

APPENDIX A

# Some “Do’s and Don’ts” and “Questions and Answers” for Design Professionals

## THE SENSIBLE SOLUTION

Any decision which affects construction contract performance, no matter how small or seemingly insignificant, may have far-reaching financial and legal implications. When something goes wrong with a project, it is no longer simply the fault of the contractor. More than ever before, the performance of the design professional is being closely scrutinized.

Faced with escalating costs, increasingly more complicated construction technology and lengthy rules and regulations governing their work, design professionals must also be acutely aware of the limits of their responsibility and authority to avoid liability. The fruits of today’s errors by design professionals are bitter—huge financial losses, legal difficulties and tarnished reputations. Judgments resulting in settlements in the millions of dollars are not uncommon.

Unfortunately, there is no custom or body of law to serve as a guideline in separating the design professional’s liability from other decision-makers involved in the project. The courts typically review not only the construction contract language before placing responsibility for error but also the activities and duties of each party to the contract. Whether or not the design professional is liable for design errors may depend entirely on control over the design. However, he or she may also be making decisions out of the area of responsibility for which he or she may be held accountable.

In light of these complexities, the design professional must operate with a certain sense of practicality. This requires some strict limitations on professional conduct and the implementation of procedures to avoid missteps.

## DO’S AND DON’TS

### First Things First

1. Do screen clients for financial ability.  
*Don’t undertake assignments for which Design Professional or staff are not skilled.*
2. Do give client written description of scope of Field or Project responsibilities.  
*Don’t approve contractor’s safety program.*
3. Do limit services to observation of the project for the owner.  
*Don’t stop construction.*
4. The owner should be informed that the Design Professional cannot guarantee the general contractor’s performance or performance of subcontractors.  
*Don’t guarantee cost estimates.*
5. Do investigate the client’s record for past disputes with Design Professionals.  
*Don’t accept projects which are highly speculative.*

### Performance Responsibilities

6. Do explain the responsibilities of a Design Professional to the client.  
*Don’t accept oral change orders from owner.*
7. Do inform the client of those areas for which the Design Professional is not responsible.  
*Don’t approve or disapprove of subcontractors.*
8. Do establish reasonable schedules for performance.  
*Don’t use ambiguous contract language.*

9. Do prepare written reports for clients as work progresses.  
*Don't interpret plans orally.*
10. Do require completion statement from client upon completion of the project.  
*Don't accept financial interest in any project where you perform design services.*
11. Do include a provision in contracts that the Design Professional will not be responsible for delays or default in the performance of design services which are beyond his or her control.  
*Don't accept responsibilities for delays or defaults by general contractor or sub-contractors.*
12. Do appoint a qualified member of the firm to coordinate in-house quality control.  
*Don't require contractor to submit drawings or plans for design professional's approval.*
13. Do check the work of junior staff members by seasoned senior member.  
*Do not withhold from the client any serious problems that develop.*
14. Do prepare an office manual describing the duties and responsibilities of all positions in the organization.  
*Do not rely on descriptions of services used in billings for design and construction history of the project.*
15. Do use specification checklist for all specifications provisions or categories which are frequently encountered to avoid omissions.  
*Do not change the language contained in the standard General Conditions, except in the most extreme circumstances.*
16. Do establish review procedures before specifications are released.  
*Don't design the least expensive alternative at the expense of professional judgment of adequacy.*

### **Budget & Accounting Procedures**

17. Do explain to client reasons for divergence from schedule or budget.  
*Don't accept payment for services contingent upon sale of the project.*

18. Do bill fees monthly.  
*Don't allow fee billings to accumulate.*
19. Do collect fees monthly.  
*Don't extend credit.*
20. Do provide for interest to be charged on any unpaid balances.  
*Don't delay collection schedule.*
21. Do provide for payment for "extra work" in contracts.  
*Don't fail to advise client of extras.*
22. Do prepare budgets by project team.  
*Don't provide services on a "break even" basis in order to establish a relationship with a client.*
23. Do have officer review and sign budget.  
*Don't agree to design a project which will not meet code requirements.*

### **Understanding Each Other**

24. Do make sure that the owner understands that the greatest protection against faulty workmanship is the competence and integrity of the contractor selected.
25. Do explain to the owner that the architect does not and cannot guarantee the contractor's performance and that an approval is not a guarantee.
26. Do make certain that the contractor and sub-contractors fully understand the agreed procedure for handling shop drawings.
27. Do make sure that the approval for shop drawings is such that it indicates approval of only a minimum conformance with the design concept and compliance with the information given in the contract document.

### **Keeping Clients Informed**

28. Do keep the client informed. Malpractice claims often stem from failure to keep in close communication with the client.  
*Don't settle any claim without insurer's approval.*
29. Do explain to the client the scope and basics of the business, namely the rendering of opin-

ions based on professional education and experience compensated by an hourly fee or an agreed fee.

