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Architectural Contracts

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I. [2.1] INTRODUCTION

The purpose of this chapter is to provide the reader with an understanding of the basics of negotiating an agreement between the owner and the architect for the architect's professional services. The owner and the architect have a different set of concerns and objectives that must be mutually resolved during the negotiating process. Successfully negotiated agreements accommodate each party's needs whenever possible. In most cases, successfully negotiated agreements will result in an agreement that is unbiased and neutral — not favoring one party at the expense of other. For purposes of this chapter, the terms “agreement” and “contract” are used interchangeably.

Broadly speaking, the issues of duty, breach, standard of care, and the like are legally identical for engineers and for architects. However, the licensing laws and registration of professional design firms do differ for engineers as opposed to architects. Applicable statutes and regulations should be consulted in that regard.

II. INDUSTRY FORM CONTRACTS

A. [2.2] In General

Several professional associations produce standard agreement forms that can be utilized as the basis of the agreements to be negotiated among owners, architects, and contractors. Examples of such professional associations include the following:

- American Institute of Architects (AIA), www.aia.org
- Association of Licensed Architects (ALA), www.licensedarchitect.org
- Associated of General Contractors of America (AGC), www.agc.org
- Engineers Joint Council Documents Committee (EJCDC), <http://content.asce.org/ejcdc>
- ConsensusDOCS: Construction Contracts Built by Consensus (CD), www.consensusdocs.org

Many of these documents have been tested in federal and state court systems, providing a wealth of available caselaw for the interpretation of the contract language contained within the various portions of these documents. The oldest form document was first published by the AIA in 1888. All AIA documents are updated and republished at least once every ten years. This chapter quotes portions of the language contained in the current 2007 series of AIA documents to illustrate issues of concern to an owner and an architect negotiating their agreement.

B. [2.3] Effect of Mixing Different Types of Contracts

When standard form documents are used, the documents among the owner, the architect, and the contractor should be from the same “family” of documents and published in the same year, if

possible. For instance, if the owner uses AIA Document B101, *Standard Form of Agreement Between Owner and Architect* (2007) (B101), then the owner should also use a corresponding owner-contractor agreement such as AIA Document A101, *Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum* (2007) (A101), as well as AIA Document A201, *General Conditions of the Contract for Construction* (2007) (A201). It is likely that mixing and matching various documents from different families, or different years, will create unnecessary conflicts — unless the architect or the owner takes the time and effort to carefully resolve all inconsistencies within and among the documents. Whenever an owner creates its own standard agreement form, it will be difficult to coordinate that form with association-produced standard forms that may also be utilized on the same project. Association-produced documents, such as AIA documents, address normal concerns intended to be negotiated and defined within the agreement. In many cases, owner-created documents fail to properly address all issues of concern that normally arise between and among contracting parties. It is a better idea to use association-produced standard form documents whenever possible.

Many times, owner-prepared agreements are unreasonably biased, favoring the owner to the architect's or contractor's detriment. Agreements prepared by architects and contractors can be equally self-serving. When an agreement is unreasonably biased against another party, the project suffers. When the project begins with an unreasonable agreement, the parties never develop a sense of mutual trust, and any small issue can quickly develop into a large problem — one that could have been avoided if all parties trusted each other and together had resolved the issue before it became a problem.

C. [2.4] Risks of Using Unmodified Form Documents

Some architects believe that they can use an AIA standard form without any modifications. They believe, since the AIA is an association of architects, that documents produced by the AIA will protect them. This is a dangerous assumption. The AIA and other professional associations produce standardized documents to be utilized on a national level. The documents are designed to be modified to address the specific project at hand and to comply with all federal, state, and local governing laws, rules, regulations, and codes.

D. [2.5] Owner's Counsel Must Coordinate Architect's Contract Provisions with Owner's Construction Contract with Contractor

Many times, the architect will assist the owner with the preparation of the "General Conditions of the Contract for Construction." This document is included in, and becomes a part of, the owner-contractor agreement. When this happens, the architect can ensure that the family of documents remains intact. However, if an owner prepares its own general conditions document, the owner, or its attorney, must carefully coordinate the duties and obligations of the architect expressed in this general conditions document with the actual contractual duties and obligations contained in the owner-architect agreement. If the owner expresses that the architect will perform a certain service in the general conditions document, and that service is not performed because it is not part of the architect's agreement, then the owner will be in breach of the owner-contractor agreement due to the misinformation given to the contractor.

III. PROFESSIONAL LICENSES

A. [2.6] In General

Both the owner and the architect must be concerned as to the status of the architect's license in the jurisdiction where the project is located. If the architect is not properly licensed, the owner may not be able to obtain a building permit. The architect might not be entitled to payment without the proper license or registration.

B. [2.7] Architect Must Be Licensed in Jurisdiction

Every state has a licensing board holding jurisdiction over design professionals. In Illinois, the Department of Financial and Professional Regulation (www.idfpr.com) regulates architects pursuant to the Illinois Architecture Practice Act of 1989, 225 ILCS 305/1, *et seq.* Any architect performing architectural services in Illinois is required to have an Illinois license. The Act defines the practice of architecture to include the following:

The practice of architecture within the meaning and intent of this Act includes the offering or furnishing of professional services, such as consultation, environmental analysis, feasibility studies, programming, planning, aesthetic and structural design, technical submissions consisting of drawings and specifications and other documents required in the construction process, administration of construction contracts, project representation, and construction management, in connection with the construction of any private or public building, building structure, building project, or addition to or alteration or restoration thereof. 225 ILCS 305/5(b).

This means that the architect needs to be properly licensed prior to offering professional services in Illinois. Other states have similar provisions, although the laws regarding architecture vary widely. Architects licensed in Illinois can obtain a license in another state through reciprocity, but that process can take months. A quicker method is available if the architect has certification with the National Council of Architectural Registration Boards (NCARB) (www.ncarb.org).

C. [2.8] Firm Must Be Registered as Professional Design Firm

In Illinois and a number of other states, if an entity (*e.g.*, corporation or partnership) is providing architectural services, that entity is required to have a separate "professional design firm" registration in addition to the license held by the individual architect. See 225 ILCS 305/21. In general, for corporations practicing architecture (1) the corporate purpose must be properly worded; (2) two-thirds of the directors need to hold a professional license, with at least one of the architects being licensed in Illinois, working full time for that corporation, and in responsible charge of that project; and (3) the corporation must have its registration current. Other business forms have similar requirements.

Failure to hold the proper design firm registration can result in the contract being held void and the architectural firm being unable to collect its fees. *Kaplan v. Tabb Associates, Inc.*, 276

Ill.App.3d 320, 657 N.E.2d 1065, 212 Ill.Dec. 720 (1st Dist. 1995). *Kaplan* has been criticized by other courts but never overturned. See, e.g., *Parkman & Weston Associates, Ltd. v. Ebenezer African Methodist Episcopal Church*, No. 01 C 9839, 2003 WL 22287358 (N.D.Ill. Sept. 30, 2003).

An Illinois architecture firm planning to solicit work in other states must comply with the laws of the other jurisdictions, and such laws can vary significantly from those in Illinois. For example, an architectural firm with a name implying there is more than one architect in the firm (e.g., a firm named “ABC Architects” rather than “ABC Architect”) seeking work in Florida is required to have two architects on staff with Florida licenses. Many firms will have one architect with multiple licenses, but rarely two. Keeping track of the requirements of different states can be a significant problem for firms with projects in a number of states. NOTE: In researching each state’s requirements, not only each act but also the corresponding rules must be examined on a regular basis.

D. [2.9] Differences in Licensure, Registration, and Authority To Do Business

Firms, such as corporations, limited liability companies, and similar entities, require several types of registrations with governmental entities. As discussed in §§2.7 and 2.8 above, one or more licenses and registrations will be required from the agency that regulates the practice of architecture in each state. In addition, registration with each state’s Secretary of State will be required. For corporations formed in one state to transact business in another state, such corporations will require authority to transact business as a “foreign” corporation. It is likely that this will be required before the requisite architectural registration is obtained for that state. All of this is in addition to the requirement for an individual license in that state for the architect in charge of that project.

IV. PRE-CONTRACTUAL ISSUES

A. [2.10] Corporate Status of the Parties

Parties to a contract must be careful that the correct names of the contracting parties are used and that the entities are, in fact, capable of contracting and actually exist. Contracts often name a corporation that does not yet exist or that has been dissolved. Sometimes the wrong name is used, which can be a problem if there is another entity that uses that name or one that is very similar. A quick check with the Illinois Secretary of State’s website (www.cyberdriveillinois.com) should provide the necessary information for corporations, limited liability company (LLCs), and similar entities. Corporations can utilize assumed names, but those names must be registered with the Secretary of State, while individuals using an assumed name file a certificate with the county under the Assumed Business Name Act, 805 ILCS 405/0.01, *et seq.* Note that an individual operating an architectural practice under an assumed name must also obtain a separate registration as a professional design firm.

B. [2.11] Status of Signer of Agreement

If a party to the agreement is anything other than an individual, the status of the person signing on behalf of that party becomes important. In general, only a person with apparent authority or an “agent” can bind a corporation or similar entity to a contract. In Illinois, various statutory provisions define who these people are. For instance, in the case of corporations, 805 ILCS 5/8.50 describes the authority of the officers of a corporation. In addition to the persons identified by statute, an entity can vest authority in agents. Thus, it is important to clarify the status of the person who actually signs the agreement. A good practice is to indicate the authority of the signer below the signature, for instance, “John Smith, President.” This shows that Mr. Smith is the agent of a disclosed principal. If the corporate capacity of the individual is not indicated, an argument might be made that the contract was with the individual and not the corporation, thus exposing the individual to personal liability.

C. [2.12] Architect Needs To Know Owner’s Real Parties

An architect dealing with an owner will want to ascertain the status of the “client.” In the event of nonpayment, an important remedy for the architect is the use of a mechanics lien (in Illinois, under the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.*). However, this remedy only works if the architect has a contract with (1) the owner, or (2) someone authorized to act on behalf of the owner or with the owner’s knowledge. The question for the architect is whether the entity entering into the contract owns the property or has some other type of ownership interest or authority. Sometimes, the client is simply someone interested in the property and its development potential. In the event of nonpayment, the architect may not be able to enforce a mechanics lien.

Another problem can arise when the owner is a single-purpose entity, usually an LLC whose sole asset is the property. In the event of nonpayment, the architect has only the property to look to for payment, as the owner will have no other funds. Usually, the funds are insufficient to pay all the lien claimants, leading to significant litigation costs while the lien claimants fight over the spoils.

D. [2.13] Assignments of Owner-Architect Agreement

For obvious reasons, the ability to assign an owner-architect agreement needs to be limited. The relationship between the architect and the owner is a personal one, with the architect hired for specific abilities or reputation. The owner does not want the architect to be able to assign the agreement to another architectural firm unless the owner can approve the new firm. Generally, the architect, who may have a close relationship with the owner, does not want to deal with a different owner. AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §10.3 (2007), has the following assignment provision:

Neither the Owner nor the Architect shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner’s rights and obligations under this Agreement.

