

The Design Professional Agreement

Presented by:

**Richard A. Capshaw
Capshaw & Associates
3031 Allen Street
Suite 201
Dallas, Texas 75204**

**Michelle I. Rieger
Winstead PC
500 Winstead Building
2728 N. Harwood Street
Dallas, Texas 75201**

Assignment

Architect

- **In accord with Owner concerning limits on Assignment Rights.**
- **Two-way street as regards bargained for relationship.**
- **Limits the types of certification.**
- **Allows Architect to control its consultants without Owner control.**

Certifications

Architect

- **No warranties or certifications which are expressly disclaimed.**
- **Standard of care defines scope.**
- **Knowledge of Architect limited as regards as constructed conditions.**
- **Must limit certification to best knowledge information and belief.**
- **Betterment is an issue which must be understood and if possible defined and accepted.**
- **Betterment is not a waiver, it is definitely a concept that should be applied to a claim involving the installation of new work that constitute an improvement to the project.**

Consequential Damages

Architect:

- **Mutual Waiver.**
- **Provides Architect with some limited protection as to damages.**
- **Not defined so common law controls. Label is not controlling.**
- **Must survive Project.**
- **Must be consistent.**
- **As last point a thoughtful discussion with Owner will be beneficial.**

Construction Observation

Architect

- Major source of potential exposure to Owner and to third parties.
- Construction management – impact should be managed and responsibility shifted.
- Construction Management Direction creates a source/basis for payment of extra services on “equitable basis”.
- Construction observation – scope of duty clearly defined so Owner and third parties and perhaps ultimately Court can define scope of legal duty.
- Distinction between full-time project representation and choice not to retain for that service is solely within Owner’s discretion.
- Architect not responsible for construction defects or conformance with plans, specifications and applicable law.

Copyrights and Licenses

Architect

- **Architect retains ownership so can use standard details on other projects.**
- **Owner use limited and if used without Architect indemnity must be provided.**
- **Must survive termination of Agreement.**
- **Design Phase Service exclusion should not impose responsibility on non-participating Architect.**
- **Indemnity vs. Release.**
- **Defines the duty so expectations of Owner and others can be controlled.**

Dispute Resolution

Architect

- **AIA well thought out and is the result of hotly contested debates.**
- **Default to litigation.**
- **Consistency across all contracts with joinder provisions important.**
- **Subsequent alternatives may be agreed upon.**
- **If arbitration detail as to applicable rules, number of arbitrators, venue and hearing location.**

Indemnity

Architect

- **Key is don't impair Architect's Professional Liability Coverage.**
- **Trigger for obligation to indemnify must be clearly defined and in accordance with coverage, standard of care basis.**
- **Duty to defend and hold harmless absent Architect's sole negligence should be avoided.**
- **Scope of financial indemnity obligation can be determined upon conclusion of matter.**
- **Do not create a warranty, must avoid "Best Design" – "Highest Standard".**
- **Define Architect role as regards applicable laws – not a legal opinion.**

Insurance

Architect

- **Must track the coverage grant with consideration of exclusion:**
 - **G.L. – no professional liability**
 - **P.L. – triggered by violation of standard of care**
- **Claims made impact – creates some continued coverage obligation, issue is scope.**
- **Project Policy is an alternative that can benefit both Owner and Architect; the problem is cost.**
- **Project Policy deductible should be resolved in advance as how to handle.**
- **Expense within limits coverage is provided; must understand as to claims/resolutions.**

Jobsite Safety

Architect

- **Should NEVER be the obligation of Architect.**
- **Definition of duty assumed is key to any claim based on jobsite safety.**
- **Architect without authority to exercise control.**
- **Means and methods of performance and safety within purview of contractor, never Architect.**

Limitation of Liability

Architect

- **Negotiation/discussion will provide significant insight into attitude of expectations of Owner.**
- **Must be clear and unambiguous.**
- **Must be reasonable as between duty/risks/ amount and basis.**
- **Must be NEGOTIATED, hence capitals and specific initial.**
- **May be defined by amount, percentage or even available policy limits.**

Standard of Care

Architect

- **Best to conform with pattern jury charge definition.**
- **Once again do nothing to create coverage problem.**
- **Do not provide and if possible disclaim any warranty express or implied.**
- **Limit to “circumstances” that which Architect knows based on available information at time at time and knowledge, information and belief.**

Suspension/Termination

Architect

- **Time is always important as basis for fee calculation.**
- **Should protect earned and future fees impacted by mobilization, demobilization and remobilization.**
- **Owner not allowed to offset without written consent by Architect.**
- **Satisfaction based on payment may be overreaching.**
- **Must provide for how to deal with disputed invoices.**
- **Negotiation of these points once again provides an insight into the thoughts, opinions, beliefs and expectations of Owner.**

Third Party Beneficiaries

Architect

- **Neither Owner nor Architect intend third party beneficiaries.**
- **Express provision on this point may be used to defeat third party claims.**
- **All contracts should contain this provision.**
- **Provides some level of control for both Architect and Owner.**