is not handy, grab anything—a business card, a scrap of paper, or a restaurant napkin—and chronicle the event or decision at hand.

Never write a letter if you can help it, and never destroy one!

—Sir John A. Macdonald

Conclusion

This ugly duckling called documentation will always be a part of our professional design services. Diligence and consistency in attending to the necessities of effective documentation are necessary to be successful in our practice. Documentation must follow the basic rules that it be identifiable, dated, acknowledged, and retained. It is a tool that we simply cannot afford to do without.

Documentation can be viewed as a burdensome drudgery or it can become a part of the way we work. Effective project managers typically develop a routine for documenting their projects so that documentation becomes a useful habit that is as easy as filing or making copies. But like it or not, documentation is an essential part of the fabric of effective project management. And effective project management that results in successful projects is always the best form of risk management.

We'll leave you with a final thought: be careful out there.

Another Fine Mess—The Onerous Contract, Part 1: Risk Management *after* the Agreement Is Signed

For most architects, discussing the finer points of contracts is much like watching paint dry, but for those of us that live among the words that bind us, there can be excitement at every clause. Our message in this piece is intended to alert the reader to words and phrases that can turn around and bite us after we have signed on the line. Although we may have agreed to the clause, there is no reason why we cannot initiate risk management efforts to minimize a bad potential outcome. We must admit that occasionally in our careers, there have been times when we could hear Oliver Hardy's voice as we stared at killer agreed-upon contracted language, "Here's another fine mess you've gotten yourself into!"

Oh, now I've got myself into an awful mess: I wish I were sitting quietly at home.

—Thornton Wilder

The primary objective in contracting for professional services is to negotiate a fair agreement with provisions that are reasonable and in accordance with acceptable practice standards. AIA standard forms of agreement are available to guide us in this effort. Other available resources are your insurance agent and a legal counsel with experience in representing architects. Your insurance agent can assist you in finding appropriate legal representation when needed. Mindful of the risks so prevalent in our business, we do our best to negotiate a contract that will protect us and allow us to serve our client appropriately while providing an adequate fee for the time spent.

However, there are times when we encounter clients with requirements that go beyond our reasonable abilities and limitations. Their contract demands exceed the level of service that we feel is within acceptable professional limits. We reach that point in the negotiation process where our better judgment tells us that we should walk away; where the risk appears to be disproportionate to the reward. We come to the conclusion that the client's proposed terms are so onerous that the deal is just not worth doing.

That is, until other considerations enter the picture. Perceived rewards entice us to venture into the rocky realms of increased risk. We know better, but the temptation is great. Perhaps it is an opportunity to enter a new market or earn the business of a national client who can bring us continuing work. It may be as simple as just needing the work to keep our people busy. We wipe the perspiration from our foreheads and take a deep breath as we sign on the dotted line. We shake hands with the client and head back to the office hoping for the best, wondering what we can do to manage this "fine mess" that we have knowingly brought upon ourselves.

This article will touch on the options available for risk management when we are faced with unreasonable demands or if we have already agreed to a tough contract. Since risk management is about balancing the risk with

the reward, there are times when increased risks may appear to be worth the chance. These options may not be cure-alls, but taking positive and responsive actions is far better than doing nothing at all.

The contractual playing field

The chances we take when contracting for services can be treacherous, and the AIA has provided us with documents that offer much protection. AIA documents have been available for more than 100 years, and they have proved to be reliable industry standards of practice. The AIA aggressively manages the document content, constantly monitoring the way the documents are used and responding with appropriate revisions.

For example, when case law was established through a ruling in the court declaring that supervision was an activity that exceeded the reasonable expectation of the architect's duties during construction, the more appropriate term, *observation*, was employed to make contractual requirements more acceptable. When the architect's authority to stop the work was viewed as an action with unbalanced risk implications, it was removed from the documents.

When AIA documents are used, they can provide reasonable protection for the design professional. It is when more stringent and onerous conditions are introduced that the architect's risks can rise above the rewards consistent with market-driven fees.

Both public and private entities occasionally present take-it-or-leave-it contracts that impose a higher standard of care than is normally required of a design professional. Public clients usually control large amounts of work; we must endure their contracts if we want the job. Also, private owners with a national and worldwide presence often force contract conditions with unyielding parameters.

Unreasonable requirements, such as payment for betterment, or value added, as well as absolute defense indemnities for any and all claims, should be considered to be deal-killing conditions in contract negotiations. Unfortunately, on occasion, these are accepted by architects in service contracts because of a lack of awareness or due to perceived necessity. As a result, design professionals sometimes take a chance in the hopes of a successful outcome.

A common danger unites even the bitterest enemies.

—Aristotle

Dangerous liaisons

Although many onerous contractual requirements may appear to be somewhat benign, they could have more serious implications. For example, *inspecting* the work connotes a more thorough review and determination of conformance. Also, *certification of payment application backup documentation* goes well beyond the requirement to be "generally familiar with the work" in that it requires a knowledge of the work that only the contractor typically has.