As a practical matter, the owner's ability to assign the contract to a lender creates problems on many projects. Typically, the lender wants the architect to agree to a contingent assignment that significantly changes the relationships if the assignment comes into play. If the owner defaults on its construction loan, the lender takes over the project under the terms of the construction loan, and the contingent assignment of the owner-architect contract also is realized. At this point, the architect probably is owed considerable fees from the defaulting owner. The architect also has lien rights under the Mechanics Lien Act. Lenders — in an attempt to minimize their risk — try to shift some of this risk to the architect by asking the architect to subrogate its lien rights in favor of the lender, and not be liable to the architect for unpaid fees. Often, the architect receives these contingent assignments just before there is a closing on the construction loan — with directions to the architect to immediately sign the document and an implied threat if the architect does not cooperate. For this reason, B101 §10.4 requires a minimum 14-day period during which the architect is given time to review the proposed language of such documents with an attorney. In almost all cases, the proposed language is detrimental to the architect and not in keeping with the original owner-architect agreement. See also §2.54 below (Certificates to Third Parties).

E. [2.14] Date of Agreement

Usually, little thought is given to the date of the agreement. Often, the date that the agreement is executed is inserted in the agreement, whether or not work has already been performed under that agreement. However, this date normally is not intended to reflect the signing date. It is not unusual — although not a good idea — for the owner-architect agreement to be executed months after the parties have started contract performance.

F. [2.15] Importance of Contract Date for Lien Rights

Under the Illinois Mechanics Lien Act, the date of the contract is important for architects. In the event of a foreclosure action, the lender tries to assert priority over the various liens. Because the architect is usually hired before the construction loan is in place, the architect should have priority over the lender. However, if the owner-architect agreement is dated after the date of the loan, the lender may have priority, the result being that the architect may be paid little or nothing. The date of the agreement should reflect the first work by the architect for the project, no matter when the agreement is actually executed. Some drafters choose to state an “effective date” which may be the date when a consensus existed to form the agreement, or the date when the architect's work actually began, even though the negotiations result in an actual signing some months later.

G. [2.16] Work Preceding Execution of Written Agreement

Architects will often perform services prior to the execution of a written owner-architect agreement. Sometimes, the parties will execute an initial letter agreement or letter of intent with the intent to sign a formal AIA agreement once the project scope is finalized. The validity of such agreements may be questionable, particularly if the document is only an agreement to agree. If there is no later agreement, the initial letter agreement is the contract between the parties, for better or worse (usually worse). The architect loses the protections of the standard AIA agreement (*e.g.*, no responsibility for safety at the jobsite). Letter agreements rarely provide the specificity

and clarity found in the standard form documents, which can be just as detrimental for the owner as for the architect. Also, letter agreements may make it possible for third parties to invoke rights and remedies against both the owner and the architect that would not survive if a form contract were used. The parties must make certain that the “real” agreement is executed as promptly as possible, dated back to the start of the work, so that all of the activities of the parties are covered by that agreement.

One reason for a poor contract at the outset of the owner-architect relationship is that the project itself is poorly defined. All AIA owner-architect agreements ask for numerous details about the project that may not be known at the outset. This is why architects use simple letter agreements or handshake agreements until the initial design work is completed. One answer to this dilemma is to use a form agreement but limit it to initial design work on an hourly basis. Once the schematic design of the project is completed, the parties should be in a position to prepare a full agreement and move forward with the project. The advantage of this approach is that the parties have the protections afforded by a good contract, even if the second contract is never executed.

Sometimes an architect proposes a letter agreement and incorporates by reference a particular AIA form agreement. This may well be legally valid, but the reference must be absolutely correct and full. Further, as noted in §2.4 above, there is a certain risk in using unmodified form documents.

H. [2.17] Owner-Supplied Information

Some project information is in the sole control or possession of the owner or its consultants but must be used by the architect. Surveys, geotechnical reports, record drawings of existing facilities, and other information that is either unique or not publicly available must be provided by the owner, and the risk of relying on that information must be contractually considered and apportioned. AIA Document B201, *Standard Form of Architect’s Services: Design and Construction Contract Administration* §2.1.2 (2007) (B201), provides:

The Architect shall coordinate its services with those services provided by the Owner and the Owner’s consultants. The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner and the Owner’s consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission or inconsistency in such services or information.

See also AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §3.1.2 (2007).

An owner should not be able to hide needed information, nor should an architect be entitled to close its eyes to obvious inconsistencies. Counsel for both parties should consider the source of particular information and determine, between the owner and the architect, who can or should be responsible for its contents. The owner, rather than the architect, can more easily verify or pursue documents attendant to the owner’s purchase of the real estate, boundaries, known restrictions,

environmental conditions, and easements. The architect may be better suited, however, to notice inconsistencies in a survey or missing components of record drawings of an existing facility.

In addition to liability and risk concerns, the parties must consider the cost of verification of information. Owners could contractually impose all responsibility for verification of owner-provided information on the architect, but the architect then must provide more services or retain consultants to do so. Architects could contractually disclaim all responsibility for owner-provided information, but the standard of care applicable to the architect's services, particularly in the eyes of a judge or jury after the fact, usually requires some level of diligence, care, and skill. Frequently, compromise is reached within the structure of the AIA language or similar contractual right-to-rely, with exceptions for certain specific information to be verified or that cannot be warranted or relied on by either party in the exercise of its respective standards of care.

V. STANDARD OF CARE

A. [2.18] In General

Absent a contractual modification, an architect does not guarantee or warrant a perfect plan or result but is held to the same degree of care and skill as provided by other architects practicing in the same area. Failure to adhere to that standard is negligence or breach of an architect's contract. AIA Document B102, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services* §1.2 (2007) (B102), provides:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

See also AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §2.2 (2007).

B. [2.19] Insurability of Heightened Standards of Care

Insurability of contractual promises is in the interests of both parties. Owners frequently revise the contractual standard of care to impose greater responsibility on their architects, particularly when an architect is chosen because of unique qualifications or expertise. Doing so, however, can create an uninsurable promise and leave the owner without the ability to collect on a claim. Professional liability policies for the design professions usually exclude coverage for warranties, guarantees, or heightened standards of care. A provision calling for the architect to provide the "highest" or "best" care consistent with the best architectural firms in the world is frequently not at all in the owner's best interest.

C. [2.20] Leadership in Energy and Environmental Design Issues

The same concern arises when a particular Leadership in Energy and Environmental Design (LEED) standard is identified in the contract. If an architect promises or warrants that the project will achieve LEED certification at any level, a professional liability insurer may refuse to cover a claim arising out of the architect's failure to deliver on that promise. Most often, the architect does not control the many decisions concerning operations and materials selection that affect LEED certification. An insurer should cover a claim arising out of the failure to conform to the standard of care affecting LEED-related services. It seems most prudent then to incorporate or reference the standard of care in any contractual standard or certification goals. For more on LEED construction, see Chapter 11 of this handbook.

D. [2.21] Code Issues

Codes applicable to any given project can conflict in text or interpretation. Compliance with "all codes" actually can, in some circumstances, be impossible. It can also be impossible to bind a code authority with an interpretation given on any particular day, even if given in writing.

The Architect shall incorporate into the Construction Documents the design requirements of governmental authorities having jurisdiction over the Project. AIA Document B201, *Standard Form of Architect's Services: Design and Construction Contract Administration* §2.4.2 (2007).

See also AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §3.4.2 (2007).

In addition, the initially submitted set of drawings for permit review typically receives some requests for clarifications or changes from the applicable code reviewer. It is very common to have one or more revisions submitted for permit and to have a final, revised set created to conform to the changes, comments, and clarifications of the code reviewer. Some owner-drafted agreements call for architects to guarantee this design, or even to guarantee that the construction, when complete, will comply with "all codes" applicable to the work. The same insurability concerns discussed in §§2.18 – 2.20 above arise from such unequivocal promises. The owner's contractor has responsibility for the quality of its own construction work and for scope that includes elements of design. Sprinkler design, for example is frequently a "design-build" specification left for the tradesmen to conform their work to the applicable code. An architect, however, can agree, to conform to the standard of care, to comply with codes and standards applicable at the time of design, and to utilize this standard when interpreting and including codes and standards in its design.

E. [2.22] Americans with Disabilities Act and Accessibility Laws

Like codes applicable to a project, contract language concerning the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et seq.*, presents a potential insurability problem. As civil rights legislation, the ADA is subject to a great deal of internally conflicting interpretation and frequently conflicts with state accessibility laws. In addition, there are many

accessibility decisions, exclusively in the owner's control, that depend greatly on the owner's intended use and ultimate operation of the project. These conflicts can cause complicated discussions, even when the scope of the contemplated design is fairly limited. A change in the public corridors of a hotel or library, for example, may have an impact on the primary ingress-egress path elsewhere in the facility and require significant accessibility design beyond the scope of the contemplated project. A project architect necessarily wants to limit liability for ADA or accessibility law compliance, and the owner usually wants none of such liability, even if it unfairly imposes liability on the architect.

If the owner wants or needs additional "comfort" for accessibility design, both parties should consider who will retain consultants or procure additional services to provide that comfort. An owner-architect agreement imposing complete responsibility on the architect for all aspects of accessibility compliance then requires the architect to provide additional services or retain additional consultants.

VI. [2.23] SCOPE OF ARCHITECT SERVICES

Contract drafters must pay careful attention to the scope of services of the design professional's duties, as well as corresponding duties of the owner. It should go without saying that the purpose of a written agreement is to define the terms of the agreement. With that in mind, it is hard to imagine what could be more important than defining the scope of services. In fact, the design professional's scope of services with its client binds even strangers to the contract. Those nonparties might include plaintiffs in worker-injury cases or claims brought by subsequent users/visitors. This proposition is a long-standing fixture of Illinois tort law. *Ferentchak v. Village of Frankfort*, 105 Ill.2d 474, 475 N.E.2d 822, 826, 86 Ill.Dec. 443 (1985). Many cases have followed *Ferentchak's* holding.

Naturally, any owner wants to avoid claims for compensation for additional services. A well-defined scope certainly furthers that interest. In addition, if the owner and the design professional have a clear understanding of what is expected from each, then delays, mistakes, and certainly acrimony are much less likely to occur.

Typically, design professional contracts establish a scope of services proceeding from the beginning of the project. For example, these agreements detail the architect's providing a schematic design, leading ultimately to the drawings to be issued for construction. Other terms typically included in the scope of services address whether the design professional is expected to perform further services once the design is complete and construction has begun. For example, is the design professional requested to visit the site during construction? Is the design professional requested to review submittals from the contractor? Is the design professional requested to respond to requests for information (RFIs)? These points are well addressed in standard owner-architect or owner-engineer agreements. Certain abbreviated agreements do not contain as many terms, yet even abbreviated agreements should specify carefully the scope of services.

