

Beat Liability: Get Involved!

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NOVEMBER 12, 2004 — Concerned about legal risk, many architects insist on contract clauses that limit their liability in a project. But along with limiting liability, practitioners have consistently continued to limit their role in many areas, such as environmental management, site safety, cost estimating, scheduling, change-order negotiation, and dispute resolution. After 20 years of collectively reducing their roles, firms are now frequently selected based mainly on the amount of their fees. To many owners, architects are no longer the owner's confidant, offering them professional advice; instead, design services are seen as a commodity.

But, in fact, architect empowerment is always a good idea for both the architect and the owner. Liability claims are less likely when firms are in on decision-making and problem solving. Claims can be almost entirely eliminated by better strategic planning at project inception, and become much less likely when the architect has the ear of the owner, helping to set strategy and make decisions. Being responsive and strategic are not simply good concepts by which to guide business development, they are also essential ingredients for managing risk.

Today's standard owner-architect contract reflects the architect's desire for diminished responsibility, but to provide the best service, a firm must be in a position of trust with the client where quality, professionalism, and clear communications guide the relationship. Positive affirmations, not limitations of liability, need to be the basis of interaction, and architects need to have a stake in the process and be in the best position to protect the client's interests.

A few basic tenets underlie healthy and productive architect-owner relationships:

- All project information and requirements are provided by the owner.
- Necessary levels of pre-project due diligence are carried out.
- Indemnity clauses do not go beyond reasonable limits.
- Limitation-of-liability clauses have a fair balance of risk.
- A written agreement is concluded before professional services begin.
- Details are spelled out to manage contractor means and methods and site safety.

Regarding compensation, the architect should be adequately remunerated, and responsibility for dispute resolution should be clear. The owner should agree to make timely payments to the architect. (Proper consideration must be given to professional competence.) As most architects know, firm selection should never be made merely on the basis of price. In fact, contract clauses should entitle the architect to increased compensation for expanded project roles.

Last, be ready to act even if the contract allows the architect to "sit it out." For example, because controlling mold is part of the architect's core competency, the mold buck should stop with the architect.

This kind of empowerment promotes the owner's respect of the practitioner's skill and professionalism. When they assume a role that is both proactive and strategic in planning, design, and troubleshooting, architects are best protected against potential liability—and the project is more likely to finish on time, on budget, and without claims.

John E. Osborn is an attorney with more than 30 years of experience in construction-contract litigation, professional-liability defense, and environmental law.

