

# Small Business Forum: Focusing and Growing Your Business Risk Management Practices for Small and Start-Up Design Professional Firms

David J. Hatem, PC  
Donovan Hatem LLP  
Boston | New York | New Jersey

February 7, 2012

# Overview

- Client Selection
  - Managing Risk at The Commencement of The Relationship
- Contract “Do’s and Don’ts”
  - Terms You Need to Know
- Dispute Resolution
  - Why, When and How

## Client Selection:

### Managing Risk at the Commencement of the Relationship

- Exercise Care in Selecting Clients
- Consider Overall Scope and Budget of the Project
  - Design Professional's ("DP") financial and professional stake in the project is typically considerably smaller than the client's
  - Communicate with client to manage risks and set reasonable expectations

# Client Selection: Managing Risk at the Commencement of the Relationship

- Contract Terms Should Be Clear and Fair
  - Client Should Agree to Important Terms
  - Client Insistence on Onerous and/or Unfair Contract Terms May be an Indication of a Potentially Problematic Client

## Client Selection:

### Managing Risk at the Commencement of the Relationship

- Client's Profile:
  - Client's Financial Capability
  - Client's "Litigation" History
  - Verify Client's Legal Identity
  - Sophistication and Experience of Client in Design and Construction Process
  - Client "Authority" Issues
  - Communication Protocols with Client

# Contract “Do’s and Don’ts”: Standard of Care

- What is the Standard of Care?
  - Perfection not required
  - Reasonable care under the circumstances
  - Relevance of service scope
  - Relevance of roles and responsibilities
  - Flexible application
  - Role of expert opinion

# Contract “Do’s and Don’ts”: Standard of Care

## Preferred Language:

The Consultant’s services shall be performed in a manner consistent with that degree of skill and care exercised by practicing design professionals performing similar services in the same locality and under the same or similar circumstances and conditions. The Consultant makes no warranties, whether express or implied, with respect to the services rendered hereunder.

- Establishes ***negligence-based*** standard of care
- Consistent with professional liability insurance coverage

# Contract “Do’s and Don’ts”: Standard of Care

## Unacceptable language:

The Consultant’s services shall be performed in a manner consistent with the highest degree of skill and care exercised by first class design professionals. The Consultant warrants that the design shall be complete and unambiguous and that the project, when completed in accordance with the design, shall be fit for its intended purpose.

- Imposes a standard of perfection
- Undermines concept of professional judgment
- Inconsistent with professional liability insurance coverage

# Contract “Do’s and Don’ts”: Standard of Care

- Distinction between Professional Services and Product Manufacture/Non-Professional Activities
  - Professional services require *judgments* regarding, and in anticipation of, future events, factors that cannot be completely known or controlled
  - Product manufacture/non-professional activities involve set specifications, standardized or established criteria, controlled environments, multiple opportunities for research, development and testing

# Contract “Do’s and Don’ts”: Standard of Care

- Subjective considerations in retaining a Design Professional:
  - Personality
  - Personnel
  - Experience
  - Reputation
  - Voluntary
  - Qualifications – Based Selection
  - “Low Bid” Procurement of Professional Services Contradicts These Subjective Considerations

# Contract “Do’s and Don’ts”: Indemnification

## Preferred Language:

- To the fullest extent permitted by law, the Consultant agrees to indemnify and hold the Owner harmless from and against any liabilities, claims, damages and costs (including reasonable attorneys’ fees) to the extent caused by the negligence of the Consultant in the performance of services under this Agreement.
  - No defense obligation
  - Negligence based
  - Responsible only for your own negligence
  - Consistent with professional liability insurance coverage

# Contract “Do’s and Don’ts”: Indemnification

## Unacceptable language:

- The Consultant agrees to defend, indemnify and hold the Owner harmless from and against any liabilities, claims, damages and costs (including reasonable attorneys’ fees) arising out of or resulting from the Project, except to the extent caused by the Owner’s sole negligence.
  - “Defend” not covered by professional liability insurance
  - Uninsured liability for broad, vaguely defined liability and damages