Some contract requirements are more obvious and threaten with more certainty, offering the unscrupulous owner a basis for filing claims against the design professional. For example, requirements such as *certifying work conformance* can make the architect responsible for the completeness and accuracy of the work. Agreeing to produce *100 percent complete documents* carries an obligation that cannot be fulfilled under the design professional's ordinary powers. Also, *guaranteeing the design will not exceed a maximum limit of cost* of construction can cause architects to become an uncompensated funding source for the owner, and can cause them to redesign until the project is within the budget. This can be an open-ended liability.

Nevertheless, these requirements are frequently demanded in contract negotiations, and they should not be agreed to unless the reward is worth the risk to be taken.

Protective actions

Although you may have agreed to an onerous contract condition, it does not mean that you must acquiesce. There are alternatives that can be undertaken to mitigate and manage difficult requirements. They may not provide complete resolution, but they will at least improve your chances of success.

It is important to note that a formal change order is not the only alternative for changing the course of a contract. Changes can be effected in the form of oral agreements and written understandings.

Silent acknowledgment

There is also the issue of silent acknowledgment. If you document a change in the conditions of your service agreement with your client in writing, and no response to the contrary is given in writing, the change may be determined to be enforceable and have credibility.

For example, your contract requires you to be present on the jobsite one day per week. You realize that the contractor only meets at the site on alternate Tuesdays, and visiting the site for two days every two weeks provides better service to the project. This represents an "average" of one day per week. You send a letter to the client advising of the change, and you receive no response. Months later, after the project is completed, the client complains that you did not provide the site visitation services defined in your contract. The client refuses to pay your final invoice and demands a refund to cover the services the client claims you did not provide. You forward the client a copy of the letter, noting the client's failure to respond with an objection to the adjusted visitation schedule.

While this may not guarantee exoneration from the client's accusation, nevertheless, it provides you with a reasonable position for rebuttal.

Alternatives to onerous contract requirements

Listed below are difficult contract requirements, and some general notions for how to deal with them.

Inspections, not observations. There are only two inspections required of the architect by AIA documents during construction: at substantial completion and at final completion. If the contract wording requires you to “inspect” the work during each site visit, your obligation for determining if the work conforms to your design documents can be greatly increased over the normal standard of care.

Certifying the contractor’s work. Although the architect certifies the contractor’s application for payment, the normal standard of care for architectural design services does not include certifying the contractor’s work.

100 percent complete design documents. Do not affix the notation, “100 Percent Complete Documents,” or any other quantitative representation on your drawings. Instead, include descriptive notations, such as “Issued for Construction,” or “Issued for Schematic Design Review.”

Guaranteeing budget conformance. It is not reasonable for the architect to be made solely responsible for a project condition over which he or she does not have authority or control.

Review and approval of payment application backup. The architect is required in AIA Owner-Architect agreements to “determine in general if the Work observed . . . when fully completed, will be in accordance with the Contract Documents.” This is not a requirement to check each and every detail in the contractor’s application for payment.

Unreasonable deadlines for submittal and RFI review. The design professional has both the right and the obligation to take the appropriate amount of time necessary to review submittals or answer questions.

Indemnities and hold-harmless agreements. These clauses offer a guaranteed protection that may be prohibited by the terms and conditions of your professional liability insurance policy.

Deletion of construction phase services. Owners sometimes ask architects to delete construction phase services from their work. Because the architect typically contracts to issue a certificate of substantial completion at the end of the project, it is difficult, if not impossible, for the architect to know if the project has been constructed substantially in accordance with the drawings and specifications if he or she has not visited the site and reviewed the work during construction.

Status Quo, you know, that is Latin for “the mess we’re in.”

—Ronald Reagan

Conclusion

We may not always succeed in negotiating a contract that is in complete alignment with our preferred services approach. Opportunities and rewards may sometimes lure us into treacherous contractual conditions. Our chosen “business decision” may be to agree to contract wording that places us at a higher risk than we typically accept. We may find ourselves in another fine mess that challenges us.

We must remember that although the ink may be dry, the opportunities for effective risk management remain. There are actions that can be taken

to improve our exposure and possibly mitigate onerous requirements altogether. The important thing to keep in mind is to never give up. Many contingent actions can be taken throughout the project to improve your risk exposure and the chance for a successful project. Do not forget that a component of successful projects typically includes a satisfied client.

We must take risks if we are to do business, but opportunities for improvement will always persist. Stay on top of your negotiations and stay close to your clients. And if you find yourself in another onerous contract, take advantage of the opportunities and resources available for minimizing your risks and improving your chances for success.

And while you're at it, be careful out there.

Another Fine Mess—The Onerous Contract, Part 2

Recapping from Part 1: Mindful of the risks so prevalent in our business, we do our best to negotiate a contract that will protect us and allow us to serve our client appropriately while providing an adequate fee for the time spent. However, there are times when we encounter clients with requirements that go beyond our reasonable abilities and limitations. “Another Fine Mess: The Onerous Contract, Part 1” explored some options available for risk management when we are faced with unreasonable demands or if we have already agreed to a tough contract. The options that follow expand on some of those ideas. The options that we explore in this article may not be cure-alls, but taking positive and responsive actions is far better than doing nothing at all.

