

Legal Counsel for the Design Professional *Spring 2019 e-Newsletter*

Legal Counsel for the Design Professional addresses current legal developments affecting architects, engineers and contractors. Since its founding in 1981, LBC&C has been serving the design profession and has been a recognized leader in the field of architects' and engineers' professional liability defense. As a full service law firm, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices.

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Douglas R. Halstrom, Partner in the Design Professionals Group, emphasizes that client selection is the most important factor in avoiding risk for the design professional.



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The Three Cs Every Architect Should Rely Upon to Minimize the Risk of Danger

Keith J. Stevens, Partner in the Design Professionals Group, discusses how architects can rely on contracts, building codes and consultants to protect the public, and secure the added benefit of protection from potential lawsuits and other claims.





Key Factors That Design Professionals Should Consider in Client Selection

BY DOUGLAS R. HALSTROM

Client selection is the most important factor in avoiding risk for the design professional. While signed contracts, contract language and doing quality work are obviously very important, knowing when to say yes or no to a new opportunity will keep you out of harm's way over the long term. While you should not simply walk away from every potentially risky situation, the following tips will alert you to risky situations you should avoid or manage in a different way.

First, be wary of the potential new client who wishes for you to substitute for another architect. There are plenty of justifiable reasons why an owner may wish to do this, but, predictably, there are reasons which may signal you to avoid this relationship, the most obvious one of which is a payment dispute with the outgoing architect. This type of situation may indicate an unwillingness by the owner to work out problems with the outgoing architect, which is a foreshadowing that this owner will do the same with you. At a minimum, you should request the owner to provide some type of proof that the outgoing architect has been paid, which you may want to confirm with the outgoing architect. In addition, have the owner explain to you why a new architect is needed so you can evaluate whether this is a situation that will be repeated.

Second, perform your own due diligence to determine whether this person or entity has previously performed similar jobs successfully. While many owners have a very clear picture of how they want a project to proceed, there are far more that may be dabbling in real estate development and are learning as they go. Situations involving the latter tend to result in delayed projects which ultimately result in claims for delay and construction extras. With the advent of social media and the wealth of information on the internet, much of this due diligence can be performed at your desktop. Moreover, the construction community is a relatively small one, even in the larger metropolitan areas of this country, and there is a wealth of information at your fingertips for you to determine whether this new client is one with whom you see yourself working efficiently.

Third, do not disregard your personal instincts during your initial discussions with this new client. While previous projects with a recurring client certainly provide you with a multitude of information, you will not have that luxury in a vast majority of projects where you are meeting a new client for the first time. As members of the human race, we are equipped with instincts which alert us to dangerous situations so we can protect ourselves. Anything that appears out of the ordinary during your first discussion with a new client should spur you to engage in your own due diligence, as mentioned above, in order to obtain information about this person or entity.



What The Design Professional Needs to Know About Blockchain

BY LEE J. SACKET

The construction industry has traditionally been slow on change. Despite meteoric advances in technology, many construction project files are still paper based and disorganized, leading to inefficiencies, redundancies and sometimes, mistakes in services and delays in payment. Design professionals are typically reluctant to embrace all of the benefits of technology, which could facilitate a more efficient and profitable practice.

It is important to familiarize yourself with the trends in technology that are finding their way into the construction industry to stay ahead of the curve and determine if and how it might impact your practice. One such trend, which has been widely described as a “game changer”, is blockchain, which is already making waves in the construction industry through “smart contracts”.

Blockchain technology is a database technology that verifies and chronologically stores transactions. Each transaction is a block, added to the prior transaction or block. These blocks create a chain, *i.e.*, blockchain. The buzz over blockchain is largely attributable to the success of Bitcoin, the world’s first form of cryptocurrency. Bitcoin utilizes blockchain technology to verify each data block and transaction, while limiting a user’s ability to duplicate, or misrepresent the value of the currency. Blockchains are designed to be faster and more secure than traditional databases and more cost effective, which is why the technology has become commonplace with banks and governments.

The blockchain database combines four central features, 1) it is public and not owned by any of the parties, 2) it is decentral, not stored on a single computer, but on many computers owned by different people located anywhere, 3) it is constantly synchronized to keep the transactions up to date and 4) it is secured by cryptography to make it tamper proof and hacker proof. The security aspect of the system is significant. The technology makes it difficult to change the rules that define the structure of a database or its content without consensus amongst the people who use it. The database can only have entries added; data can never be changed or removed because changing a single entry in an older block would mean rewriting the entire history of transactions subsequent to the block. This is the most obvious distinction between blockchain and traditional databases. Should someone tamper with the blockchain, all participants would know and it would be rejected by the network.

Some in the construction industry, most notably, design firms, have openly questioned the purported benefits of blockchain technology. For example, does blockchain really save time when each transaction requires multiple points of verification? Questions and concerns notwithstanding, blockchain has already made its way into the construction industry through smart contracts. While not a contract in the traditional legal sense, smart contracts serve as a method of controlling types of data and digital assets. Smart contracts can enforce the terms of an agreement by controlling the transfer of currency or other assets when specific conditions of the contract are satisfied. In the simplest terms, a smart contract is a computer program that works on the if/then principle.