# Contract “Do’s and Don’ts”: Limitation of Liability

## Preferred Language:

- To the fullest extent permitted by law, the total liability in the aggregate, of Consultant and Consultant’s officers, directors, employees, agents, and independent professional associates, and any of them, to Owner and any one claiming by, through or under Owner, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Consultant’s services, the project or this Agreement, from any cause or causes whatsoever, including but not limited to, the negligence, errors, omissions, strict liability, breach of contract, misrepresentation, or breach of warranty of Consultant or Consultant’s officers, directors, employees, agents or independent professional associates, or any of them, shall not exceed the total compensation received by Consultant under this Agreement, or the total amount of \$\_\_\_\_\_, whichever is greater.

# Contract “Do’s and Don’ts”: Limitation of Liability

- Applies to any cause of action
- Aggregate limit for all Client claims
- Consider whether limitation is a sufficient protection.
  - Limitation to total fee (as opposed to fees actually paid)?
  - Available insurance proceeds?
- Does not limit liability for claims made against the DP by third parties (indemnification)
- Often difficult to negotiate into agreements

# Contract “Do’s and Don’ts”: Ownership of Documents

## Preferred Language:

- Drawings, diagrams, specifications, calculations, reports, processes, computer processes and software, operational and design data, and all other documents and information produced in connection with the project as instruments of service, regardless of form, ***shall be confidential and the proprietary information of Consultant, and shall remain the sole and exclusive property of Consultant whether the project for which they are made is executed or not.*** Owner shall not have or acquire any title to or ownership rights in any of the documents or information prepared by Consultant. ***Upon payment in full hereunder, Owner shall be permitted to retain printed copies*** of such documents or information for information and reference only in connection with Owner’s use and occupancy of the project. ***The documents and/or information shall not be used or reused by Owner on other projects, for additions to this project, for completion of this project by others, or for any other purpose*** for which the documents were not specifically prepared, provided Consultant is not in default under this Agreement, except with the express written consent of Consultant and with appropriate compensation to Consultant. Owner shall defend, indemnify and hold the Consultant harmless from and against any claims, losses, liabilities and damages arising out of or resulting from the unauthorized use of the documents.

# Contract “Do’s and Don’ts”: Ownership of Documents

- Protects DP from claims arising out of the unauthorized use or reuse of its documents
- Alleviates concerns of risk due to use of documents without DP’s involvement
- If DP terminated for convenience, Owner not entitled to use documents
- Prohibits use of documents on other projects or, absent default, use on this Project by others

# Contract “Do’s and Don’ts”: Ownership of Documents

Unacceptable language:

- Drawings, diagrams, specifications, calculations, reports, processes, computer processes and software, operational and design data, and all other documents and information produced in connection with the project as instruments of service, regardless of form, and all ownership rights therein ***are hereby deemed to be vested in the Owner***. The documents and/or information shall not be used or reused by Owner on other projects except with the express written consent of Consultant. Owner ***shall be entitled to use the documents for additions to this project or for completion of this project by others***. Owner shall defend, indemnify and hold the Consultant harmless from and against any claims, losses, liabilities and damages arising out of or resulting from the unauthorized use of the documents. ***Nothing in the foregoing shall be deemed to relieve the Consultant from any liability for deficiencies in the documents other than deficiencies which may result from changes made to the documents by the Owner or its consultants without the review and approval of the Consultant.***

# Contract “Do’s and Don’ts”: Budget Evaluations

## Preferred Language:

- Evaluations of the Owner’s budget for the Project, the preliminary estimate of the Cost of the Work and the updated estimates of the Cost of the Work prepared by the Consultant **represent the Consultant’s judgment as a design professional** familiar with the construction industry. It is recognized, however, that neither the Consultant nor the Owner has control over the cost of labor, materials or equipment, over the Contractor’s methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the **Consultant cannot and does not warrant or represent that bids or negotiated prices will not vary** from the Owner’s budget for the Project, or from any estimate of the Cost of the Work evaluation prepared or agreed to by the Consultant.