To find a form that accommodates the mess, that is the task of the artist now.

—Samuel Beckett

Site inspections

Black's Law Dictionary states, “Inspection . . . has broader meaning than just looking (observation), and means to examine carefully or critically, investigate, and test officially.” During negotiations, it is advisable to review the AIA Contract Documents B101-2007 and A201-2007 site observation duties with the client and explain the differences between observation and inspection. If you elect to agree to “inspect,” then you should propose a fee commensurate with the time involved with the additional duties and increased risks.

If you have such a requirement in your contract, in the absence of specifically defined requirements for your “inspections,” you can attempt to establish the standard of care that you will meet by:

1. Reporting your site observations on a form such as AIA Document G711, Architect's Field Report, which references “observations” rather than “inspections.”

2. Including in your report the qualification: “Inspections performed by the architect under this contract have been conducted under the limited conditions as described by site observations in AIA Document A201, General Conditions of the Contract for Construction, as referenced in the Owner-Architect Agreement.
3. Arranging to discuss the subject of inspections versus observations in a project meeting and include the description provided in AIA Document A201 in the meeting minutes. Do this even if the client or contractor objects to your position during the discussion.

If you are working from an AIA document such as B101-2007 or A201-2007, you have a greater chance of your services conforming to “a reasonable standard of care” as established in part by the AIA family of documents for practitioners.

Certifying the contractor’s work

Although the architect certifies the contractor’s application for payment, the standard of care for architectural design services typically does not include certifying the contractor’s work. AIA document A201-2007 clearly states in paragraph 3.3.1, with similar language in A201-1997, that the contractor is solely responsible for their work and the work of the subcontractors:

The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract. . .

Certification of the contractor’s work by the architect could be interpreted to represent that the architect has confirmed that the work is in strict accordance with the contract documents and is complete. Such certification may cause the architect to be held responsible for the contractor’s incomplete, incorrect, or defective work.

During contract negotiations it is beneficial to help the client understand that although the architect will be responsible for his or her own acts and omissions, it is not a guarantor of the work performed by others. AIA document B101-2007 states in paragraph 3.6.1.2:

The Architect shall be responsible for the Architect’s negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor, or of any other persons or entities performing portions of the Work.

If you fail in this endeavor or discover that your contract includes an onerous certification, you can attempt to establish a reasonable standard of care for your services *after the fact* as follows:

1. Your professional liability insurance agent may tell you that you are not covered under your insurance policy when providing such

absolute certifications. If so, you should advise your client of this fact and attempt to negotiate a compromise.

2. Inform your client that your certification is for “substantial” conformance to the contract documents as defined in AIA Document A201.
3. If your client persists in demanding that you certify the contractor’s work, ask your professional liability insurance agent to contact the client and explain the potential owner liabilities of this action.
4. Consider adding the following qualification to your certificates of substantial completion:

This certification is not a representation that the contractor’s work is correct or complete, but it is consistent with the architect’s responsibilities as stated in AIA Document A201 as referenced in the Owner-Architect Agreement.

100 percent complete design documents

Contract documents are conceptual as defined in the AIA documents and, by definition, they cannot be 100 percent complete. This issue is explored in “A Loss Cause: Drawing Discrepancies and Ensuing Damages” in Chapter 4.

Most contracts appear to anticipate, and it is common in the industry for many architects to refer to the status of their documents as a “percentage of completion.” This industry habit is an effort to objectively quantify what is an inherently subjective process. There is no industry-standard definition for what constitutes “completion” for the design or construction document phases of architectural services.

Such objective measurements of subjective issues tend to go without adequate discussion during contract negotiations. Architects, when negotiating an agreement, are often unwilling to engage in conflict on this issue because everyone knows that sooner or later the documents will be considered “complete.” If you should agree to a contract containing this requirement, try the following:

1. Do not affix the notation “100 Percent Complete Documents” or any other quantitative representation on your drawings. Instead, include descriptive notations, such as “Issued for Construction” or “Issued for Schematic Design Review.”
2. Discuss the issue openly in a project meeting, explaining that no industry definition exists and that it is impossible for documents to be 100 percent complete. Record your discussion in the meeting report.
3. Meet with the client and explain the conceptual realities of design documents. “Drawing the Line: Why the Architect’s Documents Cannot Be Used for Construction” in Chapter 4 will address the conceptual nature of construction documents in greater detail. Record your conversations in a meeting report.
4. If you are still not getting through, ask your insurance agent to contact the client and explain the conceptual realities and limitations of design documents.

Guaranteeing budget conformance

Some clients may ask you to guarantee that your documents express a design concept that can be constructed within a specific project budget. Supplementary clauses such as “redesigning the project to conform to budget constraints” are sometimes imposed. It is not reasonable for the architect to be made solely responsible for a project condition over which they do not have authority or control.