*Don't accept responsibility for determining that OSHA requirements are being met on the project site.*

30. Do explain long, undue or inordinate periods of delay or inactivity.
31. Do send copies of reports or self-explanatory letters to the client as often as possible. The more clients hear, the more confidence they have in the progress of the job.
32. Do keep the client advised of all risks that may be involved and document the conveyance of that information to the client with letters.
33. Do advise the client of alternate design or option involving risks and let the client make the decision.
34. Do confirm oral instructions or important conversations with the client by letter; have all purchase orders and change orders signed by the owner and the architect.
35. Do consult with the client before any major decisions relating to contract or payment or retention fund.

### **The Written Record**

36. Do confirm in writing all instructions given to the contractor.
37. Do avoid use of the terms "As Built Drawings." Use instead: "Record Drawings Based On Information Provided By Contractors And Based On Change Orders Kept By The Contractor Shall Be Provided."
38. Do, when dealing with a private corporation, obtain verification of its right to enter into the contract and verification of the authority of the signing officer and/or the approving individual.
39. Do make sure that the entity has obtained its necessary internal procedures compliance (a public board approval, a partnership vote, etc.).

40. Do make a memorandum of all telephone calls with the date and preferably the time of the call and the essence of the conversation.
41. Do verify in writing by follow-up letters all lengthy telephone conversations.
42. Do keep meticulous documents and records of design and construction activities.
43. Do provide designers with forms to record basic services, decisions and reasons for decisions during each step of the design and the construction process.
44. Do encourage the use of dictaphones and photography for documenting site visits.
45. Do dictate reports for site visits and meeting summaries in a clear and precise manner and preserve them.
46. Do make sure that business entries are kept in the normal course of business and that such entries conform to procedure in maintaining such records in the normal course of your business.
47. Do try and keep a permanent file for all job files and, ideally, a second copy in a permanent fireproof location. It is suggested that as storage space provides, maintain records and files *ad infinitum*.
48. Do use the time-tested and proved standard contracts of the design professional as frequently as possible.
49. Do have your attorney review all contracts before they are signed.
50. Do have the insurance requirements of all contracts reviewed by your broker before the contract is signed.
51. Do require that you be added as an additional insured on the owners' builders risk policy or that subrogation be waived against you under that policy.
52. Do report all claims, lawsuits, disputes and incidents or situations reasonably likely to become claims promptly to the insurance company.

## QUESTIONS AND ANSWERS

### Keeping Trouble To A Minimum

1. Q. What are some guidelines which a design professional can follow in dealing with clients to reduce the probability of disputes or claims emanating from clients?
  - A. *For suits or claims against the Design Professional emanating from clients, the Design Professional can eliminate disputes and guard against future problems by checking the ability of the client to finance the project. The owner-user is a better risk than the speculator-owner or speculator-builder.*
2. Q. Is the past record of the client a useful guide to the propensity to sue?
  - A. *Yes, some clients are more likely to sue than others. The highly leveraged real estate promoter who cannot weather the storm of changes in financing costs will more likely sue the Design Professional for alleged errors in plans or improper supervision of construction when costs exceed budget.*
3. Q. What can the Design Professional do in early negotiations with prospective clients to reduce disputes?
  - A. *The Design Professional must first ascertain the level of understanding as to the scope of professional services really needed and financial ability to handle the project.*
4. Q. Many clients make unreasonable demands on the Design Professional and the contractors for completion of the project; what steps can be taken to establish a reasonable schedule for performance?
  - A. *Do not promise what you cannot reasonably expect to deliver. Explain to clients and give to them reasonable time schedules for completion. Also, keep close contact with clients and communicate the reasons for delays or non-performance by all parties to the project.*

5. Q. What are some "early warning signs" for the Design Professional that trouble lies ahead?
  - A. *Financial problems of either the owner or the general contractor frequently alert the Design Professional that the design will be challenged as a principal cause of the problem.*
6. Q. Why should monthly billings be used?
  - A. *The use of monthly billings will determine the owner's ability to meet timely payment obligations. Collection problems are a sure sign of later allegations of design error.*

### Consulting Or Advisory Agreement

7. Q. What should be included in the contract agreement where the Design Professional is engaged as a consultant or advisor?
  - A.
    - 1) *The parties to the contract are essential—namely the "client" and the "consultant."*
    - 2) *Client's project should be described.*
    - 3) *Client engages the services of the consultant.*
    - 4) *Consultant agrees to perform "professional services" of:*
      - a) *consulting,*
      - b) *design,*
      - c) *advisory,*
      - d) *surveying.*
    - 5) *Client agrees to pay or reimburse consultant for the fees and other costs of checking and inspection, zoning and annexation, assessment, soils engineering, soils testing, aerial topography, and other permits, bond premiums, title company charges, blueprints and reproductions, shipping, costs of transportation, meals and lodging for work done away from consultant's offices or the project site and all similar charges and costs incurred in connection with the project or the performance of this contract.*

### For Services Rendered

- 6) *Bill fees and all other charges on a*

- monthly basis as the work progresses.
- 7) Collect each invoice in the month of billing.
  - 8) Provide for interest to be charged on any unpaid balances.
  - 9) Additional services shall be paid for as "extra work."
  - 10) Escalation of wages and benefits should be the subject of increased compensation.
  - 11) In the event of suspension of work or abandonment of the project by the client, consultant should be paid for services performed up to the time of suspension or abandonment.