# Contract “Do’s and Don’ts”: Budget Evaluations

- Highlights importance of cost estimating; consider outside consultants if necessary
- If Client has option to request Consultant to redesign in case bids exceed budget, should limit Consultant’s exposure to redesign effort. However, financial burden of redesign effort not likely covered by insurance
- Need flow-down provisions in sub-consultant agreements

## Unacceptable language:

- Any language warranting or affirmatively representing that project can be accomplished for a certain sum

# Contract “Do’s and Don’ts”: Consequential Damages

## Preferred Language:

- The Consultant and the Owner waive consequential damages, including but not limited to damages for loss of profits, loss of revenues and loss of business opportunities, for claims, disputes or other matters in question arising out of or relating to this Agreement.
  - Mutual waiver
  - Owners often delete these provisions
  - Types of damages include loss of use, loss of profits or anticipated profits, diminution in property value, etc.
  - Appropriate for certain engagements such as studies, peer reviews, speculative ventures, projects where owner will heavily rely on stream of commerce (e.g., hotels, restaurants, casinos)

# Dispute Resolution

- Every relationship, contractual or not, has the potential for a dispute to arise
- Many disputes will lend themselves to informal resolution, which is often the quickest and most efficient solution

# Dispute Resolution: Informal

- Efficient, Informal Dispute Resolution Requires:
  - Decent relationship existing between the parties
  - Ability to communicate well
  - Willingness to consider both sides and all factors
  - Willingness to compromise

# Dispute Resolution: Formal

- Traditional and Alternative Means for Resolving Disputes:
  - Litigation (Traditional)
  - Arbitration (Alternative)
  - Mediation (Alternative)

# Dispute Resolution: Alternative

ADR is complex and requires many decisions:

- Mediation or Arbitration?
- What forum, scope, and procedures?
- Extent of discovery?
- What remedies and enforcement mechanism?
- Nature of appeal rights?
- Timing and cost?
- Confidentiality?
- Simultaneous with or in lieu of litigation?
- Selection of mediator or arbitrator(s)?

# Dispute Resolution: Litigation

## Litigation:

- Preferable to arbitration because:
  - Allows for more extensive discovery
  - Bound by the rules of evidence
  - Must apply legal principles
  - Jury trial available
  - Allows rights of Appeal
  - Threat of litigation might lead to or encourage settlement

# Dispute Resolution: Arbitration

## Arbitration:

- Provides most “trial-like” ADR forum to a party who still wants his or her “day in court”
- Can be, but is not always, a faster avenue to an end result than under most court systems
- Even with arbitration fees, the cost may be, but is not always, less than litigating the same dispute
- Can allow greater privacy for resolution of disputes than the court system

# Dispute Resolution: Arbitration

## Arbitration downsides:

- In binding arbitration the decision maker has broad discretion in fashioning the ultimate remedy
- Arbitrator need not apply contractual terms or legal principles in decision-making
- Court rules of evidence not required to be used
- Very limited discovery allowed
- Arbitrators may not be required to issue a reasoned decision
- Appellate challenges are extremely limited

# Dispute Resolution: Mediation

## Mediation

- Least adversarial structure among arbitration, litigation, and mediation
- Encourages parties to fashion their own resolution, including a unique remedy
- Mediator is a facilitator, offering alternative theories, discussing possible outcomes and suggesting the reasonableness of various positions taken by the parties
- Selection of mediator is important
- Non-binding; if parties cannot reach an agreement, there is no resolution
- Allows for the quickest and least expensive route to resolution, but preparation and effective presentation is key to achieving a successful outcome

# Dispute Resolution: Mediation

## Preferred Language:

- Prior to the initiation of any legal proceedings, the parties agree to submit all claims, disputes or controversies arising out of or in relation to the interpretation, application or enforcement of this Agreement to non-binding mediation. Mediation shall be conducted under the auspices of the American Arbitration Association or such other mediation service or mediator upon which the parties agree. The party seeking to initiate mediation shall do so by submitting a formal written request to the other party to this Agreement. This Article shall survive completion or termination of this Agreement, but under no circumstances shall either party call for mediation of any claim or dispute arising out of this Agreement after such period of time as would normally bar the initiation of legal proceedings to litigate such a claim or dispute under the laws of the State of \_\_\_\_\_.

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