Owners often mistakenly believe that the architect not only has ultimate control of project costs, but that their pursuit of design excellence is such that they will jeopardize the project budget with their efforts to have their way. During contract negotiations you must candidly explain to owners the relationship between time, cost, and quality. This issue is addressed in *The Architect's Handbook of Professional Practice*, 14th Edition, in an article entitled, “Maintaining Design Quality.” Essentially, this concept states that an owner may expect to control two of the three components—time, cost, or quality—but not all three.

Owners have no doubt derived their mistaken beliefs about the architect's control over the budget because many of the requirements for the design are expressed in the architect's instruments of service. The reality is that owners, contractors, and designers all affect the time, cost, and quality on a project. Of the members of this team, the constructors are better positioned to be knowledgeable about costs and to offer advice as to when design changes should be implemented to meet budgets.

During negotiations, try to explain to the owner that you will not nickel-and-dime them for minor revisions in assisting with managing the budget, but you cannot be responsible for major changes when those changes are not consistent with prior owner approvals.

For example, an owner desires an arching barrel vaulted roof on his new villa. Estimates skyrocket, and the owner demands that you redesign with a flat roof. That demand is not consistent with prior program requirements and approvals, and it will require the architect to experience severe fee penalties. If, on the other hand, the project exceeds a predetermined budget, and the client asks you to change the specification from copper roofing to painted metal, it would probably be a wise business decision to make this minor change at your own expense.

As a rule, the design professional should *never agree* to be responsible for the cost of construction in excess of a budget. If the client resists and represents this requirement to be a deal breaker, you should walk away from the commission, no matter how grand it may be.

In the event that you have onerous budget clauses in your contract, try the following:

1. Firmly establish the owner's program requirements. Document all program discussions thoroughly in letters, memoranda, or meeting reports.

2. Firmly establish the basis for the owner's budget, including the source, date, and quality of cost data.
3. Notify the owner if you perceive a discrepancy between the program requirements and the budget. If you believe the budget is deficient for the desired program, give the owner definitive notification of this belief. Provide the owner with reasonable solutions for resolving the discrepancy, such as a reduction of program requirements or an increased budget.
4. Do not proceed with designs for which you have notified an owner a discrepancy exists without a firm direction from the owner that resolves the discrepancy. If you do proceed, you may risk setting the expectation that the discrepancy has been resolved.
5. Document all such resolutions in writing.

This subject could be reviewed in much greater detail, and it merits a great deal of brainstorming and discussion with the owner and the contractor.

Review and approval of payment application backup

The architect is required in AIA owner-architect agreements to “determine in general if the Work observed . . . when fully completed, will be in accordance with the Contract Documents.” This is not a requirement to check each and every detail in the contractor's application for payment. Payment application backup on large projects can involve hundreds of pages of documentation, and any detailed review and approval of this information should probably be done through an audit by an accountant.

In errors and omissions claims, owners often allege that the architect has inflicted damage upon them by approving payment to a contractor for erroneous or incomplete work. This is often due to a lack of understanding by the owner as to the architect's responsibilities for reviewing and certifying a contractor's application for payment. To avoid this misunderstanding, it can be beneficial to help the owner understand the specific review requirements during contract negotiations.

Suggested negotiation points are as follows:

1. The architect does not make detailed inspections and is thus not in a position to know the specific conditions of the work for which the contractor has requested payment
2. The architect does not guarantee the contractor's performance of the work
3. The contractor is responsible for their own actions.

Nevertheless, if you should have the requirement to make a detailed review of the contractor's payment application backup in your contract, you may try the following:

- If appropriate in the context of your contract terms, remind your client in writing that you are only required to determine “in general”

if the work is in conformance with the contract documents. This does not include a comprehensive review, approval, or audit of the supporting data submitted by the contractor.

- Advise the client that you are not an accountant and that you are not qualified to review and evaluate such accounting data.
- Use AIA Document G702, Application and Certificate for Payment, which states the limitation that “the Architect certifies to the Owner that to the best of the Architect’s knowledge, information, and belief.”
- Request a change in services from the owner stating that the services of a professional accountant are required to discharge the responsibility for backup review under the terms of your contract.

I love deadlines. I like the whooshing sound they make as they fly by.
—Douglas Adams

Unreasonable deadlines for submittal and RFI review

The review of submittals by the designer can be time-consuming if they are complex or submitted untimely or in an unreasonable sequence. RFIs often take time to review and resolve. Contractors use extended review time to claim delay and subsequently ask for additional general conditions costs. Nevertheless, the design professional has both the right and the obligation to take the appropriate amount of time necessary to review submittals or answer questions. A201-2007 provides for a reasonable review time in paragraph 3.10.2. Similar language can be found in A201-1997:

The Contractor shall prepare a submittal schedule . . . for the Architect’s approval.

