**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 4: The Design Professional**

Read Sections 17:1-17:12 in volume 5 of *Bruner & O’Connor on Construction Law* (Westlaw Aug. 2023), by Phillip L. Bruner & Patrick J. O’Connor, Jr. These sections introduce the common roles that design professionals play in the design and construction process, and they summarize the basic principles governing design professional liability and the legal relationship between design professionals and their clients. These materials also explore the critical distinction between the potential liability of design professionals based on contract law versus tort law, and they hint at the complex legal principles that determine the extent to which a design professional may owe a duty of care to those who are not parties to the design services contract. This last issue implicates the economic loss rule, a topic you will encounter more directly in later lessons.

Several of the assigned sections from the Bruner and O’Connor treatise emphasize the potential liability risks that design professionals face, which is, indeed, a topic of considerable importance in the construction industry. For construction lawyers, however, the legal aspects of design services involve much more than liability issues because design professionals and the services they provide can have significant impacts, either directly or indirectly, on most project participants and on many construction contracts. Accordingly, beyond prosecuting and defending claims, construction lawyers help their clients structure and manage relationships involving design services, deal with professional licensing and regulatory matters, and address many other issues concerning the roles that design professionals play. They may address these matters when representing a design professional, a client contracting directly with a design professional, or any of the many other project participants who rely on, become involved with, or may be affected by a design professional’s acts and omissions.

To reflect on these considerations in one important and practical context, read American Institute of Architects (AIA) contract form AIA B101 (2017), “Standard Form of Agreement Between Owner and Architect,” in its entirety. As you review B101, remember that it reflects one common arrangement for a project that uses the design-bid-build project delivery system and in which the owner’s architect provides comprehensive design services. B101 is not intended for use under other circumstances. As section 17:2 of the Bruner and O’Connor treatise explains, the design professional’s role varies significantly depending on which delivery system a project uses. Alternative project delivery systems require substantially different contractual arrangements concerning design services. For example, in a design-build project, the primary design professional may be part of the design-build firm or may be a consultant to that firm, or when the owner retains a construction manager, some functions the B101 assigns to the project architect may be shared with or completely transferred to the construction manager. Moreover, in any project delivery system, some design professionals may be involved as consultants or subcontractors to the primary design professional or to other project participants. Additionally, no matter what project delivery system a project uses, design professionals and the services they provide affect a range of legal relationships in addition to those between the designer and the participant who retains that designer.

For present purposes, however, it is sufficient to focus primarily on the specific context for which AIA B101 is designed. Consider especially these features:

* *Article 1, “Initial Information.”* This Article requires the owner to furnish details concerning the owner’s “program for the Project” and to supply other important information as background. It also specifies whether the owner or the project architect will retain certain design consultants. Additionally, it contemplates that the owner may have a “Sustainability Objective for the Project,” which will be governed by additional AIA contract terms, and that the project will use “Building Information Modeling,” in accordance with digital data protocols established by a separate AIA document incorporated by reference. Article 5 details other important responsibilities that the AIA approach assigns to the owner.
* *The standard of care stated in Section 2.2 and the insurance requirements stated in Section 2.5.* The specifications in Subsection 2.5.6 for professional liability coverage are especially significant because other forms of liability insurance, including commercial general liability insurance, expressly exclude coverage for liability resulting from professional services.
* *The distinctions concerning “Basic Services,” “Supplemental Services” and “Additional Services.”* Article 3 defines the scope of the services (the “Basic Services”) covered by the compensation provided for in Section 11.1. Article 4 deals with “Supplemental Services” and “Additional Services,” which entitle the architect to additional compensation. The division of Basic Services into the distinct phases described in Sections 3.2-3.6 reflects a conventional breakdown of an architect’s responsibilities during the stages of a design-bid-build project, including the AIA’s vision for the architect’s role in contract administration during construction. Also note how extensively Article 11 covers many other financial details of the owner-architect relationship.
* *Article 6, “Cost of the Work.”* These provisions, which address aspects of construction costs, obligate the architect to assist in achieving the owner’s goals for the project budget to some extent, but they also limit the architect’s financial risk if the costs of construction ultimately exceed those goals.
* *Article 7, “Copyrights and Licenses.”* Among other things, these provisions recognize both the potential market value of design services and the risk that reuse of design work can expand the design professional’s liability exposure. Federal copyright law protects intellectual property in “architectural works.” 17 U.S.C.A. § 102. The protection extends to “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design but does not include individual standard features.” 17 U.S.C. § 101.

