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Seven Crucial Client Contract Clauses: Part 1

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We would like to thank the Design Professional unit of XL Catlin for their contribution of sample contract language which was excerpted from their eGuide resource.

Design firms purchase professional liability insurance to provide financial protection in the event they make an error or omission when delivering their professional services to a client. However, not all of a design professional's acts will be covered by its professional liability (PL) insurance. For instance, your PL policy likely spells out that intentional acts of fraud or other forms of wrongdoing are not covered.

Likewise, the language contained in your contract with your client can dramatically affect your liability and insurability when performing professional services. Your goal when drafting your contract is to:

1) Include contract language that limits your liability to those specific acts for which you are legally liable.
2) Remove contract language that attempts to expand your liability beyond those acts for which you are legally liable and insurable.

Here, we will examine seven critical clauses affecting liability and insurability that you and your attorney should consider when drafting your client contracts.

1) Scope of Services

A Scope of Services clause should specifically spell out all of the professional services you are agreeing to perform for your client. This way you know exactly what your firm is being hired to do, and your client is agreeing to this exact scope -- *in writing*. Without a specific written scope, there can be misunderstandings as to what services you agree to perform, typically resulting in scope creep. Your client may expect you to perform professional services that you had no intention of providing and that you did not charge for. This can lead to claims of service omissions from your client, and the possibility that you have to perform added services for free.

But don't stop with a listing of the services you are agreeing to perform. In addition, it is advisable to list:

1) Those services that you are willing to perform for an additional fee.
2) Those required services that you are specifically excluding because they are being performed for the client by someone else or because you do not provide such services.

Here is sample contract language provided by XL Catlin as part of their *Contract e-Guide for Design Professionals*:

SCOPE OF SERVICES

The Client and the Consultant have agreed to a list of services the Consultant will provide to the Client, set forth on the appended Scope of Services, Exhibit A.
If agreed to in writing by the Client and Consultant, the Consultant shall provide Additional Services, which shall be labeled as Exhibit B, appended hereto. Additional Services are not included as part of the Scope of Services and shall be paid for by the Client, in addition to payment for the services listed in Exhibit A. Payment for Additional Services will be made by the Client, in accordance with the Consultant's prevailing fee schedule, as provided for in Section ___, Compensation, or as agreed to by the Client and the Consultant.
Services not set forth above and not listed in Exhibit A of this Agreement are specifically excluded from the scope of the Consultant's services. The Consultant assumes no responsibility to perform any services not specifically listed in Exhibit A.

In addition, beware any client language that attempts to have you guarantee that your scope of services is sufficient to complete the project. You cannot control the actions of the client, the contractor or other parties to the project, so guaranteeing project completion is impossible.

2) Standard of Care

As a design professional you are required to render your services with the ordinary degree of skill and care that would be used by other reasonably competent practitioners of the same discipline under similar circumstances in a similar geographic location. Nothing more, nothing less.

This standard of care not only establishes the minimum level of quality to which you should perform your professional services, it sets the parameters of your professional liabilities and your insurability. If you perform your services to the prevailing standard

of care, your liability for those services should be at or near zero. If you fail to meet the prevailing standard of care, you will likely be held liable for your errors and omissions.

From an insurability standpoint, how your client contract addresses your standard of care can have a dramatic effect on your financial protection. Specifically, if you contractually agree to perform services at a level that exceeds the prevailing standard of care, you may not be insured for failing to meet your excessively high standards.

For instance, if you contractually agree to provided the "best" or "highest quality of" services, and then lose a claim because the services you delivered were only adequate, your professional liability insurance may not cover your loss. The insurer bases its premiums and terms of coverage on, among other things, laws that set current industry standards. Your contractual agreement to exceed those standards creates additional exposure and a voluntary assumption of additional liability for which you would not otherwise be responsible. Your insurer has every right to refuse to cover that additional, voluntarily assumed liability.
Speak with your attorney about including a Standard of Care contract clause similar to this one offered up by XL Catlin Design Professional:

STANDARD OF CARE

In providing services under this Agreement, the Consultant shall perform in a manner consistent with and limited to that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality. The Consultant makes no warranty, express or implied, as to its professional services rendered under this Agreement. Accordingly, the Client should prepare and plan for clarifications and modifications, which may impact both the cost and schedule of the Project.

