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Three Often Overlooked Ways to Reduce the Chances of Being Sued

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.

The best way to avoid a claim for alleged errors or omissions in your delivery of professional services is to create absolutely perfect designs and ensure that the contractor expertly executes your plans. That, of course, never happens.

Fortunately, there are three effective but underutilized contractual tools that can reduce your chances of having a claim filed against you. Specifically, these three tools, can limit who can sue you, when they can sue you, and for what reason they can sue you. Talk with your attorney about using these three claims killers in your future contracts.

1) Certificate of Merit Clause
A number of jurisdictions (including California, Colorado, Georgia, Hawaii, Kansas, Minnesota and New Jersey) have enacted certificate of merit legislation. These laws oblige a potential plaintiff to demonstrate that a case against a design or environmental professional has legal or technical merit before a formal claim or demand can be filed.

A certificate of merit requirement accomplishes two things. First, it discourages someone from filing a frivolous claim against you. Second, if the claimant does obtain a certificate of merit, it indicates to you that there is at least one member of your profession who believes the case against you is valid and may be prepared to testify to that in court.

Most jurisdictions with certificate of merit laws require that another consultant licensed in the same discipline as the defendant declare whether or not a case has merit to proceed through the civil system. In other jurisdictions, a screening panel of knowledgeable persons gives its opinions on the merit of the case. Some jurisdictions have the plaintiff's attorney draft and deliver the certificate of merit and the identity of the licensed professional they consulted remains anonymous. In other jurisdictions, the licensed professional in the same discipline is identified and may actually draft the certificate.

In most certificate of merit jurisdictions, if the plaintiff does not file the required certificate on a timely basis, the law will allow the defendant to file a motion for summary judgment. This can be a relatively quick and inexpensive means of getting out of a lawsuit.

If you live or work in a jurisdiction that has a certificate of merit law, it is wise to determine all of the specifics of such legislation and learn exactly what is required to issue a certificate of merit. If your jurisdiction does not have a certificate of merit law, or if the prevailing certificate of merit law in your jurisdiction is deemed lacking, you might be able to get your client to agree to a certificate of merit contract provision. Here's how:

- Have your attorney draft a contract provision stating that your client shall make no claim for professional negligence, either directly or by way of a cross complaint against you, unless the client has first provided you with a written certificate of merit executed by an independent consultant currently practicing in the same discipline as you and licensed in the state/province where the project is being executed.
- Spell out that any certificate of merit executed shall 1) contain the name and license number of the certifier; 2) specify the acts or omissions that the certifier contends are not in conformance with the standard of care for a consultant performing professional services under similar circumstances; and 3) state in detail the basis for the certifier's opinion that such acts or omissions do not meet the standard of care.
- Require that any certificate of merit shall be provided to you not less than thirty (30) calendar days prior to

the presentation of any claim or the institution of any arbitration or judicial proceeding.
- Where appropriate, note that your certificate of merit clause will take precedence over any existing law in force in your jurisdiction at the time of the claim or demand. (This clause is appropriate whenever the requirements of your mutually agreed to contractual clause is at least as broad or demanding as the existing certificate of merit laws of your jurisdiction.)

The American Institute of Architects (AIA) as well as some specialized professional liability insurance carriers can provide recommended language for your contract clause. The AIA's recommended clause can be found in Section 8.4.1 of the B101.

Why would your client agree to adding such a clause to your contract? Some would argue that such a clause benefits the client as much as the design professional, avoiding the costs of litigation until the complaint has been shown to have merit. Often a certificate of merit clause can be used as a contract negotiation point. For instance, your client may require that you indemnify them against certain liabilities. You may counter with a request for a mutual indemnity and a contractual certificate of merit requirement. Or, you might offer to perform your services for a slightly lower fee if the client will agree to a certificate of merit requirement.

If your state/province does not have a certificate of merit law, you and your colleagues should try to change that. A number of state professional associations are working to enact or improve existing certificate of merit laws. The AIA, the American Council of Engineering Companies (ACEC) and the American Society of Civil Engineers (ASCE) have all developed model law language and may help local professional organizations get this legislation on the books.