A201-2007 gives the architect the significant authority to determine review time in paragraph 4.2.7. Similar language can be found in A201-1997:

The Architect’s action will be taken, in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect’s professional judgment to permit adequate review.

If you must agree in your contract to specific review periods, or in the event that your contract contains the requirement that submittals and RFIs be reviewed and responded to in a short interval of time, consider the following alternatives:

- Inform your client in writing that review times vary with the size of the submittal and that you will endeavor to respond to these documents within the average number of days required in the contract.

- If you are using MASTERSPEC specifications or other documents that require a submittal schedule, request the submittal schedule from the contractor to confirm that the contractor has scheduled reasonable and adequate review time for each submittal. If necessary, demand in writing that the contractor provide a submittal schedule for your approval. Since you are allowed in MASTERSPEC and AIA contracts to agree to this schedule, advise the contractor if the time allotted is inadequate and unreasonable.
- Monitor the submittal schedule and determine if the contractor has met their obligations for sequencing and timing to fit your review availability. Advise during construction meetings if the contractor is not meeting their schedule and document in writing if deviations or nonconformance is evident.
- Advise the owner that AIA Document B101, in Article 4.3.2.1, allows for a Change in Services to increase the architect's fee for, "Reviewing of a Contractor's submittal out of sequence from the submittal schedule agreed to by the Architect." While you may not be able to negotiate additional fees, you can use the clause as leverage in negotiating reasonable review times. In addition, AIA Document B503-2007, Guide for Amendments to AIA Owner-Architect Agreements, which is provided free to AIA members on the AIA website, provides language for the review of multiple submittals.

Indemnities and hold-harmless agreements

Indemnities and hold-harmless agreements in contracts must be approached with caution. You should always consult with your attorney and your insurance company before you accept any indemnity or hold-harmless agreement. These clauses offer a guaranteed protection that may be prohibited by the terms and conditions of your professional liability insurance policy. However, mutual indemnities between the client and architect for damages caused by their own actions are common.

Deletion of construction phase services

Owners sometimes ask architects to delete construction phase services from their work. Since the architect typically contracts to issue a certificate of substantial completion at the end of the project, it is difficult if not impossible for the architect to know if the project has been constructed substantially in accordance with the drawings and specifications if the architect has not visited the site and reviewed the work during construction.

Many states mandate that construction administration must be performed by a licensed architect because some state licensing boards recognize the need for professional review to determine conformance. It is important that you retain this important phase of services in your contract so that your ability to determine conformance and completion will not be impaired.

If you have prepared construction documents and a separate architect is retained to perform construction phase services on your design, you could be at a disadvantage in that you will not have the opportunity to discover discrepancies before they are constructed. The primary responsibility of the general contractor is to plan and coordinate the work in advance, and the primary objective of the architect during construction should be to resolve any conflicts or complications ahead of time. Design professionals who provide construction phase services on the work of others often have less liability and thus may be less proactive in discovering problems.

If you are asked to delete this phase of work from your services, consider the following actions:

- Explaining the importance of the benefits of a single architect and your vested interest in finding and resolving discrepancies.
- Visiting the site anyway to review conformance generally. If you cannot visit the site and develop a comfort level with construction conformance, under no circumstances should you issue a certificate of substantial completion or any other certification.
- Asking your insurance agent to contact the owner to explain the benefits of including construction administration with basic services utilizing the same architect.

It's not the tragedies that kill us, it's the messes.

—Dorothy Parker

Conclusion

We must take risks if we are to do business, but opportunities for improvement will always exist. Stay on top of your negotiations, and stay close to your clients. And if you find yourself in another onerous contract, take advantage of the opportunities and resources available for minimizing your risks and improving your chances for success.

And while you're at it, be careful out there.

Free Fall: Working without a Contract

All architects that we know have worked for some period of time without a contract, and it is likely that this practice will continue undisturbed. But given the risks involved with such behavior, we felt that we should point out cautions and offer suggestions for managing them. The 2007 revisions to the AIA documents have provided five new owner-architect contracts to choose from, and now it should be easier for the practitioner to find and execute one that meets their needs. We note that even the notorious letter agreement qualifies as a type of scope documentation, and the act of memorializing services you are required to provide your client cannot be overemphasized.

A verbal contract isn't worth the paper it's printed on.

—Samuel Goldwin

Have you ever provided design services without a contract? If your answer is “no,” it is likely that you are somewhat new to the profession of architecture. Most architects have provided professional services without executing a contract at some time in their career. It is gratifying to receive a commission, and we tend to want to get the work going and worry about the contractual stuff later. It does not help that contracts are more complicated these days. Owners and their lawyers often negotiate tough conditions. Getting the contract executed often takes time and requires advice from our insurance agent or our lawyer.

Design services can range from brief studies and evaluations to full basic services. Although common in the industry, it is risky to document services on small projects with letter agreements. It is convenient to keep a template on our hard drive and fill in the blanks, sending it to the client quickly. Abbreviated letter agreements, however, often do not provide sufficient protection against the perils inherent in today's practice.