What to affirmatively exclude is just as important as what is explicitly included. Design professionals want to exclude responsibility for means, methods, techniques, and sequences of construction. They also want to exclude any obligation for safety. Recall that under *Ferentchak, supra*, these exclusions from the scope of services bind nonparties. See, e.g., *Fruzyna v. Walter C. Carlson Associates, Inc.*, 78 Ill.App.3d 1050, 398 N.E.2d 60, 34 Ill.Dec. 385 (1st Dist. 1979).

Another customary exclusion in the scope of services is what to do if hazardous materials are found during construction. Design professionals generally desire no duty at all in that regard, reasoning that any hazardous substances both predated design work and would have been present because of the owner or someone else.

Usually, a provision calling for the owner to supply certain data correspondingly excludes the duty to supply this data by the design professional. For example, an owner is ordinarily required to supply site surveys. The explicit requirement of that duty on the owner removes the duty from the design professional. Another example is a requirement for the owner to provide accounting, legal, and other services.

Owners sometimes retain their own consultants for a limited or specialized purpose. Alternatively, an owner might hire all the design professionals individually. Either approach is legally acceptable, of course.

EXAMPLE: Assume a new concert hall is being built. The owner might retain its own acoustical consultant for such specialized service, apart from the designs of the architect of record. A carefully written agreement needs to enumerate the boundaries between these design professionals, lest the owner pay for an overlap or, equally as bad, learn later of a gap.

In the typical project, an owner hires an architect who, in turn, hires others from various engineering disciplines (e.g., structural, civil, mechanical). The lead architect's aim is to coordinate the services in order to produce a cohesive design of all disciplines. If the owner chooses to hire separately each professional from the various design disciplines, then the owner needs to set carefully the respective scopes of service.

VII. [2.24] CONSTRUCTION ADMINISTRATION BY ARCHITECT

Years ago, the architect's usual services broadly encompassed virtually all services at the jobsite. This was the era of the "master builder." Today, owners may employ a design-builder, yet design-build is not for everyone. When employing a design professional for design services, many owners further insist that the design professional visit the site during construction to provide the owner with "satisfaction" or "peace of mind" that the design (for which many dollars have been paid) is being followed. In that respect, the design professional enhances the likelihood that the owner will receive the project that it anticipates.

On the other hand, not all owners desire that design professionals provide even occasional field observation services. Alternatively, some owners (e.g., Illinois State Toll Highway

Authority) retain one engineer to design bridges and roads and retain a different outside engineer to provide services during construction. Some owners want to avoid the additional cost of design professional visits. Such owners may believe their contractor is competent, trustworthy, and otherwise not in need of the continued involvement of the design professional.

While the majority of design professionals want to see their projects come to life in the field, a minority take a different view. This minority believes that site visits are a dangerous source of potential liability. For example, many injured workers have named design professionals as defendants in lawsuits. Only in rare cases is the design professional found liable. However, considerable legal fees and headaches are incurred before a likely dismissal. The concern remains that an architect making even occasional visits, nonetheless, can be alleged to have had the duty to see and act upon temporary site conditions (*e.g.*, shaky scaffolds) or improper installation/workmanship issues. A carefully written scope, as noted in §2.23 above, goes a long way toward preventing this. However, plaintiffs and their attorneys (who either do not know the law or are incredibly optimistic) may very well be inclined to name design professionals as defendants once they learn the design professional visited the jobsite on a “regular” basis (whatever frequency that might have been).

An owner needs to have appropriate expectations for its design professional’s visits. In fairness, an engineer cannot be expected to find all workmanship problems on only occasional visits. Owner agreements with design professionals rarely, if ever, call for the design professional to warrant or guarantee compliance by the contractor with the plans and specifications. Indeed, almost always, the opposite is stated. See, *e.g.*, AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §§3.6.2.1, 3.6.2.2 (2007). Simply stated, the design professional cannot be expected to become a guarantor of the contractor’s work.

Apart from site observations, however, there are other duties a design professional might undertake, by contract, to provide during the contractor’s work. These duties are typically referred to as the design professional’s “administering” the contract. In this sense, the design professional — on occasional visits — may be asked to check the actual progress and overall quality of construction against the contractor’s pay request. The design professional might, by contract, be asked to provide a review of change-order requests from the contractor. Obviously, the design professional might be asked to comment upon requests for information or other questions from the contractor. Again, the standard contract forms will clarify the design professional’s duties during construction so that duties may be added or subtracted for the project at hand.

Regarding worker-injury lawsuits, both owners and design professionals should fully disclaim any obligation for the safety of the contractors’ employees. If they do not, they can expect to be named as defendants in such lawsuits. Even under the now repealed Structural Work Act, Illinois courts uniformly ruled that the disclaimer by the design professional of any involvement in construction means, methods, techniques, sequences, and safety of construction would result in summary judgment. See *Fruzyna v. Walter C. Carlson Associates, Inc.*, 78 Ill.App.3d 1050, 398 N.E.2d 60, 34 Ill.Dec. 385 (1st Dist. 1979). Owners should take a similar stand in owner-contractor contracts. The importance of such disclaimer of duty cannot be stressed enough. Silence on this subject, unfortunately, will often lead to the design professional or owner being added as a defendant in worker-injury lawsuits.

How much should the design professional reasonably be expected to observe at the site? What should the architect catch? Obviously, both answers depend in large measure on how frequent the visits are. Several issues arise on this point. First, design professionals look, during the course of construction, to see whether the construction, when finally completed, will meet the drawings and specifications. See, *e.g.*, B101 §3.6.2.1. This necessarily means that temporary conditions or contractor methods of doing the work are not likely to be observed. Most design professionals refer to their service as “observation,” not “inspection” and surely not “supervision.” The Illinois Supreme Court in *Miller v. DeWitt*, 37 Ill.2d 273, 226 N.E.2d 630 (1967), premised the architect’s liability for what arguably was an improper work method by the contractor due to the architect’s undertaking “supervision.” Design professionals typically no longer undertake so detailed a scope of construction services, and thus the foundations of *Miller* rarely apply now.

Contractor-selected means and methods of doing the work are usually the essential cause of worker-injury claims. Design professionals should disclaim explicitly any duty to review means, methods, techniques, sequences, or safety. If disclaimed, the contract language governs even against injured workers. Owners should take no lesser stance.

The project architect’s level of observation depends on numerous factors, including, among other things, the perceived skill and experience of the contractor, the complexity of the design, the frequency of the visits, and the owner’s stated expectations. In every instance, whatever observations the design professional provides do not relieve the contractor of full compliance with appropriate construction practices and results.

The authors of this handbook believe a vast majority of lawsuits involving design professionals stem from construction administration duties. Of course, design errors or design omissions can give rise to claims; however, such claims usually are a small percentage when compared to construction administration, construction involving worker-injury claims, construction delay claims, payment questions, and the like. Note in §2.27 below, how the design professional might be declared the “the initial decision maker” for the first run of the claims processed. This would be another example and feature of construction administration.

VIII. [2.25] FEES

Fees for architectural services are generally payable monthly as the project proceeds, but total fees can be based on a number of methods. Hourly fees can be used, but the more common approach is use of a fixed fee or a fee based on a percentage of construction cost so that the owner can budget for various ranges of fees. Percentage fees can include contingencies for various construction budget ranges, using a larger percentage for construction costs up to a certain level, with slightly lower percentages for construction costs above that level. The advantage of paying or receiving a percentage fee is its certainty and lack of need for renegotiation as the budget becomes more refined. The disadvantage comes from the variability of construction costs that may have nothing to do with a change in the hours expended and that are outside the control of either party.

A. [2.26] Phased Fees

Fees are typically estimated and then spread over various phases of design and construction. The phased payments, however, may be spread out to equalize cash flow more than to compensate for each phase's work. See AIA Document B201, *Standard Form of Architect's Services: Design and Construction Contract Administration* §6.5 (2007); AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §11.5 (2007). While 20 percent of the architect's fee may be payable during the construction phase, that percentage may have little relationship to the number of hours worked during that phase. For an owner, it is important not to pay for work faster than it is being performed. For the architect, the vast majority of hours and services may be rendered by the time construction begins. These amounts, phases, and frequency of payment can be negotiated.

B. [2.27] Additional vs. Basic Services

"Basic services" are defined in phases and types of work in AIA Document B201, *Standard Form of Architect's Services: Design and Construction Contract Administration* art. 2 (2007), and AIA Document B101, *Standard Form of Agreement Between Owner and Architect* art. 3 (2007). "Additional services" — essentially all services that are not basic services — are defined later. To avoid confusion, Article 3 of B201 identifies a matrix of responsibilities (B201 §3.1) and two lists of potential additional services (B201 §3.3). One list requires advance approval. B201 §3.3.1 (similarly provided in B101 §§4.1 and 4.3) provides as follows:

- .1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, but not limited to, size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method;**
- .2 Services necessitated by the Owner's request for extensive environmentally responsible design alternatives, such as unique system designs, in-depth material research, energy modeling, or LEED[®] certification;**
- .3 Changing or editing previously prepared Instruments of Service necessitated by the enactment or revision of codes, laws or regulations or official interpretations;**
- .4 Services necessitated by decisions of the Owner not rendered in a timely manner or any other failure of performance on the part of the Owner or the Owner's consultants or contractors;**
- .5 Preparing digital data for transmission to the Owner's consultants and Contractors, or to other Owner authorized recipients;**
- .6 Preparation of design and documentation for alternate bid or proposal requests proposed by the Owner;**
- .7 Preparation for, and attendance at, a public presentation, meeting or hearing;**

- .8 Preparation for, and attendance at a dispute resolution proceeding or legal proceeding, except where the Architect is party thereto;**
- .9 Evaluation of the qualifications of bidders or persons providing proposals;**
- .10 Consultation concerning replacement of Work resulting from fire or other cause during construction; or**
- .11 Assistance to the Initial Decision Maker, if other than the Architect.**

The list in B201 §3.3.2 does not require advance approval, but

[i]f the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Architect, and the Owner shall have no further obligation to compensate the Architect for those services:

- .1 Reviewing a Contractor's submittal out of sequence from the submittal schedule agreed to by the Architect;**
- .2 Responding to the Contractor's requests for information that are not prepared in accordance with the Contract Documents or where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;**
- .3 Preparing Change Orders and Construction Change Directives that require evaluation of Contractor's proposals and supporting data, or the preparation or revision of Instruments of Service;**
- .4 Evaluating an extensive number of Claims as the Initial Decision Maker;**
- .5 Evaluating substitutions proposed by the Owner or Contractor and making subsequent revisions to Instruments of Service resulting therefrom; or**
- .6 To the extent the Architect's Basic Services are affected, providing Construction Phase Services 60 days after (1) the date of Substantial Completion of the Work or (2) the anticipated date of Substantial Completion, identified in Initial Information, whichever is earlier.**

Finally, B201 §§3.3.3 and 3.3.4 establish included frequencies for submittal reviews, site visits, and inspections; and provides for finite completion time for all project work — above which will be treated as additional services. It is important that these be filled in to add certainty to the defined basic services.

