# Legal Counsel for the Design Professional
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Legal Counsel for the Design Professional addresses current legal developments affecting architects, engineers, design professionals and related trades in the construction industry. 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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### The Four Things I Wish My Clients Would Do

In the changing manner in which business is done, not to mention the types of risks that never existed not so long ago, Douglas Halstrom provides a short list of four things that design professionals can do to avoid claims and better manage risk.

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### Lessons Learned from the Pandemic

The COVID pandemic challenged businesses like never before and the construction industry was no exception. Lee Sacket discusses the lessons learned and why businesses should embrace some of the changes that may ultimately prepare the industry for a potentially different looking future.

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### New York's Pay-When-Paid Clauses

Poonam Pelia explains the legalities and benefits of Pay-When-Paid clauses in design professional and construction contracts versus Paid-If-Paid clauses which are unenforceable in New York.

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# The Four Things I Wish My Clients Would Do

02.16.22 | BY DOUGLAS R. HALSTROM

Avoiding claims against design professionals is a difficult task considering the changing manner in which business is done, not to mention the changing types of risks contemplated now that never existed not long ago. This makes it difficult to advise clients on what to do and what not to do, but the following is a short list of things I wish my clients would do, no matter how things continue to change.

The first item on the list of the top four non-technical risk drivers, as compiled by a well-known national insurance broker, was communication. Everyone needs to use discretion and care in communicating, whether it be orally or in writing. Given the nature of oral communications, taking care to be clear when speaking about projects can, obviously, go a long way. However, the main challenge these days is convincing clients to take additional steps to achieve clarity in the written word, which typically takes the form of e-mails and text messages. Not long ago, letters were written, and letter writing was done very diligently by our clients. Whenever I reviewed letters contained in a client's file, the care taken, by whomever the author, was evident. Thoughts were concise and clear and naturally invited a response of equal clarity. However, emails have largely taken over as the most popular form of written communication, with text messages also becoming quite popular. The problem with both forms of communication is that emails and text messages are written while walking down the street or while engaged in another activity and the care and thought in writing them are not present. Typographical errors are one thing, but missing words changing the meaning of what you wrote are difficult to undo when a matter is being litigated. With that said, written communication needs to improve as miscommunication is a leading cause of disputes arising out of construction projects.

Somewhat related to the need to take better care in communicating is the need to maintain electronic project records in a systematic way. While some design firms have already employed a system that makes the task of reviewing project documents and electronic communications easy, far more still perform searches of emails to accumulate the electronic communications relevant to a particular job. For larger design firms, this task may require searches at multiple servers located throughout the country, making the formulation of a defense to claims involving the project challenging. If individuals having first-hand knowledge of the project are no longer associated with the design firm in issue, finding all electronic communications becomes even more difficult. However, a software system that collects all electronic communications removes this risk, assuming all employees are well trained on saving

electronic communication to the electronic project file and company-wide diligence is maintained.

Also high on the list of non-technical risk drivers referenced above is to be honest with oneself about what the design professional and her team can provide in terms of talent. In the eagerness to obtain new work, the design professional, like most people, tends to take on projects that may go beyond the firm's capabilities. Inexperience with the particular type of project or jurisdiction, while qualified and fully licensed on paper, may be reason to take a second look to make sure the design professional is comfortable with taking on the new project. This requires one to assess oneself in a critical way that could very well keep the design firm moving forward without taking on unnecessary risk.

Finally, haphazard client selection is a recurring factor that can put design professionals into litigation in situations where a different client would have invited problem-solving input from the design professional without litigation. The problem is: how do you know that before the project starts? Here are a few factors. First, check around to determine if the client is experienced with the type of project being contemplated. Second, check to see if the client has a history of litigation, not paying contractors or design professionals, or is behind on paying fees on other jobs (or on the current job, if the design professional is being asked to take over for another architect). A simple search of the local court system may reveal the answers to these questions. While taking on new work with a new client always has inherent risks, undue risk can be avoided.