Recent court cases have upheld the validity of certificate of merit laws and contractual clauses. But note that any certificate of merit clause you negotiate into your contract only applies to claims by the client who signed the contract. It does not apply to any other party. Here is some protection against third party liability.

2) Third Party Beneficiary Clause

Under the legal concept known as "privity of contract," architects, engineers and other professionals are only liable for causing economic loss to those with whom they have entered a legally binding contract. For example, if an architect's negligence caused delay losses to a client, the architect could be held liable for those losses. However if the contractor or a building tenant suffered economic loss due to the same delay, the architect would have no liability to these or other third parties.

Over the years, the concept of privity of contract has been weakened. In many jurisdictions, courts have ruled that design firms can be held liable for the economic losses of third parties, who would then be entitled to consequential damages. Determining the likelihood of being held liable to third parties is difficult. Not only have court rulings varied jurisdiction to jurisdiction, but courts within the same jurisdiction have come to different conclusions in very similar cases.

So what can a design firm do to increase its chances of having the privity of contract enforced and liability to third parties thrown out? Spell out the extent of your liability in a third-party beneficiaries contract clause:

- State in your contract that nothing in your agreement with your client shall create a contractual relationship between either of you and an outside third party.
- Specify that all of your services performed under your contract are performed solely for the benefit of your client.
- State in this clause that no other party shall have any claim against you because of your performance or nonperformance of services specified in the contract.
- Specify that a third-party beneficiary clause will be included in all contractor, subcontractor and subconsultant contracts relative to the project.

Most design firms do not find it difficult to get their clients to agree to including this type of clause in their contracts. After all, the clause benefits the client as much as it benefits the design firm. It provides them with added protection from third-party claims but does not relieve the design firm of its responsibilities to the client.

3) Statutes of Limitation and Repose Clause

As with certificate of merit laws, statutes of limitation and repose are set at the state/province level. These statutes establish deadlines as to when particular types of lawsuits can be filed against a design professional.

The difference between a statute of limitation and a statute of repose has to do with when the clock starts ticking toward the deadline to file a claim. As a rule, statutes of limitation begin running on the date on which the alleged error or omission occurred or was discovered. The statute of repose begins to run at the time of completion of design services or substantial completion of the project. In most states, the length of time of the statutes of repose are significantly longer than the statute of limitations. For example, in Wisconsin, the statute of repose is 10 years and the statute of limitation is 3 years.

It is important to have both a statute of repose and a statute of limitations. Without a statute of repose, a design professional's exposure to a claim could theoretically run indefinitely, since an injury or the discovery of a deficiency could occur at any time. Statutes of repose and limitations work together to limit the total period of time during which the architect or engineer is exposed to liability.

So is there a remedy for a design firm that feels the statutes of limitation and repose in their state or province are too generous in years, or too vague or open-ended as to when the clock starts running? Yes. A design firm can negotiate a mutual clause in its contract that shortens the amount of time a client has to file a claim. In such a clause:

- State that all legal actions by either party against the other arising out of the contract and services performed are barred after X number of years. (Five years is usually considered reasonable.)
- Specify that the clock starts running at the date of substantial completion of the project, or completion of your services, whichever is sooner.
- Specify that if the contract between you and your client is terminated by either party, the clock starts running at the date the agreement is terminated.
- Note that if the length of time specified in your agreement is shorter than the shortest duration permitted by law, then the shortest duration permitted by law applies.

Courts are not always open to contract clauses that significantly reduce the number of years specified by state statutes. To increase the chances of the contractually imposed time limits being upheld, make sure the clause is very conspicuous (e.g., bold or large type) and initialed by both parties.

Work with Your Attorney

Your attorney should be able to assist you in determining how certificates of merit, third party liability and statutes of limitation and repose are handled in your jurisdictions. Professional associations and your professional liability insurance carrier might be able to assist you with general recommended contract language. Such language, however, should be customized as necessary by your legal representative to fit your particular circumstances.

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.