For the architect and for the owner, it is important to identify in advance those charges that will be deemed additional and the procedures for their approval. Many owners will not pay for additional charges not approved in advance or over which they have no control (e.g., contractors' requests or an undefined "extensive" number of claims). It is important to discuss and define the terms that will be used to justify additional services and the procedures for notice and approval. No architect wants to surprise a client with additional services, and no owner wants to be surprised with a significant expense. For the owner's protection, provisions modifying or deleting the language in B201 §3.3.2 or B101 §4.3, permitting additional services to proceed without advance owner approval, may use language like the sample paragraphs (separately or in combination) below:

Notwithstanding anything to the contrary in this Agreement, the Architect shall not proceed with, nor be entitled to be paid for, any Additional Services not approved in writing and in advance of performance of such Additional Services.

Notwithstanding anything to the contrary in this Agreement, the Owner shall not be responsible to pay, and the Architect shall not be entitled to receive compensation, for any Change in Services if such services were required due to the fault of the Architect or the Architect's failure to perform in accordance with the terms of this Agreement or the degree of care and skill employed by architects in Illinois on similar projects.

The Architect acknowledges that the Owner is not a design professional and the Owner's review or approval of any plans, specifications, or other materials provided by the Architect is solely for consistency with the Owner's overall program. The Owner's review or approval of any plans, specifications, or other materials provided by the Architect shall not limit the Architect's responsibility for the services provided under this Agreement or relieve the Architect of any responsibilities under this Agreement.

C. [2.28] Reimbursable Services

As in any business, architects have expenses that customarily are billed to clients. Some owners use their own lists and have their own procedures for approval. Article 6 of AIA Document B102, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services* §6.2 (2007), defines "Reimbursable Expenses" as follows:

Reimbursable Expenses are in addition to compensation for the Architect's professional services and include expenses incurred by the Architect and the Architect's consultants directly related to the Project, as follows:

- .1 Transportation and authorized out-of-town travel and subsistence;**
- .2 Long distance services, dedicated data and communication services, teleconferences, Project Web sites, and extranets;**
- .3 Fees paid for securing approval of authorities having jurisdiction over the Project;**

- .4 Printing, reproductions, plots, standard form documents;**
- .5 Postage, handling and delivery;**
- .6 Expense of overtime work requiring higher than regular rates, if authorized in advance by the Owner;**
- .7 Renderings, models, mock-ups, professional photography, and presentation materials requested by the Owner;**
- .8 Architect's Consultant's expense of professional liability insurance dedicated exclusively to this Project, or the expense of additional insurance coverage or limits if the Owner requests such insurance in excess of that normally carried by the Architect's consultants;**
- .9 All taxes levied on professional services and on reimbursable expenses;**
- .10 Site office expenses; and**
- .11 Other similar Project-related expenditures.**

For the owner, it is important to avoid surprises; therefore, it is reasonable to either negotiate an allowance or not-to-exceed figure, or to require advance approval for certain types of or large expenses. Architects frequently do seek to recover some administrative cost over the actual cost of such expenses. Such amounts are frequently negotiated and can range anywhere from zero to fifteen or twenty percent.

IX. [2.29] RISK SHIFTING

Owners and design professionals will naturally seek to shift risks in their agreements. They do so in many different respects. A discussion of many such issues is found in §§2.30 – 2.41 below:

A. [2.30] Additional Insured Status

An owner might demand its design professional carry certain specified insurance coverages; that owner might also demand that it be made an additional insured on such coverages. Owners can certainly be added as additional insureds on general liability or automobile liability, but they will not be so added for workers' compensation/employer liability coverages of the design professional. By definition, the owner is not the employer! As well, the owner cannot be added to the professional liability policy. Such coverage is limited to licensed design professionals. Even when the owner happens to be so licensed, additional insured status is rarely if ever extended to anyone else. An owner who functions only as an owner need fear no tort liability from others who might assert the design was erroneous.

Both owners and design professionals might seek to become an additional insured on a contractor's or construction manager's policy. For the owner, the question is largely one of financial cost and leverage. Again, the owner need not and will not be named as an additional insured on workers' compensation/employer liability coverages.

Design professionals with additional insured status on a contractor's policy should be protected for general liability and automobile liability coverages. However, an important and quite typical exclusion needs to be noted for the general liability policies. Just as the design professional's own general liability policy is intended to dovetail, not overlap, the design professional's professional liability policy, so, too, a contractor's general liability policy rarely has coverage for professional liability claims. For example, in *Prisco Serena Sturm Architects, Ltd. v. Liberty Mutual Insurance Co.*, 126 F.3d 886, 890 – 891 (7th Cir. 1997), an architect allegedly, negligently performed various observation duties. Although the court determined that there was an "occurrence," nonetheless, the professional-acts exclusion barred coverage.

Indeed, an older decision held that even an allegation that the architect negligently constructed a scaffold, which certainly sounds like general liability, nonetheless triggered the professional-acts exclusion because the court determined it is well known that architects do not actually construct such scaffolds. Architects might observe them, but observation is professional, not general, liability. *See Wheeler v. Aetna Casualty & Surety Co.*, 11 Ill.App.3d 841, 298 N.E.2d 329 (1st Dist. 1973), *vacated as moot*, 57 Ill.2d 184 (1974). In short, design professionals might do well to insist on being covered for general liability purposes. Yet they must have realistic expectations of how a plaintiff's complaint will ultimately be interpreted in view of the professional-acts exclusion.

Some additional insureds seek to bolster their additional insured status by demanding that the status be in place before work begins. They may even insist that no work take place until the status has been so arranged. In one case, the court declared the owner to have waived the contractor's obligation to provide additional insured coverage once the owner, despite the strong contract language, allowed the work to begin. *See, e.g., Whalen v. K-Mart Corp.*, 166 Ill.App.3d 339, 519 N.E.2d 991, 116 Ill.Dec. 776 (1st Dist. 1988). Better drafting calls for an explicit non-waiver on a contractor's purported failure to so perform. Cases concerning the duty to buy insurance are legend. A careful practitioner should investigate them carefully.

What insurance should an owner demand of its architect? Typically, limits are dependent on the size of the project and the size of the architect's firm, tempered by the likelihood the architect will seek additional fees should it have to purchase higher limits for that project. Qualitatively, owners should call for a certificate of insurance demonstrating the architect has professional liability, general liability, automobile liability, and, certainly, workers' compensation/employer liability. Because the professional liability policy is a "claims-made" policy as opposed to an "occurrence" policy, an owner might demand the architect agree to carry the professional liability policy for a few years after completion. Unless an owner checks in the years that follow, an architect's breach of that requirement may leave the owner with no remedy.

B. [2.31] Indemnification

Until 1971, indemnity clauses were customarily employed by anyone exercising any economic leverage to demand indemnification for attorneys' fees, expenses, costs, judgments, or settlements (or some combination thereof). However, effective 1971, the Construction Contract Indemnification for Negligence Act (Indemnification Act), 740 ILCS 35/0.01, *et seq.* (formerly, the Anti-Indemnity Act) was passed.

C. [2.32] Illinois Indemnification Act

Section 1 of the Construction Contract Indemnification for Negligence Act provides:

With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable. 740 ILCS 35/1.

Cases construing the Indemnification Act have made it clear that the Act will be applied broadly. Indeed, many believe there is almost no activity touching on construction for which the Act would not apply. Apart from the obvious application for workmanship, the Act has been applied for construction-related services (*e.g.*, crane rentals). By its terms, however, the Act does not prohibit agreements to purchase or provide insurance. Thus, risk-shifting for Illinois projects clearly revolves around insurance and no longer indemnity agreements.

So, why might parties still have indemnity clauses in their agreements long after 1971? The Illinois Supreme Court answered that question in *Braye v. Archer-Daniels-Midland Co.*, 175 Ill.2d 201, 676 N.E.2d 1295, 222 Ill.Dec. 91 (1997). There, the court held that by the employer's agreeing to a standard indemnity/hold harmless agreement in its contract with the general contractor, it did expose itself to unlimited liability in a contribution action. Thus, the court's earlier ruling in *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 585 N.E.2d 1023, 166 Ill.Dec. 1 (1992), was contractually abrogated.

Generally, owners and design professionals will desire language that purports to waive the *Kotecki* limitation of contribution involvement by the employer of an injured worker. *Braye* holds that such waivers can be accomplished by a typical indemnity clause.

The American rule provides, generally, that each party bears its own attorneys' fees unless a contract or statute explicitly provides to the contrary. Indemnity agreements often provide that the indemnitor will pay the attorneys' fees of the indemnitee. In a construction setting, because of the Indemnification Act, what might be a proper attorney fee-shifting clause will often be nullified because the clause as a whole will be deemed void. If the goal is to provide that the prevailing party shall recover attorneys' fees, better drafting demands that no provision contain language that will look in any way like a void indemnity clause.

D. [2.33] Waiver of Consequential Damages

In the last 10 – 12 years, standard form owner-architect agreements have typically called for the waiver of “consequential damages.” Lawyers and their clients have often wondered as to the value and scope of such clauses.

A must-read case for Illinois lawyers concerning consequential damages is *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill.2d 306, 515 N.E.2d 61, 113 Ill.Dec.252 (1987). Many practitioners believe lost profits are automatically a consequential damage and, in view of a purported waiver, simply cannot be recovered. *Midland Hotel*, however, teaches that lost profits might very well be recoverable compensatory damages and not waived consequential damages. In *Midland Hotel*, a hotel sued the publisher of a telephone directory for failing to list the hotel in the correct classification of the directory. The hotel sought lost profits. The publisher sought to characterize those lost profits as consequential damages that, in turn, would have been recoverable only if within the reasonable contemplation of the parties when the contract was executed. The court in *Midland Hotel* held that the lost profits were not collateral to the contract with the defendant and simply were not consequential damages. 515 N.E.2d at 67. The court noted that the very purpose of the listing was to increase profits, and those profits formed the basis of its contract with the defendant. It cannot be said that such profits, were only collateral to the contract. Thus as the plaintiff’s lost profits were a direct and foreseeable consequence of the defendant’s breach as a matter of law, the trial court properly refused to tender a “reasonable contemplation” instruction to the jury. *Id.*

Thus, despite a waiver of consequential damages clause, an owner might still recover damages for loss of use of a facility not completed on time. *Midland Hotel*, with its “basis of the contract” approach, allows for a broader recovery of compensatory damages than what many practitioners might at first think likely. *Id.* Damages not within the reasonable contemplation of the parties, such damages not being a direct and foreseeable consequence of a defendant’s breach, are those damages likely to be deemed waived by a waiver of consequential damages clause. As an example, lost profits might be recoverable, but an injury to reputation resulting in the loss of a future job might well be deemed a consequential damage.