### **Put It In Writing**

- 12) All tracings, survey notes and other original documents as instruments of service shall remain the property of consultant.
- 13) Client shall not use such documents without consultant's prior written consent.
- 14) Client shall not assign interest in the contract or project without consultant's written consent.
- 15) Consultant will not assign interest in the contract without the written consent of the client.
- 16) Consultant is authorized to subcontract any portion of the work to be performed without written consent of client.

### **Performance Procedures**

- 17) Delays or default in the performance of professional services caused by:
  - a) labor difficulties,
  - b) accidents,
  - c) acts of God,
  - d) shortages or unavailability of labor, materials, power or transportation.
  - e) failure of client to furnish information or to approve or disapprove consultant's work,
  - f) late, slow or faulty performance by client, other contractors or govern-

mental agencies, the performance of whose work is precedent to or concurrent with the performance of consultant's work,

- g) any other cause beyond consultant's reasonable control shall not be deemed a breach of the contract.
- 18) Consultant makes no representation or warranty, either expressed or implied, as to its findings, recommendations, specifications, or professional advice provided hereunder except that they will be promulgated and prepared in accordance with the local standards of the engineering profession.

### **Exclusions From Contract**

- 19) Client agrees that the following are specifically excluded from this contract:
  - a) soil surveys and general and sub-surface soil tests,
  - b) on-site construction review,
  - c) project job site conditions,
  - d) the cost figures used in connection with maps, plans, specifications or drawings,
  - e) completion or quality of performance of contracts by the construction contractor or other third parties.

### **Miscellaneous Provisions**

- 20) Client warrants the accuracy of all data and information supplied to consultant by client.
- 21) Client shall indemnify, defend and hold consultant harmless from any and all cost, expense, claim, damage or liability of any nature arising from:
  - a) soil conditions,
  - b) changes in plans or specifications made by the client or others,
  - c) use by client or others of plans, surveys or drawings unsigned by consultant, or for any purpose

- other than the specific purpose for which they were designed,*
- d) job site conditions and performance of work on the project,*
- e) inaccuracy of data or information supplied by client, and*
- f) work performed on material or data supplied by others.*

22) *Consultant makes no representations concerning estimates of areas.*

### **Proceed With Caution**

8. Q. What safeguards should be followed in selecting consultants to the Design Professional?
- A. *The similar criteria which are used in screening clients also apply to consultants:*
- 1. Financial responsibility.*
  - 2. Adequate staff—both number and qualifications.*
  - 3. Subcontract work under a written contract.*
  - 4. Define the scope of consultants' responsibility.*
  - 5. Select the best consultants available.*
  - 6. Require certificate of insurance for professional liability insurance and other insurance in and for adequate amounts for the project.*
  - 7. Pass on any "hold-harmless" obligations from client to consultant.*
9. Q. What is Design Professional's liability under building codes and zoning laws?
- A. *A Design Professional is charged with the knowledge of all building codes, zoning laws and restrictions applicable to the project.*
10. Q. Is it generally recognized that building codes, by their nature, are minimum standards?
- A. *Yes, the Design Professional must accept the fact that designing the project to the building code may not be a sufficient defense to an action where the project clearly required a higher standard. Note that many building codes are outdated and not in conformance with present*

*good practice.*

11. Q. What should be done where the Design Professional sees the need for "extras?"
- A. *When it is apparent that either "change orders" or "extras" are called for, secure client's written approval for the changes.*
12. Q. Where delay is encountered in the project, what steps should be taken?
- A. *Tell the client immediately of the problems as they develop and provide proposed solutions.*

### **Responsibility And Authority**

13. Q. What supervision should the Design Professional take on the job site?
- A. *The owner and the general contractor should retain control over the job site. The Design Professional's role should be limited to observation of the progress and quality of the construction project.*
14. Q. What checking procedures should be utilized on plans, drawings and specifications?
- A. *Checking procedures for plans and specifications should be implemented whereby a senior staff member checks the work of his subordinates.*
15. Q. Is a table of organization and an office manual including job descriptions desirable?
- A. *Yes, the duties, responsibilities and reporting relationships should be spelled out in an office manual.*
16. Q. What guarantees or warranties should the Design Professional undertake?
- A. *Make no guarantees and no warranties. Affirmatively state that professional services are performed in accordance with the local standards of the profession.*
17. Q. Should the Design Professional stop construction when observing an unsafe work site or practice?
- A. *No, the control of the project safety should be retained by the owner and the general contractor who should establish compliance with OSHA requirements.*