What The Design Professional Needs to Know About Blockchain (*cont'd*)

BY LEE J. SACKET

If the architect delivers the design development drawings, *then* he/she gets paid the percentage of compensation payable under the contract. *If* the contractor delivers the steel, *then* they get paid. These conditions are recorded on the blockchain and payment can be made automatically through cryptocurrency, without the need for a middleman. The automation of tasks that customarily are performed by people, in theory, reduces the time, costs and risks associated with them. Traditionally time consuming processes involving multiple parties, such as, change orders, requests for information and shop drawing review/approval, could theoretically become a thing of the past.

Blockchain technology and the use of smart contracts are working their way into the construction lexicon. While this technology is unlikely to become the standard bearer anytime soon, it is good practice to understand, investigate and consider industry-centric technologies, such as this one, to stay ahead of the curve and prepare your practice for the next big thing.



The Three Cs Every Architect Should Rely Upon to Minimize the Risk of Danger

BY KEITH J. STEVENS

The architect's duty to safeguard the health, safety and welfare of the public from dangers such as personal injuries, property damage and fire hazards has never been as significant as it is today. While not all hazards can be avoided, it is incumbent upon every architect to exercise the utmost care in limiting the risk of danger. In protecting the public, you the architect will secure the added benefit of protecting yourself from potential lawsuits and other claims. In order to accomplish these goals, you should rely on the three Cs: (1) contracts; (2) codes; and (3) consultants.

First and foremost, the contract documents should clearly define the scope of services of each party involved with a project. The most comprehensive agreements in this regard are AIA agreements. AIA Document B101-2017 is the Standard Form of Agreement between Owner and Architect. This document clearly defines both the owner's and architect's responsibilities during all phases of the project.

Before determining whether to use B101, you need to decide what level of responsibilities you want to retain. In entering into an AIA B101 agreement, the architect undertakes responsibility for the entire design of the project. For example, an architect who enters into a B101 Agreement is responsible for all facets of the engineering requirements for the project. This puts the onus on the architect to retain the proper consultants to protect the public from unnecessary dangers. For those architects who prefer an AIA agreement, but do not want to bear responsibility for the design of the entire project, AIA B103 and B109 shift responsibility to the owner for retaining the consultants, preparing cost estimates and even scheduling the various facets of the project. B103 is used for large and/or complex projects while B109 is relied upon for certain multi-family and mixed use residential projects.

Whether relying upon B101, B103 or B109, the General Conditions of the contract are almost always defined by AIA A201 which is incorporated into the owner/architect agreement. In terms of life safety, Article 3 and Article 10 of A201 place a heavy burden on the contractor to avoid injuries to persons and property. Article 3 provides in relevant part that the contractor shall supervise and direct the work, as well as be solely responsible for the construction means, methods, techniques, sequences and procedures. Article 10 provides in relevant part that the contractor shall be responsible for taking reasonable precautions and providing reasonable protection to prevent injury or damage to persons, the work and other property. Accordingly, A201 limits the potential liability which may be imputed onto the architect who does not direct, control or supervise the construction.

When it is not feasible to enter into an AIA agreement, an architect must take extra precautions to ensure that the contract documents clearly define each party's scope of work. An effective way to avoid confusion is to separately list the specific services which are not included in your scope of work. For example, you should exclude controlled inspections for all items which it did not design. By specifically excluding these items from its contract, you make the owner aware that other entities must be retained to safeguard the public.



The Three Cs Every Architect Should Rely Upon to Minimize the Risk of Danger (*cont'd*)

BY KEITH J. STEVENS

While the contract documents are an architect's first line of defense, every architect should be familiar with the relevant sections of the building, fire prevention and energy codes which are applicable to a project. This holds especially true when the code sections are designed to safeguard the public against potential hazards. When you are not familiar with the relevant sections of the Building Code and/or do not possess the required expertise to perform certain facets of a project, you must retain the proper consultants to avoid creating an otherwise avoidable danger.

By way of an example, my architect client who was unfamiliar with Alteration Type 1 additions was retained to design the gut rehabilitation of the existing stories of a building and the addition of another floor. The project included a new wooden open staircase throughout the building. The architect relied on an expeditor in lieu of a MEP engineer in determining the fire safety requirements for the Alteration Type 1 addition.

In saving the cost of retaining a MEP engineer, my client designed a building which was a significant fire hazard. In deviation of the New York City Building Code, the architect's design omitted: (1) fire rated enclosures for the wooden staircase; and (2) fire sprinklers and a fire escape (*i.e.*, a second means of egress) which should have been installed in conjunction with the staircase. While the Department of Buildings caught my client's omissions before the building was occupied, this potential catastrophe could have been avoided had the architect retained the proper MEP consultant.

While it is not possible to eliminate the risk of danger, the three Cs will certainly help you limit the risk and, consequently, mitigate your risk against potential claims and lawsuits. In doing so, you will have more time to pursue the other three Cs which are important to every architect: concept, creation and construction.