E. [2.34] Limitation of Liability

Design professionals often consider using limitation of liability clauses to their economic benefit. Illinois law has long applied pre-tort liability releases and indemnity — outright bars, in certain instances (*e.g.*, drag racing). Limitations of liability have been applied in other contexts such as service contracts with fire alarm companies. No Illinois case has squarely addressed limitation of liability clauses in an owner-design professional agreement. The authors of this chapter believe, however, that a properly drafted agreement would be upheld, as they have been in other jurisdictions. *See, e.g., Valhal Corp. v. Sullivan Associates, Inc.*, 48 F.3d 760 (3d Cir. 1995) (Pennsylvania law). A good drafting technique is to copy from a reported decision a limitation of liability clause rather than drafting one anew. During contract negotiations, the clause might create some discussion; after the fact, however, rest assured that each word will be parsed. At this time, a careful drafter reveals that the clause came from a reported decision and lets stare decisis take on the battle of persuasion.

F. [2.35] Waiver of Subrogation

Standard agreements often call for a “waiver of subrogation.” The intent is to prevent the insurer of a party from shifting the insurer’s risk to third parties. Generally, subrogation cannot be accomplished in the name of one insured against another. Thus, if all parties at the site are insureds on the builders risk policy, subrogation is, generally, rather limited.

Take, however, a case in which there is no global property loss policy. The owner’s property insurer might seek to subrogate against the architect of record or contractor for losses during construction, perhaps even afterward.

Because many construction professionals and their counsel do not understand waivers of subrogation, such waivers are often freely allowed — simply for the asking. Parties should consult their insurers as a waiver given without permission might amount to a “voluntary payment” and cause a loss of coverage.

Parties often desire a waiver of subrogation clause to preserve good working relations developed during the construction project. After all, the insurance carrier for an owner who sues other parties on the site hardly enhances the owner’s standing among all. Subrogation actions can engender retaliatory counterclaims. Many find it morally wrong to allow a carrier — which was already paid a premium to accept the risk in the first place — to seek repayment from others. If a given loss is not insured in the first place, then the waiver of subrogation clause is moot anyway.

G. [2.36] Coordinating Risk-Shifting Clauses

Unfortunately, contracts between the lead design professional and its consultants are typically less well crafted than the contract between the owner and the lead design professional. The owner-architect agreement of 10 – 20 pages contrasts greatly with a 3 – 4-page consultant agreement. Just as general contractors use “flow-down” clauses with their subcontractors, so too might the lead design professional do so with its consultants. As with so many contract provisions, clear, concise, and unequivocal language leads to the desired result.

Flow-down clauses are not without their questions. One rule of thumb has been that such clauses dealing with scope, quality, character, and manner of the work flow down, whereas provisions that might be considered ancillary do not necessarily flow down unless the provision is specifically incorporated in the consultant’s agreement. For example, dispute resolution provisions should be specifically spelled out. Many typical flow-down clauses suffer from their broadness. For example, consider the following:

The Architect binds itself to its consultant under this Agreement in the same manner as the Owner is bound to the Architect under the Owner-Architect Agreement.

Coordination between the prime agreement and the consultant agreement should be actively pursued rather than the subject of an afterthought, simple, flow-down clause. Direct and specific incorporations by reference should be the rule rather than the exception. Good drafters focus on

the provisions that will become pivotal at the end of the contract's performance and even post-completion. These provisions include, among others, dispute resolution, limitation of liability, accrual of actions/contractual statutes of limitation, consequential damage waivers, and subrogation waivers.

When standard form agreements are used between an owner and a lead design professional, those same standard form agreements should be followed in agreements with sub-consultants. This way, the likelihood of terms carrying the same definitions is substantially enhanced. Moreover, there is a greater likelihood that the breadth of terms is more likely to match the prime agreement. For example, if the owner reserves the right to terminate the architect's agreement "for convenience" as a provision in the standard prime agreement, it is apt to be referenced in the consultant's agreement in a consistent fashion. In short, coordination is a must, not a luxury!

H. [2.37] Statute of Limitations and Repose

The work of architects is normally subject to the statute of limitations found at 735 ILCS 5/13-214(a). This provides a four-year period within which to bring an action that relates to design or construction of a building. 735 ILCS 5/13-214(b) provides for a ten-year period of repose. The difference between statutes of limitation and repose is not well understood and requires an understanding of the discovery rule.

A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action. The injuries need not have occurred, much less have been discovered. *Hinkle v. Henderson*, 85 F.3d 298, 301 (7th Cir. 1996),

The discovery rule, as codified by 735 ILCS 5/13-214(b), sets the start of the statute of limitations as the time when a party discovers, or reasonably should know, that an act or omission may have caused that party damages. The actual statute of limitations, §13-214(a), is four years as of this writing. Once a party, through the exercise of reasonable care, knows or should know of some act or omission, the party has four years to file suit. If the party does not discover the error or omission until after ten years, the action is barred. However, if the party discovers the error or omission prior to ten years, the party will still have four years to file suit. Thus, the maximum exposure period related to construction will be fourteen years (ten plus four), except in unusual circumstances.

Parties can establish their own limitations period. *Federal Insurance Co. v. Konstant Architecture Planning, Inc.*, 388 Ill.App.3d 122, 902 N.E.2d 1213, 327 Ill.Dec. 827 (1st Dist. 2009). For instance, AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §8.8.1 (2007), sets an outside time limit for filing suit at ten years:

The Owner and Architect shall commence all claims and causes of action, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute

resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

Prior versions of the AIA owner-architect agreement established the date of substantial completion as the start of the statute of limitations, thereby eliminating the need for the statute of repose (e.g., AIA Document B151, *Standard Form of Agreement Between Owner and Architect* §9.3 (1997) (B151 was retired May 2009)). Courts have upheld such provisions. See *Federal Insurance, supra*. Under such agreements, a party had only four years after substantial completion to initiate litigation; otherwise, the action was barred.

I. [2.38] Substantial Completion

The date of substantial completion of a project is important for a number of reasons, including statute of limitations. The “substantial completion,” as defined in AIA Document A201, *General Conditions of the Contract for Construction* §9.8.1 (2007), is as follows:

Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

At the appropriate time (usually upon notice and demand of the contractor), the architect should issue a document entitled “Certificate of Substantial Completion.” This sets forth an actual date when substantial completion of the project occurred. The document is distributed to the owner, the contractor, and other interested parties. If anyone objects to the accuracy of the date of substantial completion, the objection can be put in writing. Otherwise, the date shown in the certificate will almost certainly survive a later challenge. However, this document is often not issued. In lieu of this document, a certificate of occupancy issued by the local municipality is often used in establishing the date of substantial completion, although there may be problems with this approach, particularly when there is a close call on the running of the statute of limitations.

J. [2.39] Importance of Coordination with Sub-Consultant Agreements

In general, it is important that the architect’s contract with its sub-consultants track the owner-architect agreement. This is even more important regarding the running of the statute of limitations. If a problem is caused by an architect’s consultant, the owner can bring an action against the architect. The architect needs to bring its own action against the consultant in order to avoid being significantly out of pocket. If, for example, the owner-architect agreement uses the 2007 AIA documents and the architect uses an older version of the AIA agreements with its consultant, it is entirely possible that an action that was brought more than four years after substantial completion will survive against the architect, but the statute of limitations will have run as between the architect and its consultant, leaving the architect caught in the middle.

K. [2.40] Claims and Initial Decision Maker

Traditionally, the construction industry has followed the procedures set forth in AIA Document A201, *General Conditions of the Contract for Construction* §9.8.1 (2007), for general conditions. If a claim arises, A201 art. 15 sets forth a process to resolve this claim. Although any party can have a claim, the typical claim is by the contractor or one of its subcontractors. In general, the claim initially must be submitted to the initial decision maker (IDM) as of the 2007 version of the AIA documents. By default, this person is the architect, as was historically the case. As of 2007, however, the owner and contractor are free to choose someone other than the architect to be the IDM. If possible, the architect should not undertake the role of IDM, as described in §2.41 below.

Note that as long as the architect (or IDM) is acting as a neutral decision maker, akin to an arbitrator, the architect will enjoy quasi-judicial immunity. *Craviolini v. Scholer & Fuller Associated Architects*, 89 Ariz. 24, 357 P.2d 611 (1961), is perhaps the leading case on this topic. *See also Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962) (architects are immune only if acting within their jurisdiction in judicial capacity). Thus, in this neutral role, architects face liability only if they act in bad faith as a neutral. Negligence is not the standard of care for this role of the architect.

Once a claim is submitted to the IDM for an initial decision, A201 provides the parties with a series of steps to be taken by the parties and the IDM in arriving at the initial decision, or in declining to make an initial decision. If the owner and contractor are satisfied with this decision, a change order can be executed to finalize the claim and modify the contract in terms of cost and/or time. Alternatively, a settlement agreement can memorialize the agreement. If one or both parties are not in agreement with the initial decision, the next step is nonbinding mediation, followed by either binding arbitration or litigation, depending on which final dispute resolution method was selected in the owner-contractor agreement. Note that under A201 §15.2.1, an initial decision is a condition precedent to mediation, which, in turn, is a condition precedent to arbitration or litigation. If the IDM fails to make a timely decision after the claim is referred to the IDM, the parties may proceed to mediation.

A little noticed or used provision of the 2007 version of A201 can make the initial decision final:

Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.
A201 §15.2.6.1.

In practice, the party in whose favor the initial decision has been made should immediately make the 60-day demand of the other party. If the other party then fails to initiate mediation within that time limit, the initial decision becomes final and binding, much like an arbitration award. An earlier, similar provision was also found in AIA Document A201 *General Conditions of the Contract for Construction* §4.4.6 (1997) (expired May 31, 2009).

L. [2.41] Risks for Architect as Arbiter

If the architect is the initial decision maker, there are certain risks that may not be worth the trouble. First, the owner might not be willing to pay the architect to properly perform this function, particularly if the decision goes in favor of the contractor. If the claim is made after the architect has closed its file on the project, the owner will be even more reluctant to pay the architect. Second, the architect is paid by the owner and not the contractor. The owner believes that the architect owes the owner a duty of loyalty. This can create obvious problems for the architect and may sway, or at least appear to sway, the decision reached by the architect. The owner may put extreme pressure on the architect to make the decision favorable to the owner. Third, if the architect makes a mistake, such as failing to issue a written decision so that the owner can issue the 60-day demand under AIA Document A201, *General Conditions of the Contract for Construction* §15.2.6.1 (2007), the architect may be liable to the owner for this omission. For these reasons, the architect should not be the IDM.