3) Certifications, Guarantees and Warranties

Clients often feel they have the right to demand certifications, guarantees or warranties regarding the professional services they are paying you to perform. After all, many of the vendors who provide systems, equipment, appliances and other goods that are part of their project offer guarantees or warrantees. Why not the designer? Because, a certification, guarantee or warranty demands virtual perfection by the design firm. And as we know, there is no such thing as a perfect design.

You cannot certify that there are no hazardous materials on a building site. You cannot guarantee that your design will obtain a platinum LEED certification or achieve ADA compliance. You cannot warrant that a contractor has followed your design documents exactly, or that the building will perform to a high level. You can't guarantee that all codes and ordinances will be met. Nor can you guarantee perfection in the work of your subconsultants, the contractor and its subcontractors. Indeed, certifying, guaranteeing or warranting someone else's work can result in a huge, uninsured liability.

Again, it comes back to a matter of the standard of care. You are not expected to be perfect, and certifying, guaranteeing or warranting that your design is error-free creates uninsured liabilities. Here is XL Catlin's recommended contract language to combat this risk:

CERTIFICATIONS, GUARANTEES AND WARRANTIES

The Consultant shall not be required to sign any documents, no matter by whom requested, that would result in the Consultant's having to certify, guarantee or warrant the existence of conditions whose existence the Consultant cannot ascertain. The Client also agrees not to make resolution of any dispute with the Consultant or payment of any amount due to the Consultant in any way contingent upon the Consultant's signing any such certification.

In addition to eliminating specific certifications, guarantees and warranties, avoid absolute terms such as "every," "all," or "none" when they could be interpreted as a guarantee. Finally, it is OK to certify known facts, such as that you are a licensed architect or engineer, or that you conducted a site visit on a particular day. Just don't certify, guarantee or warrant things you cannot be absolutely certain about.

4) Third-Party Beneficiaries

There is no doubt that a design firm owes a legal obligation to its clients to perform its contracted services up to the prevailing standard of care. However, there is plenty of doubt when it comes to what obligation a design firm owes to third parties who have an economic interest in the project but who do not have a contractual relationship with the designer. If the designer is negligent in performing its design services for a new building, can tenants successfully sue the architect for damages? If a retailer suffers a loss of profit because an engineer's negligence caused a delay in the store's grand opening, can it file a claim against the engineer? Under a strict interpretation of the theory of "privity of contract," there would be no liability. Design firms would only be liable for economic losses to those with which they had entered into legally binding contracts. However, privity of contract has been eroded as a legal theory. Some jurisdictions have ruled that a contract between parties is not necessary in order for one party to claim damages for economic loss due to the negligence of another party. Have your attorney examine the prevailing laws in your jurisdiction regarding privity of contract and third-party beneficiaries. (If you perform work in other jurisdictions, have their prevailing laws checked as well.) Then work with your attorney to draft a Third-Party Beneficiaries clause in all of your contracts. XL Catlin provides the following language for you and your attorney to consider:

THIRD-PARTY BENEFICIARIES

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Consultant. The Consultant's services under this Agreement are being performed solely for the Client's benefit, and no other party or entity shall have any claim against the Consultant because of this Agreement or the performance or nonperformance of services hereunder. The Client and Consultant agree to require a similar provision in all contracts with contractors, subcontractors, subconsultants, vendors and other entities involved in this Project to carry out the intent of this provision.

Your client should have no objection to this clause since it protects its interests as well. However, if you include the last sentence, requiring you both to include Third-Part Beneficiaries clauses in contracts with all parties to the project, you are now obligated to do so.

More to Come

In part two of this two-part article, we will cover three more critical contract clauses that can help you reduce your liabilities and increase your insurability. These clauses address:

- Indemnity Agreements
- Insurance Requirements
- Dispute Resolution Methods

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.