The four general areas described above are things the design professional should try to incorporate or at least think about to avoid risk or better manage risk. As the business world continues to change, these are things that will likely continue to be important no matter what the future holds.

# Lessons Learned from the Pandemic

10.21.21 | BY LEE J. SACKET

The COVID Pandemic challenged businesses like never before. Faced with unprecedented uncertainty, businesses had no game plan in place to navigate an economic shutdown and many were simply fighting for survival. The construction industry was no exception. Readily available vaccinations and advances in the understanding of the virus brought optimism that the Pandemic was nearing an end. Projects resumed and many companies started to cautiously bring employees back into the office, while others were scheduled to do so in the coming months. Unfortunately, that optimism that the Pandemic was nearing an end has faded into a stark reality. The Pandemic is not over and this alternative work and economic universe continues to challenge our industry and businesses. While we desperately want to put the Pandemic in the rear-view mirror, there have been important lessons learned, which should prepare our industry and businesses for not only future shutdowns, but to run more efficiently into the future.

- Remote Working: While "work from home" is common in some industries, it was not readily accepted, or acceptable, in most. However, many businesses and industries were pleasantly surprised by the ability to not only conduct business remotely but do so in a productive and efficient manner. Remote working, including the ability to conduct virtual meetings, has and will change the way we do business. To effectively incorporate remote working into a business plan, companies must consider investing, or increasing their investment in technology and virtual infrastructure, which necessarily includes appropriate security measures (which is typically required anyway for public and municipal clients, financial institutions, insurance companies and heath care and education providers). The ability and flexibility to perform business remotely may provide your business with advantages to hire better talent, while lowering certain overhead costs (more on that below).
- Updated Contracts: Every business and industry should be reviewing its contracts and any contract forms, armed with an updated perspective. Provisions and issues that naturally come to mind include, but are not limited to, delay, force majeure, government shutdowns and costs for health and safety equipment to comply with the ever-changing personal protective equipment requirements.
- Office Administration: Government requirements resulting from the Pandemic have created new responsibilities for Human Resources and Office Administrators. Not surprisingly, these new challenges have prompted the creation of new and useful apps. Companies should consider using apps for

attendance, contact tracing and daily health disclosures. Many payroll companies are already providing tools for these services through their websites.

- Marketing Plans: In-person meetings, conferences and entertainment have largely been minimized due to the Pandemic. Businesses must consider broader marketing strategies to address circumstances when in-person activities are limited.
- Accounts Receivable: While this may seem obvious, when COVID hit, cash dried up almost instantly. Clients stopped paying bills and put future work on hold. Consider having a credit line, and for those that have one, refrain from overusing it so it is available when truly needed.
- Real Estate and Leases: As noted above, the Pandemic has driven significant portions of the workforce into remote working situations, which not only provides the worker with flexibility, but also, the business. If you are utilizing remote working, consider what your real needs are for a physical footprint. Consider shorter lease terms for any physical space. While longer terms provide more stability for long term planning, this recent experience should cause companies to at least reconsider those strategies. Try to negotiate rent relief terms into a lease if the building cannot provide access due to state or federal shutdowns.

We cannot predict when the next pandemic will occur or foresee the next major obstacle. Rather than wipe our memory clean of this troubling time, as much as we want to, we should review and evaluate our decisions and businesses and consider embracing some of the changes which ultimately may benefit our companies and workers and prepare our companies and industry for a potentially different looking future.

# New York's Pay-When-Paid Clauses

02.16.22 | BY POONAM PELIA

What exactly is a Pay-When-Paid clause? Pay-When-Paid clauses are often found in design professional and construction contracts and are known as contingent payment clauses, meaning the payment is contingent upon another event taking place (i.e. payment from the owner to the consultant, construction manager, contractor and the like). Reading the plain language of such a clause, one would easily assume there was no obligation for a party to the prime contract to make payment to its subcontractor or subconsultant until payment from the owner was received. This delay could be never-ending and eventually lead the prime contractor to completely relieve itself from making a payment to its subcontractor or subconsultant if it never gets paid itself.