X. [2.42] BUDGET AND COST ESTIMATES

Most owner-architect agreements contain provisions whereby the architect has some responsibility for the cost of the project. In the usual course of things, this means that, once a budget for the project is established, the architect must design the project so that it can be constructed for the budgeted cost. The contract can assign responsibility and liability for this in a number of ways as discussed in §§2.43 – 2.46 below. When drafting budget and cost provisions, the parties should understand the real-world limitations. While owners assume that all architects are experts in construction costs, the reality is that most architects generally have only a vague understanding of these costs. Forecasting costs over a number of years, as is required to provide good estimates for large projects, is difficult and best left to persons better equipped for this task, such as contractors, construction managers, and professional estimators. Material costs can be changed dramatically by major world events such as hurricanes or wars. Even in good times, labor shortages can drive up costs. Strikes can cause delays and increase costs. For these and many other reasons, forecasting costs is, at best, an art and not a science. A contingency in any budget is a must. Owners must understand that an architect cannot guarantee that the project will wind up costing any particular amount.

A. [2.43] Fixed Limit of Construction Cost

Owner-architect agreements prepared by the AIA usually have had either a “fixed limit of construction cost” provision or the opposite — a “no fixed limit” provision. (Until the 2007 version of the AIA agreements, the owner-architect agreements fell in the latter category.) Essentially, the contracts provide that the parties define the scope of the project as best they can. At the early stages, the architect gives very rough cost estimates to the owner, based on cost per square foot for the type of building. Later, as the project becomes better defined and major systems become known, the cost estimates should also become more refined. In many cases, the owner has a limited sum of money to make available for construction, and the architect is tasked with designing a building within that budget. Normally, the owner is free to modify the budget for any number of reasons. Sometimes, the project that the owner desires simply cannot be built for

the dollars available and still meet code and other requirements. In such a situation, the architect advises the owner to either scale back the project or increase the budget. If the contract has a fixed-limit provision, the architect still does not guarantee the cost but takes the risk that the drawings will have to be redone at no additional charge to the owner if the bids come in over budget. Under a no-fixed-limit provision, the owner takes that risk, with the architect being paid to redraw the project in such a case.

AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §6.2 (2007), includes this language:

The Owner's budget for the Cost of the Work is provided in Initial Information, and may be adjusted throughout the Project as required under Sections 5.2, 6.4 and 6.5. Evaluations of the Owner's budget for the Cost of the Work, the preliminary estimate of the Cost of the Work and updated estimates of the Cost of the Work prepared by the Architect, represent the Architect's judgment as a design professional. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment; the Contractor's methods of determining bid prices; or competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's budget for the Cost of the Work or from any estimate of the Cost of the Work or evaluation prepared or agreed to by the Architect.

This provision states that the budget may be adjusted from time to time by the owner and that the architect's estimates are not guarantees. An architect who guarantees such estimates is likely to find that its professional liability insurance does not cover a claim relating to such a guarantee of cost.

B101 §§6.6 and 6.7 provide as follows:

§6.6 If the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall

- .1 give written approval of an increase in the budget for the Cost of the Work;**
- .2 authorize rebidding or renegotiating of the Project within a reasonable time;**
- .3 terminate in accordance with Section 9.5;**
- .4 in consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or**
- .5 implement any other mutually acceptable alternative.**

§6.7 If the Owner chooses to proceed under Section 6.6.4, the Architect, without additional compensation, shall modify the Construction Documents as necessary to

comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. The Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6.

B101 §§6.6 and 6.7 above are the sections that make the B101 agreement a fixed-limit contract. Note that if the bids come in too high, the owner can modify the program and require the architect to redraw the project to reflect the various changes, hopefully bringing the project within the budget. Of importance is the final sentence, limiting the architect's liability for the budget overruns to providing free services. The owner may want to eliminate this last sentence as a way of making the architect liable to the owner if the owner decides that rebidding is not a viable option and wants to sue the architect for damages. Of course, the architect would then likely protect itself by increasing the contingency and designing for an even lower budget. As a result, the owner may wind up with a building that is well under budget but without amenities that the owner could have had if the architect had more leeway in designing the building.

B. [2.44] Options When Bidding Exceeds Budget

Under AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §6.6 (2007), the owner has several options if the bids exceed the budget. If the owner wants the building the architect has designed and does not want to modify it and also does not believe that rebidding will help, the owner can simply agree to accept one of the bids. This then becomes the new budget, and the project continues from there.

Occasionally, a good option is to simply rebid the project. Perhaps there were too few bidders the first time, or the labor situation was bad at that particular time. The only downside to this is the time required to rebid, thereby delaying the project.

A third option is simply to terminate the project. Under this scenario, the owner loses most, or even all, of the costs involved with the project to date.

The fourth option is to modify the project, as discussed above. The architect would do this additional work at no charge. Often, the owner works with one of the bidders to identify areas where costs can be reduced, a process often referred to as "value engineering."

The project can also be put on "hold" until conditions improve. This falls under the fifth option in B101 §6.6. If this is implemented, the owner should negotiate with the architect as to the use of the drawings and the owner's ability to hire other architects to complete the project.

C. [2.45] Fast-Track and Multiple-Bid Packages

The term "fast track" refers to a process whereby construction begins before all of the drawings and specifications are completed. The purpose is to accelerate the construction process, thereby opening the project sooner, saving money in terms of carrying costs, interest charges, and the like. The major downside is that, almost certainly, there will be coordination problems and more errors in the drawings and specifications, resulting in an increase in the number of change

orders during construction, thereby increasing the costs. Although the standard of care provision in the contract (e.g., AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §2.2 (2007)) arguably covers the increased error rate to be expected from fast-track documents, it is preferable to spell out the expected standard of care under such conditions.

Multiple-bid packages are often used when the owner uses a “true” construction manager in place of a general contractor. In the typical situation, the owner hires a single general contractor who, in turn, hires various subcontractors. The general contractor coordinates the work of the various subcontractors, is responsible for them, and pays them. In return, the general contractor charges a fee that can be substantial. If the owner hires the subcontractors directly, the owner hopes to save this fee. The owner’s construction manager normally takes the responsibility for coordination. For the architect, preparing multiple-bid packages is more expensive than a single package, and the fee should reflect this if this is negotiated at the outset. In addition, the architect will be working on multiple phases at the same time. This is covered in AIA Document B103, *Standard Form of Agreement Between Owner and Architect for a Large or Complex Project* §11.5 (2007) (B103):

The Owner acknowledges that with an accelerated Project delivery or multiple bid package process, the Architect may be providing its services in multiple Phases simultaneously. Therefore, the Architect shall be permitted to invoice monthly in proportion to services performed in each Phase of Services, as appropriate.

The agreement should so state if fast-track or multiple-bid prime contracts are intended to be used, and B103 should be considered. If such a decision is made at a later point, the parties should consider an amendment to the owner-architect agreement to cover issues that will arise under these circumstances.

D. [2.46] Payment Certifications

Historically architects have reviewed payment or draw requests from general contractors and accompanied such reviews with limited certifications or representations. Article 2 of AIA Document B201, *Standard Form of Architect’s Services: Design and Construction Contract Administration* §§2.6.3.1, 2.6.3.2 (2007), recites a traditional approach to such certifications:

§2.6.3.1 The Architect shall review and certify the amounts due the Contractor and shall issue certificates in such amounts. The Architect’s certification for payment shall constitute a representation to the Owner, based on the Architect’s evaluation of the Work as provided in Section 2.6.2 and on the data comprising the Contractor’s Application for Payment, that, to the best of the Architect’s knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject (1) to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, (2) to results of subsequent tests and inspections, (3) to correction of minor deviations from the Contract Documents prior to completion, and (4) to specific qualifications expressed by the Architect.

§2.6.3.2 The issuance of a Certificate for Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

See also AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §3.6.3 (2007).

Some owner form agreements provide for much more stringent review and certification of compliance with the plans and specifications, essentially shifting risk of contractor performance to the architect. The architect is not typically on site every day and not performing (or in privity with those performing) construction work. An architect's ability to review and certify may be properly limited to what is observable or verifiable. Latent conditions or additional requirements of construction lenders or title insurers may justify or require independent reviewers or a greater scope of architectural services (and corresponding fees) during the construction phase.

XI. [2.47] SUBMITTALS AND SHOP DRAWINGS

Architectural drawings and specifications typically require more information on fabrication or installation for various components of construction. Some of those elements require the installing contractor or fabricator to verify that their proposed component meets the intent of the design. However, architects are not fabricators or installers and do not have a contractual relationship with the contractors, fabricators, or installers. Design, fabrication, construction, and installation therefore all converge contractually and practically in a process intended to be a check or balance before fabrication or delivery. AIA Document B201, *Standard Form of Architect's Services: Design and Construction Contract Administration* §2.6.4.2 (2007), provides:

In accordance with the Architect-approved submittal schedule, the Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

See also AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §3.6.4.2 (2007).

It is important to note that this language is repeated in AIA Document A201, *General Conditions of the Contract for Construction* §4.2.7 (2007), and any changes made to the architect's agreement should be coordinated with those general conditions.

With respect to elements of the project actually engineered by contractors or their fabricators or suppliers, the architect typically disclaims responsibility to re-engineer the component and instead is entitled to rely on the outside engineer's certification. B201 §2.6.4.3 provides as follows:

If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review shop Drawings and other submittals related to the Work designed or certified by the design professional retained by the Contractor that bear such professional's seal and signature when submitted to the Architect. The Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals.

See also B101 §3.6.4.3 (similar treatment).

The architect's scope of work, however, can be expanded to include such reengineering, usually with compensable additional services, or reimbursement of the additional services provided by a consultant.

The submittal and shop drawing process usually involves each of the contractors in the chain (supplier — subcontractor — general contractor) (a) affixing a stamp attesting to review for compliance with the plans and specifications, and ultimately, (b) review and a stamp by the architect (or architect and appropriate sub-consultant). It can be appropriate contractually to require everyone in the chain or supply or privity to stamp the submittal before the architect is required to review it. It also can be appropriate to require the architect to respond within a reasonable time. Architects frequently resist having a finite number of days for every submittal, however, because a submittal requiring review by several design disciplines or requiring significant review time are frequently outside the architect's control. The B201 agreement handles it this way:

§2.6.4.4 Subject to the provisions of Section 3.3, the Architect shall review and respond to requests for information about the Contract Documents. The Architect shall set forth in the Contract Documents the requirements for requests for information. Requests for information shall include, at a minimum, a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested. The Architect's response to such requests shall be made in writing within any time limits agreed upon, or

otherwise with reasonable promptness. If appropriate, the Architect shall prepare and issue supplemental Drawings and Specifications in response to requests for information.

See also B101 §3.6.4.4.

If a finite amount of time will be imposed contractually (not to exceed 14 days, for example), it is recommended that some process be described for the architect to request or notify those affected that additional time may be required.