On larger projects, we have become accustomed to lengthy negotiation periods, and we tend to go about work without the feeling of urgency that is warranted in getting a contract executed. Contract negotiation is viewed by many architects to be an adversarial process that they would like to avoid. When those monthly checks begin to arrive from the owner, optimism can take over, and we may disregard getting the final contract executed altogether.

Meanwhile, the risks inherent in architecture practice are greater than they have ever been. A fair and balanced contract is essential if we want to protect ourselves adequately. When we work without a contract, we are like the aerialist high above the ground, walking the high wire with no safety net below. All will be fine as long as everything goes as planned. However, should things go awry, our professional and financial health could be threatened.

This article will explore the dangers of working without a contract and the safeguards that well-executed service agreements can provide. It will address the importance of effective contracts management, including suggestions for setting up a contracts management program in your firm. Included are suggestions on what to do in difficult situations, such as when clients refuse to sign the contract.

What do contracts do?

Among other things, contracts establish a documented record of what services we are going to provide for the fee that we earn. Such documentation is necessary to help avoid disputes in the services scope and avoid misunderstandings. The following paragraphs address some important parts of a contract.

Identification of parties. It is important that individuals and companies doing business together be accurately identified in the agreement. Not only

is this necessary to make sure that the agreement forms a binding contract between the right parties, but it is also necessary to help avoid potential problems in communications. It is wise for the name of the owner's designated representative to be listed as the primary contact so as to allow one source of communications.

Scope of services. Architectural design can encompass many things. There are basic services that are typically provided for projects; however, the expectation of the result of those services can vary greatly. The contract, if properly written, can define services in a way that will help prevent misunderstanding. When services are adequately defined in the contract, there is less confusion regarding subsequent "additional services" for which the architect will expect to be paid.

Compensation. The fee basis as well as the sequence and conditions for making payment are typically defined including hourly rates for services later added to the agreement. This should help avoid misunderstandings and simplify payment for additional services beyond basic services.

Termination. Contracts should also provide options and conditions for contract termination, including fair payment for work performed through the termination date. Some owners include terms requiring the architect to surrender ownership and copyrights to drawings and other instruments of service. An appropriately written termination clause can stipulate that ownership transfer will not occur until the architect has received payment for this work. These conditions can decrease the chance of wrongful termination claims and hopefully provide an organized transition.

General conditions. Another important component of a contract is to establish a uniform set of general conditions of the contract for construction. These conditions set out the duties and responsibilities of the parties during the construction phase and help reduce confusion. AIA Document A201, General Conditions of the Contract for Construction, is the document most commonly used for this purpose.

When the architect negotiates a basic services agreement, A201 is typically referenced as the general conditions document, as in B101-2007, Section 3.6.1.1. However, when the contractor and owner negotiate their contract, they sometimes agree on different general conditions or they modify A201 from its original form. Since the architect's agreement is usually executed first, the architect should compare the two general conditions (including any supplemental conditions to the construction contract) to determine if the requirements placed on the architect are consistent. It is advisable to explain to the owner the value in maintaining the close inter-relationship between A201, if used, and the other AIA documents that may be used on the project. The AIA documents consistently relate to each other, within each document family, and changes in one document can adversely affect others.

If you are using AIA agreements B101-2007, B102-2007 or B103-2007, you are contractually obligated only for the contract conditions in the A201-2007 as originally published by the AIA, provided that it is the general conditions document referenced, but you will still need to know if the owner and contractor have modified it. For example, the owner and

contractor may have agreed to specific general conditions changes in their contract which will lead them to expect a different level of service than your agreement requires. Some owners and contractors view their agreements as confidential. Should the owner or contractor refuse to provide you a copy of the owner-contractor agreement and general conditions, which is unfortunately a more frequent occurrence in today's practice, it will be impossible to know whether the owner has modified the contract conditions you are to administer under your agreement. In this instance, you should attempt to explain to the owner that your contract requirements must conform to that of the contractor's, or one or both of you may not be able to deliver the contracted services.

One option is to send the owner a blank copy of the AIA Owner-Contractor form that pertains to the way the project is contracted. For example, if the project is a lump-sum contract, you would use AIA Document A101-2007, Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum. Include with it a copy of A201-2007, General Conditions of the Contract for Construction, as referenced in the agreement.

Remind the owner that you have requested a copy of the executed owner-contractor agreement with general conditions, and advise them that unless they indicate otherwise, you are assuming that the enclosed documents represent the way that they expect you to perform services for administration of the contract for construction. These actions often result in a copy of the executed agreement sent by return mail, but if not, you at least have informed the owner of your contracted scope of services. If this effort fails, you should consult with your lawyer or insurance agent for assistance. If you do nothing, your actions could be called into question because of conditions within an owner-contractor agreement that conflict with your service agreement.

Moreover, AIA Owner-Architect Agreements B101-2007 and B103-2007 require the owner to provide the architect a copy of the executed agreement between the owner and the contractor, including the general conditions of the contract for construction.