AIA B101 includes many other important provisions that are also relevant to other construction industry contracts and that later lessons will address. These topics include procedures for handling claims and disputes (Article 8) and the rights of contracting parties to terminate the contract or to suspend performance (Article 9),

A sampling of cases

An extensive body of caselaw addresses liability arising from design services. Although the courts generally agree on some of the most fundamental principles, the reported opinions also evidence some significant jurisdictional variations. Read the following cases, which cover a few issues commonly litigated.

* City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978).

This classic case concerns liability for allegedly defective design. The court adhered to the traditional professional negligence standard of care that applies to a design professional’s services. The case is especially significant because, in an era when courts were frequently open to expanding tort liability on policy grounds, the court refused to imply into a contract for architectural services a warranty that the project, if constructed in accordance with the architect’s plans and specifications, would be fit for its intended purposes.

* Caldwell v. Bechtel, Inc., 631 F.2d 989 (D.C. Cir. 1980).

This case demonstrates a relatively limited, but important, expansion of a design professional’s liability in tort. Because the court read the contract as assigning the responsibility for jobsite safety to the defendant engineering firm, a construction worker had a potentially valid tort claim against the defendant for injuries the worker allegedly suffered as the result of hazardous conditions at the job site. While the defendant’s contract was with the project owner, the defendant’s contractual responsibilities established a “special relationship” between the defendant and the worker that gave rise to a tort duty of care for the worker’s protection. Typical contracts between owners and project designers (as contrasted with safety engineers or consultants), however, routinely exclude any responsibility for worker safety.

* Demetro v.Dormitory Auth., 96 N.Y.S.3d 30 (N.Y. App. Div. 2019).

This relatively recent decision explores how the precise scope of design services defined by a contract, together with related contract terms and the conduct of project participants, can affect the potential liability of a design professional to an injured worker. The case centers around a contract for the defendant design firm to provide both architectural and engineering services for a boiler project. The contract for design services called for the defendant design firm to furnish “performance specifications” to an HVAC contractor for a certain system for which the contractor would develop the final design. In other words, with respect to this specific system for the project, the defendant design firm did not provide complete design but only specified performance standards that the contractor’s detailed design would need to satisfy. In addition, however, the defendant design firm’s contract provided for the firm to review certain design details for the system that the contractor prepared. As a result, the extent of the defendant design firm’s potential liability for an injury allegedly attributable to defects in the system’s final design turned on fact-intensive questions of professional negligence and proximate cause.

Legal issues, disputes and claims relating to design services arise in many circumstances in addition to those mentioned in the assigned sections from the Bruner and O’Connor treatise and the three assigned cases. Indeed, Chapter 17 of the Bruner and O’Conner treatise, of which the assigned sections are only a small part, divides its coverage of the roles and responsibilities of design professionals into over 100 topics. This lesson’s selected reading assignments merely alert you to the highly specialized law concerning design professionals and their services.

For Review and Discussion

1. Section 1.2 of AIA B101 provides that, subject to certain qualifications, both the owner and the architect “may rely on the Initial Information.” In most circumstances, how important do you believe Section 1.2 is to the architect, and how important is it to the owner?
2. The American Institute of Architects, the largest organization for architects in the nation, promulgates AIA B101. Do any provisions or approaches in B101 seem to unduly favor architects over the owner and other project participants?
3. In the situation involved in *Caldwell v. Bechtel, Inc.*, assuming a contract that obligated Bechtel to provide the same safety engineering services as described in the case, could Bechtel have included any provisions in its contract that would have absolved it from a tort duty of care toward the plaintiff?
4. What is the precise holding of the *Demetro v. Dormitory Authority* opinion?
5. Section 3.6 of B101 vests the project architect with broad authority and responsibilities for contract administration during the construction phase. Are all the services the architect provides under section 3.6 professional services that are subject to the professional malpractice standard of care? Viewed from the perspective of the architect’s legal counsel, do any aspects of section 3.6 potentially expose the architect to unacceptable liability risks?