A. [2.48] Changes in the Work

Most projects under construction experience necessary changes in the scope of work as originally indicated. Changes in the work can be accommodated through the issuance of “change orders,” “construction change directives,” and “minor changes in the work.” These services are normally prepared by the architect as additional services. The owner may, however, direct its contractor or construction manager to prepare change orders instead of the architect. The architect and owner together issue construction change directives. Only the architect issues minor changes in the work. AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §3.6.5.1 (2007), defines the architect’s involvement in those changes as follows:

The Architect may authorize minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. Subject to the provisions of Section 4.3, the Architect shall prepare Change Orders and Construction Change Directives for the Owner’s approval and execution in accordance with the Contract Documents.

The above paragraph indicates that the architect shall prepare all change orders and construction change directives. B101 §4.3.2.3 indicates the architect is to be compensated for it as an additional service. If the owner desires that its contractor or construction manager prepare change orders, rather than the architect, this section of the agreement must be adjusted to reflect who will prepare them. However, if the owner requests the architect to prepare any particular change order, then the architect shall be compensated for it as an additional service. B101 §4.3.2.3 provides as follows:

To avoid delay in the Construction Phase, the Architect shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If the Owner subsequently determines that all or parts of those services are not required, the Owner shall give prompt written notice to the Architect, and the Owner shall have no further obligation to compensate the Architect for those services:

* * *

.3 Preparing Change Orders and Construction Change Directives that require evaluation of Contractor's proposals and supporting data, or the preparation or revision of Instruments of Service.

B. [2.49] Change Orders

A change order is an owner-authorized change in the scope of work agreed to by the contractor. The change order

1. describes the change to the work in detail;
2. includes an adjustment, whether an increase, decrease, or no change, to the contractor's fee; and
3. includes an increase, decrease, or no change in the contractor's time to perform the work of the project.

All change orders become effective when signed by the contractor and approved in writing by the owner's signature. The architect may also execute the change order to acknowledge awareness of the change in the scope of work of the project. Note in AIA Document A201, *General Conditions of the Contract for Construction* §7.2.1 (2007), incorporated in the discussion in §2.51 below, that the AIA agreement requires the signature of the architect on change orders. This requirement is misleading, as a change order becomes legally binding when signed by the contractor and the owner, even if the architect fails or refuses to sign it. In signing the change order, the architect is merely acknowledging awareness of the owner's authorized change in the scope of the work. The architect cannot issue a change order that is binding on the owner without the owner's signature authorizing the change.

C. [2.50] Preparation vs. Approval

The architect, construction manager, or contractor can prepare a change order for consideration by the owner. A change order is not legally binding and shall have no effect in changing the scope of work of the project, the contractor's fee, or the contractor's time to complete the construction of the project, unless and until it contains the signatures of both the contractor and owner, indicating each party's approval and authorization of the change. Change orders should be executed by the contractor and owner before the contractor performs the scope of work indicated in the change order. Failure to receive the owner's written authorization to perform a change to the work, via a change order, may jeopardize the contractor's ability to receive payment for such change in the work.

A change order that is executed by the contractor and owner but fails to address any adjustment to the contractor's fee, or fails to include any alternate procedure to determine the cost of the change to the scope of the work, is still valid and will be interpreted to mean that there is no adjustment in the fee.

A change order that is executed by the contractor and owner but fails to address any adjustments in the contractor's time to complete the construction of the project is still valid and will be interpreted to mean that there is no adjustment in the time.

Article 7 of AIA Document A201, *General Conditions of the Contract for Construction* (2007), describes how changes in the work may be accomplished by a change order, a construction change directive, or a minor change in the work, in part as follows:

§7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

§7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

D. [2.51] Coordination with Language in General Conditions

The language required within the actual change order must be coordinated with Article 7 of AIA Document A201, *General Conditions of the Contract for Construction* (2007), in part as follows:

§7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

- .1 The change in the Work;**
- .2 The amount of the adjustment, if any, in the Contract Sum; and**
- .3 The extent of the adjustment, if any, in the Contract Time.**

E. [2.52] Construction Change Directives

Construction change directives occur when the owner and contractor are unable to agree on the contractor's charge or time adjustment to perform the proposed change, but the change is still required by the owner and architect. The architect prepares a construction change directive, signed by the owner and architect, ordering the work to be performed in accordance with the terms stated in Article 7 of AIA Document A201, *General Conditions of the Contract for*

Construction (2007). After the work is constructed, a change order is then issued stating the cost and time adjustments, if any, for the change. The costs and time extensions are determined as stated in A201 §7.3. This is a cumbersome procedure and should be utilized only when it becomes impossible to agree on a change order before the required work is actually performed. See A201 §7.3 for a definition of “construction change directive.”

F. [2.53] Minor Change in Work

A minor change in the work is a change ordered by the architect that does not change the contractor’s fee or time to complete the project. Such changes should have virtually no impact on the project. It is prudent for an architect to avoid authorizing minor changes in the work without the owner’s knowledge and agreement. If the owner agrees to the minor change, then a change order should be issued. An owner might not agree with what an architect considers to be a “minor” change in the work. As an example, the movement of a door location two feet from the location indicated on the plans may be considered minor by the architect but may have a negative impact on how the owner uses the space that is affected by the relocation of the doorway. It is best to issue a no-cost, no-time-extension change order.

AIA Document A201, *General Conditions of the Contract for Construction* §7.4 (2007), defines a “minor change” in the work as follows:

The Architect has authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.

XII. [2.54] CERTIFICATES TO THIRD PARTIES

As discussed in §2.13 above (assignments), architects are frequently called on to execute lender-generated forms to certify various kinds of information about a design in progress but not yet in construction. For the owner, such requests for certificates are usually a minor detail in a much larger, extensively documented loan transaction and usually come just as the loan is scheduled to close. Lenders, however, frequently include terms inconsistent with the agreement between the owner and the architect, as well as requests to certify aspects of the project outside of the architect’s expertise or duties. For an owner, there is some urgency in closing the loan and at least the perception of inability to negotiate the terms of the consent. However, for an architect being asked to make such certifications, there may be liability risks to third parties well beyond the architect’s ability to objectively verify the certified facts. For terms inconsistent with the existing owner-architect agreement (*e.g.*, extra time for a lender to cure, assignments of copyrights regardless of payment, or certification of lack of contractor or owner defaults), it may be advisable to include a contractual responsibility to cooperate with reasonable lender requests subject to some amount of time for the architect to seek advice on the scope of the certificate. For facts either not objectively verifiable or outside of the scope of the architect’s expertise (*e.g.*, certifications of rentable square feet), the architect may request modifications to the lender’s form of consent.

XIII. [2.55] DISPUTE RESOLUTION ISSUES FOR ARCHITECT AGREEMENTS

Dispute resolution is covered elsewhere in this handbook (see Chapter 13), but there are a number of dispute resolution terms and issues unique to the design team. The AIA form agreements now provide a checkoff for use of litigation, mediation, arbitration, or something else — all of which may be coordinated or joined with an overall project dispute resolution mechanism. See AIA Document B101, *Standard Form of Agreement Between Owner and Architect* art. 8 (2007); AIA Document B102, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services* art. 4 (2007).

An architect, however, is not typically insured for unpaid or withheld fees in the event of an error or omission claim. In addition, professional liability insurance policies are usually subject to a deductible or self-insured retention on a per-claim basis. In the event of an error/omission claim when the owner also withholds the architect's fees — even if the claim is fully and properly insured — the financial impact of the withheld fee can be crippling. To prevent such a financial hit, architects may seek to include language in the AIA or other form agreements that an owner will not withhold fees attributable to claims covered and paid by applicable insurance.

A. [2.56] Joint-Defense Options in Disputes with Contractors

Another element that makes an architect's dispute resolution different from that of a contractor is the contractual independence between the architect and contractor. In a dispute between the owner and contractors, even when an element of design is implicated, it can be to the advantage of both the architect and the owner to jointly defend the contractor's claims and to defer claims between them. This can be done by a joint-defense agreement after a dispute arises, or it can be negotiated as an exhibit to the owner-architect agreement.

B [2.57] Joinder Issues

Architects frequently resist being dragged into multiparty arbitrations among contractors in which their liability is either tangential or contractually independent. The AIA form agreements now contain provisions permitting either party to join the other in arbitrations with other parties in the project. See AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §8.3.4 (2007); AIA Document B102, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services* §4.3.4 (2007). If a joint defense mechanism cannot be negotiated or agreed, the architect may seek to delete the joinder provisions or to expressly provide that any arbitration concerning the owner-architect agreement will be separate. If joinder is not permitted, the owner should also consider a corresponding obligation to jointly defend or defer claims as discussed above. In either event, the owner-architect agreement is usually negotiated before any of the other agreements for the project. Before committing to any particular dispute resolution mechanism or procedure in the architect agreement, it is important for the owner to consider its overall dispute resolution strategy for the project as a whole. Otherwise there may be one set of procedures established with the architect that become inconsistent with programs or procedures included in the contractor agreements.

C. [2.58] Importance of Coordination with Sub-Consultant Agreements

Contractors typically use form agreements that require subcontractors to participate and be bound by any dispute resolution mechanism in the general contract. Design professionals are less likely to have a standard form sub-consultant agreement and may therefore be bound to arbitrate with the owner but to litigate with its consultants, or the other way around (or even to arbitrate with the owner and contractors but without joinder of the consultant in the same arbitration). For the lawyer representing an architect, coordination of dispute resolution provisions with those among the sub-consultants is extremely important.

D. [2.59] Choice of Law and Venue Clauses

The parties are free to choose venue and substantive law as in any other contract, but this issue can become tricky with respect to licensing, lien rights, and applicable enactments of the Uniform Arbitration Act. AIA Document B102, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services* §7.1 (2007), provides:

This Agreement shall be governed by the law of the place where the Project is located, except that if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 4.3.

This should be reviewed and coordinated with sub-consultant agreements and with the forum state's applicable substantive law.

XIV. [2.60] BUILDING INFORMATION MODELING AND INTEGRATED PRACTICE

Building information modeling (BIM) is a process by which a building project can be developed using a software system that serves as a repository for information assembled by the various participants in the design and construction of a building project. The owner can then use the result of the BIM input to maintain and operate the project throughout the life cycle of the building. Unlike typical projects produced using traditional computer-aided design and drafting (CADD) software, BIM allows for the integration of input from the architect, the owner, and the contractor and subcontractors to effect the immediate transmission of current information to all parties as that information changes during the design and construction process. Sections 1.64 – 1.91 and 2.54 – 2.56 of PRE-CONSTRUCTION ISSUES (IICLE, 2009) provide a detailed description of BIM and the integrated practices of project production.