Responsive actions to non-standard contracts

The AIA documents help set the industry standard for how we practice architecture, and when they remain intact, we can generally go about our work, business as usual. However, significant changes to the documents by clients are becoming more prevalent. The result could be an agreement that does not include requirements and conditions that conform to commonly accepted standards of architecture practice and that give us reasonable protection. Should this occur, following are some actions that can be taken to attempt to rectify the difficult issues:

No architect signature on change order. *The general conditions in the owner-contractor agreement have been modified and no longer require the architect's signature on change orders.* In this case, the architect should advise the owner that changes to the contract without the architect's

knowledge or consent could prevent their awareness of the project scope and could prevent them from determining the date or dates of substantial completion or assessing final completion.

Waiver of warranty to architect. *The owner was persuaded to waive the contractor's warranty to the architect guaranteeing work conformance.* A201–2007, Section 3.5, and A201-1997, Section 3.5.1 state:

The Contractor warrants to the Owner and Architect that . . . the Work will conform to the requirements of the Contract Documents. . .

The architect should advise the owner that deleting this requirement will make it difficult, if not impossible, for the architect to certify payments or certify substantial completion, conditions that are often unacceptable to lenders. The architect relies on the contractor's warranty that work put in place will be in conformance whether or not the architect is on site and observes the work. The issue of substantial completion is covered in detail in "Substantial Completion, Where Art Thou? A Challenging and Elusive Milestone" in Chapter 5.

Submittals redefined as contract documents. *The owner has agreed to a contractor demand that the owner-contractor agreement define submittals to be contract documents.* For good reason, A201 states that shop drawings and submittals are not contract documents. The architect should explain to the owner that if the contractor's submittals are defined as contract documents, the contractor can change the contract scope and thus manipulate the value of the project. This is explored further in Chapter 5, "According to Hoyle: The Submittal Process."

Clearly, it is a disadvantage to the owner to allow contract requirements to be altered by the contractor's submittals. If the owner agrees to have submittals defined as contract documents, the architect could add an explanatory note to each submittal explaining that they have been prepared by the contractor who is solely responsible for their content, and the architect's review action makes no representations as to their accuracy or completeness.

I'm up on the tightwire, flanked by life and the funeral pyre.

—Leon Russell, Carny, 1972

Steadying the high wire

Such changes in the contract are usually made because the owner does not understand the issues, and dialogue with the owner often helps. However, if the owner refuses to address discrepancies between the agreement with the contractor and the agreement with the architect, the architect should consider advising the owner in writing as to how its services will be impacted.

Hopefully, this notice will cause a desire to coordinate the construction contract with the owner-architect agreement, including the applicable general conditions. If not, the architect must decide if the added risk is worth the

agreed-upon professional fee. The most effective way to manage these issues is to resolve them during negotiation of the owner-architect agreement.

Your contracts management program

Ideally all professional services should be performed under a written contract. It can be helpful to develop a contracts management program to increase the chances that some form of contract is executed on all projects. A contracts management program can be beneficial to the sole practitioner as much as to the larger firm. One could be developed along the following lines:

Standard owner-architect agreements. Develop a standard marked-up agreement for each type of services you perform. This can range from a letter agreement to a full-service contract, depending upon the services to be provided.

When applicable, as in the case of a full-service owner-architect agreement, choose an AIA form of agreement that best suits your needs, and modify it to meet the needs of your practice. If you think it necessary to modify agreement terms, consult your lawyer and your professional liability insurance agent for assistance. The agent should have access to resources such as insurance company in-house lawyers and panel counsel who may be able to provide assistance in developing the specific contract wording. Your standard markup may not survive negotiations completely intact, but at least you will have established a contractual position for the initiation of discussions.

Atypical conditions. Another key element of your contracts management program can be to develop a process for determining “atypical contract conditions” and communicating them to your project team. When an agreement is negotiated with an owner, there are often some conditions that vary from standard AIA language. Conditions that vary from the AIA language should be highlighted and communicated to the team.

For example, in the AIA Document B101-2007, the number of architect’s site visits is left for the architect to negotiate with the owner. Should you negotiate a contract that stipulates, “The architect will visit the project fifty times during construction at intervals not to exceed one time per week,” the project team must be made aware of this strict requirement so that someone can substitute for the construction administrator when that person is ill or on vacation. Do not forget that, in this instance, site visits requested in excess of the stipulated number can be billed as an additional service to your contract.

For more information about dealing with difficult contract requirements such as these, refer to “Another Fine Mess: The Onerous Contract” earlier in this chapter.

Outside reviews. Another important aspect of your program should be structured reviews of unfamiliar or difficult contract clauses by a competent outside source. Experienced construction lawyers can be retained for this purpose, or your professional liability insurance company may provide this service as a part of your policy support. If paying a fee for this service

concerns you, remember that the money spent to avoid a claim is frequently a fraction of the amount required to defend against one.