However, Pay-When-Paid clauses in New York are not intended for this purpose. Pay-When-Paid clauses do not extend payment indefinitely and cannot be used as a strategy to extinguish a party's responsibility for making a promised payment to a third party. Rather, New York's Pay-When-Paid clauses are intended to act as timing mechanisms so that a party can reasonably withhold or delay payment without extinguishing the responsibility to pay.

This is in direct contrast to Pay-If-Paid clauses, which make the "event" a condition precedent to payment, shifting the risk to subcontractors. For example, a Pay-If-Paid clause would allow a prime contractor to withhold payment from its subcontractor or subconsultant indefinitely. So, if the prime contractor is not paid, the subcontractor/subconsultant is not paid. However, Pay-If-Paid clauses are strictly prohibited in many states, including New York, as against public policy.

To overcome this prohibition, parties holding the prime contract with the owner often disguise Pay-If-Paid clauses as Pay-When-Paid clauses in its subcontractor or subconsultant contract by omitting a reasonable timeframe to pay the subcontractor/subconsultant, allowing the prime contractor to assert that it cannot pay its subcontractor or subconsultant "until" it has received payment from the owner. However, these clauses are rejected by New York courts.

Most recently, in A.E. Rosen Elec. Co., Inc. v. Plank LLC, a New York State court in Albany, New York rejected a general contractor's attempt to utilize its Pay-When-Paid clause to act as a condition precedent to its obligation to pay whereby the clause merely regulated the time of payment, which was an enforceable Pay-When-Paid provision. The Court ultimately determined the general contractor's withholding of payment to the subcontractor for two years was unreasonable.

Though Pay-If-Paid clauses are unenforceable in New York, design professionals, consultants and contractors holding the prime contract with the owner can still take advantage of Pay-When-Paid clauses by incorporating them into their subcontractor/subconsultant contracts. To be enforceable in New York, a Pay-When-Paid clause must set a reasonable time for payment to its subcontractor or subconsultant and must not make the payment from the owner a condition precedent to the subcontractor's or subconsultant's right to payment. Though New York courts have not defined what a "reasonable time" for payment is, case law indicates that withholding payment for a period of two or more years is unreasonable. On the other hand, New York courts have suggested a contractual provision delaying payment until the owner has accepted the project is appropriate, but again, the courts will not likely allow an unreasonable delay by the owner in accepting the project to allow the prime contractor or design professional to indefinitely delay payment to a subconsultant.

For lengthy construction projects, the time to pay can run out fast. However, Pay-When-Paid clauses can still benefit prime contractor by allotting time to reasonably delay payment to a subcontractor or subconsultant while awaiting payment from the owner. This also still allows full protection to subcontractors and subconsultants, small and large, ensuring ultimate payment for their services rendered.

*[1] A.E. Rosen Elec. Co. v. Plank, LLC, 63 Misc. 3d 1207(A), 114 N.Y.S.3d 575 (N.Y. Sup. Ct. 2019), aff'd, 181 A.D.3d 1080, 120 N.Y.S.3d 220 (2020).*

*[2] See Superior Site Work, Inc. v. NASDI, LLC, No. 214CV01061ADSSIL, 2018 WL 3716891, at *27 (E.D.N.Y. Aug. 3, 2018; see also Power Partners MasTec, LLC v. Premier Power Renewable Energy, Inc., No. 14CV8420, 2015 WL 774714, at *2 (S.D.N.Y. Feb. 20, 2015).*

*[3] Maines Paper & Food Service, Inc. v. Losco Group, Inc., 36 A.D.3d 1047, 827 N.Y.S.2d 345 (3d Dept. 2007).*