Contracts management policies. In a larger firm, it is a good idea to establish policies for maintaining consistency and managing risk. The following suggestions may be useful in developing your contracts management policies:

- **Letter agreements.** If your firm uses letter agreements, develop a consistent format and determine to what extent professional services will be performed with this approach. Require your associates to convert the letter agreement to a formal owner-architect agreement should the project proceed beyond some pre-established preliminary phase.
- **Deal breakers.** Consult with your insurance agent or legal counsel to identify contract clauses and conditions with risks that exceed available rewards. You may also wish to have your agent or lawyer assist you in explaining these issues to a client when they arise. Be alert for new deal breakers when negotiating and check with your agent or lawyer when in doubt. Some firms include potential deal breaker clauses as a part of their “go/no go” decision-making process.
- **Outside contract reviews.** Establish a policy for when a proposed agreement should be reviewed by an outside source. Lawyer-generated and extensively marked-up AIA documents often deserve scrutiny. Unusual certifications that go beyond those addressed by AIA documents should definitely be targeted.
- **Consultant agreements.** It is important to establish a protocol for executing your architect-consultant agreements after the owner-architect agreement is signed. Some practitioners believe it is acceptable to work with consultants with only a letter agreement. However, the requirements in the owner-architect agreement must be passed through to the consultant for the architect to have adequate contractual protection. AIA Document C401-2007, Standard Form of Agreement Between Architect and Consultant, tracks the AIA owner-architect agreements and is available for this purpose.
- **Additional services.** It is important to establish the method by which you will contract for additional services. There are options available in the AIA family of documents, including AIA Document G606-2000, Amendment to the Professional Services Agreement, which can be used to modify an existing owner-architect agreement.

Execution of the agreement

Agreements are not finalized until the terms and conditions are agreed upon by both parties in writing. Absent a signed agreement, the contract may be disputed.

There may be occasions when contract negotiation is held up by the owner. For instance, suppose you have traded drafts and made your revisions,

and the owner-architect agreement is in the owner's possession. Weeks and months have passed, and there is no return draft. Your queries to the owner remain unanswered. It appears that the owner does not intend to finalize the agreement.

Although the most recent draft agreement exchanged between the parties may support credibility, it could just as likely serve to show that the parties did not agree on its provisions. Other actions can be taken to assist in confirming the owner's acceptance. Communicate with the owner by a traceable means such as certified letter or e-mail advising that you are providing services according to your last draft agreement unless they advise you to the contrary. While this may not show the owner's acceptance of the contract to the degree a signature would, it is nonetheless better than taking no action and hoping for the best.

Again, many architects view contract negotiations and getting contracts signed as inherently adversarial activities. You should view these activities as due diligence aimed at positioning your project for success.

Additional services

Another area where owners are often reluctant to sign agreements is additional services. Agreements often require the owner's written acceptance in advance, but with the time-driven activities inherent in design and construction, it is often difficult to get a signed approval before you do the work.

A helpful recourse can be to send a confirming communication advising that you are assuming that the owner agrees unless notice to the contrary is received within a given period. You should confirm that the additional services are appropriate and have been requested before taking this action.

For more information on our views about the types and adequacy of documentation, refer to "To Document or Not to Document: Basic Documentation Requirements," earlier in this chapter.

Initiating your contracts management program

Adequately enforcing these policies and procedures in your firm will require monitoring and management. It can be helpful to create a contracts management file to help bring order to the process. The file should contain copies of all signed agreements, the complete history of any unsigned agreements, transmittal records if no agreement has been signed, and logs indicating the status of additional service agreements and consultant agreements.

If the file is initiated at the onset of the project, it can be a helpful management tool throughout the phases of service. If your project management should transition from one person or department to another, the file can assist in maintaining continuity on the project and communicating important contract status information. It can also serve as a way to communicate with your bookkeeper or accountant to facilitate effective invoicing.

I'm fallin'
I'm fallin'
fall, fall, fall, fall

—Alicia Keys

The safety net

The negotiation and execution of contracts has become more difficult over the years. The number of nonstandard or lawyer-generated agreements could likely increase. It is also likely that the complexity and the physical size of the average contract may increase. Even if building information modeling and the promise of integrated project delivery brings us a more cooperative, less litigious process, if we wish to maintain a reasonable balance of risk and reward, we must manage our contract negotiation and execution as efficiently as possible. Effective contracts management is as important as providing effective design services because risks must be managed and fees must be collected if we expect to achieve success.

When you sit down at the negotiation table and check your list of deal breakers, bear in mind that the draft agreement in front of you will become your safety net. The effectiveness of that net will be determined by the effectiveness of your actions and decisions in negotiating the agreement and its conditions. Be mindful that when agreement is reached and you begin your services, should you encounter problems and slip from the high wire, a fair and balanced agreement can help stop your free fall.

As you ponder putting off until tomorrow calling your client about the status of the contract, and as you teeter and sway on the high wire, don't look down, and always, remember to be careful out there.