XV. COPYRIGHTS

A. [2.61] Basic Copyright Law

Current U.S. copyright law is contained in the Copyright Act of 1976 which has been frequently amended. The core of the Act is comprised of the first five chapters of Title 17,

beginning with the defined terms found in 17 U.S.C. §101. (For in-depth copyright information, see INTELLECTUAL PROPERTY LAW (IICLE, 2008).) State and other laws that dealt with copyright-like rights have been superseded by the Act. Architects are deemed the authors of the plans and specifications and have a copyright in those works from the moment of creation. Clients almost never have a copyright interest in the plans and specifications unless the contract specifically conveys some right. For our purposes, the three main categories of works that can be protected are drawings, specifications, and the building design itself. However, one should note that only the original aspects of these works can be protected. For instance, a standard wall detail commonly used by many architects is not copyrightable. Any details or specifications obtained from a manufacturer are the intellectual property of that manufacturer and cannot be copyrighted by anyone else. If the specifications are based on a system such as Masterspec[®], only those original parts added to the form can be copyrighted.

Under the Copyright Act, the author has the exclusive right to reproduce the work, *i.e.*, (1) make copies of the drawings, (2) make copies of the specifications, and (3) since 1990, construct buildings based on the plans and specs. See §2.63 below. 17 U.S.C. §106. Further, the author has the exclusive right to prepare derivative works, *i.e.*, (1) authorize the construction of additional buildings based on the original plans and specs, and (2) prepare new drawings that reuse the architect's protected details. Not all details are protected — only original works are protected.

Some things are not protected by copyright, *i.e.*, (1) ideas, procedures, methods, concepts, principles, or devices; (2) non-original materials, drawings, sketches, and information; (3) manufacturer's standard details; (4) details from standard reference works; and (5) specifications not original to the architect.

A copyright notice, under 17 U.S.C. §401, is not required but recommended. The form of notice includes the following:

(1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and

(2) the year of first publication of the work; in the case of compilations, or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.
17 U.S.C. §401(b).

B. [2.62] Copyright Registration

Copyright registration falls under 17 U.S.C. §408. In order to obtain maximum protection, the architect (or the owner, if the contract assigns the copyright) should register the copyright. If a

copyright is properly registered before an infringement, additional remedies are available against the infringer, including attorneys' fees and statutory damages. Registration is required in order to file a copyright infringement lawsuit. If the registration takes place after an infringement, only actual damages can be obtained. These actual damages might include the profits of every infringer. For example, if an architect's drawings are infringed on and used in the construction of a new home, the architect may sue the owner, the subsequent architect, the general contractor, and all of the subcontractors. Except for the owner, each of these parties would have had profits that might be recovered in the lawsuit as actual damages. In addition, the owner might be liable for the amount paid to the first architect had the first architect been hired for the project. Obviously, these costs can be substantial. Of course, the attorneys' fees that are spent by each party can be substantial as well, which is why early registration of the copyright is important.

The primary registration method as of March 2010 is with the "Electronic Copyright Office (eCO)" on the United States Copyright Office website, www.copyright.gov/eco. A second option for registering is the fill-in Form CO (replacing form VA (visual arts works)), also available on the Copyright Office website. The third registration option is by way of paper Form VA; however, paper forms are being phased out. Although paper forms are not available on the website, the form for requesting a paper copy by mail is on the website. Paper forms can also be requested in writing by regular mail to the following address:

Library of Congress
Copyright Office — COPUBS
101 Independence Avenue, SE
Washington, DC 20559-6304

Forms can also be obtained by calling the Forms Hotline at 202-707-9100 NOTE: The following information is also (as of March 2010) offered by the Copyright Office and is in keeping with the phaseout of paper forms.

Due to budgetary constraints and fee/form changes, we now limit the quantity of forms that we mail to two of each kind. We encourage you to photocopy the forms we send or to register online at www.copyright.gov. www.copyright.gov/fls/sl35.pdf.

Follow the form instructions carefully, as they tend to be somewhat confusing. Architects should register two separate copyrights for each project — the first for "technical drawings" and the second for "architectural works." A separate form, fee, and deposit will be needed for each.

Part 6 of the VA form requires a listing of "derivative work." A derivative work is one based on one or more preexisting works. Often, many parts of the plans and specifications are based on preexisting works. The floor plans may be based on a design prepared by the owner or another architect. Various details may be from a project that the owner built years ago or from prior drawings that the architect created. With so many manufacturers now furnishing computer-aided design/computer-aided drafting details, architects frequently use these details on their drawings, as well as details from reference books such as Graphic Standards or Underwriters Laboratories. The architect's copyright will be limited to only the original work, and not to the older, derivative

parts of the drawings and specifications. If the derivative nature of the plans and specifications is not properly stated in Part 6, the copyright may be found to be invalid, since that would imply that everything submitted to the Register of Copyrights is original, and that implication would be false.

Send the filled-out form, along with the filing fee (this fee changes from time to time, but is nominal) and one copy of the material to be copyrighted if it is unpublished, or two copies if published. In general, architectural materials will be considered unpublished, even when plans are filed with the building department or when the building is built. One exception is if multiple copies of the same building are constructed, as in tract housing. The Copyright Office will accept a disc with pdf versions of the drawings and specifications in lieu of sending large sets of drawings. This will be substantially less costly.

C. [2.63] Architectural Works

The Architectural Works Copyright Protection Act of 1990 (AWCPA), Pub.L. 101-650, 104 Stat. 5133, became effective on Dec. 1, 1990. The effect of this amendment to the Copyright Act was to extend copyright protection to the building itself as well as the drawings, which were previously protected. Before the AWCPA, someone could build a building without the architect's permission as long as the builder did not physically copy the plans. Someone could measure an existing building and construct an exact duplicate. Since the AWPA, buildings are protected.

The definition of an architectural work is “the design of a building as embodied in any tangible means of expression.” 17 U.S.C. §101. This could mean the actual building, plans and specifications, models, or photos. Only “buildings” are protected. This includes any structure habitable by humans and intended to be both permanent and stationary, including (1) houses, (2) office buildings, (3) churches, and (4) museums. Structures excluded and not entitled to protection under this part of the Act (although the technical drawings can still be copyrighted) are (1) non-habitable buildings, moveable structures, temporary structures; (2) bridges and roads; and (3) boats.

D. [2.64] Copyright Ownership

By virtue of the Copyright Act, the creator of the drawings and specifications will own the copyright. Thus, the architect will own the architectural drawings, the structural engineer will own the structural drawings, and so forth. Occasionally, the owner wants to own the copyright. Unless the owner is a “chain” or franchise operation (*e.g.*, McDonald's Corporation), there is no need for the owner to actually own the copyright in the drawings. All that the owner really needs is a license to use the drawings for construction and for maintenance, renovations, and future expansions of that building. In fact, giving up the copyright might expose the architect to future problems. The architect, having given up the copyright to the owner, will not be able to use the details and other creative elements created for the current project on any future projects without first obtaining a license from owner. For instance, if Frank Lloyd Wright had conveyed the copyright to the owner of his first prairie home, there would have been no second prairie home.

There is a common misconception that an owner can obtain the copyright by a contractual provision whereby the drawings are “works made for hire.” Use of this language indicates that the author is either an employee and that the work is being done within the scope of employment (this is why the design architect in a large firm is not entitled to the copyright), or that there is a written agreement whereby the work becomes the intellectual property of the employer. However, the statutory basis (17 U.S.C. §101) for a work made for hire requires that one of several conditions be met. The principal case in this area is *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 104 L.Ed.2d 811, 109 S.Ct. 2166 (1989). Generally, the employer of an architect is considered the author; the employee is not. This does not mean that a client who hires an architectural firm is considered the employer. The client, in fact, does not fit within any of the specific conditions of the works-made-for-hire doctrine. The Copyright Office has information about works made for hire on its website. See *Works Made for Hire Under the 1976 Copyright Act*, Circular No. 9, www.copyright.gov/circs/circ09.pdf.

The best way for the owner to obtain the copyright is to obtain an assignment of the copyright from the architect. An assignment generally must be in writing and should clearly identify what is being assigned. The owner-architect contract could contain the assignment, but it may be better to assign the documents once they have been created and can be identified by drawing number and date. To obtain the complete copyright, there should be assignments from each firm that created documents, including the architect, structural engineer, and mechanical, electrical, and plumbing (MEP) engineers.

E. [2.65] License To Use Documents

Another way for owners to obtain the right to use an architect’s drawings and specifications is by a license. A license gives permission to use all or parts of the work under certain conditions. The AIA owner-architect agreements give licenses to the owner under certain conditions. These documents specify the extent of the license and how it can be terminated. Without realizing it, architects may give an owner an “implied license” to use the documents if a nonstandard agreement, letter agreement, or “handshake” is used. For instance, in *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996), the architect used a short-letter agreement that was silent as to copyright. The court held that the owner had an implied license to use the drawings, even though another architect used the drawings to create the final working drawings and even though the first architect was not paid for all of its work. Such a license may be effective even if the owner fails to pay the architect for the work.

F. [2.66] Architect Grants Owner Limited License

The architect grants the owner a limited license under AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §7.3 (2007):

Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The

Architect shall obtain similar nonexclusive licenses from the Architect’s consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner’s consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

Under this license, the architect gives the owner a license to use the drawings and specifications, and any other intellectual property that the architect creates (as well as the work created by the architect’s subcontractors) for the limited purpose of building the project and, thereafter, using and maintaining the project. This license also specifically gives the owner (as well as any successor to the owner, such as a purchaser of the project) the right to alter the project and to build additions. Prior versions of the AIA documents required the owner to obtain permission from the architect if an addition to a building was to be built using the architect’s plans. Owners find the newer language much more acceptable, while it is also reasonable for the architect. This is all fairly well in keeping with what owners and architects expect to happen on a project.

The owner may want to amend the agreement to make the license irrevocable, so that in the event of any termination of the architect, the owner will be able to use the drawings and specifications prepared by the architect no matter why there was a termination. Under the B101 agreement, the license would be irrevocable only if the owner terminated for cause, in which case the architect would take the position that such a termination was wrongful and the license was terminated, leading to more litigation.

G. [2.67] Owner’s Termination of Architect

If the owner terminates the architect, the question of whether the owner will have a license to use the architect’s drawings to complete the project hinges on whether the termination was reasonable, if the contract contains the copyright language found in AIA agreements. This likely will require litigation to resolve, and the owner will proceed at its own risk in using such drawings. If the agreement is silent on the issue of copyright, although the architect is still the owner of the copyrights in the drawings, the owner may well have an “implied license” to use the drawings to complete the building — even if the owner wrongfully terminated the architect. *See I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996). Note that this implied-license theory is not favored by many courts and is likely to apply only in the Seventh and Ninth Circuits. If it is held that the owner’s termination of the architect was unjustified, then the owner is liable to the architect not only for contract damages, but also for copyright damages and possibly attorneys’ fees.

The owner faces another, and separate, problem in using the terminated architect’s drawings. Unless the drawings are complete and ready for construction, the owner needs to hire a replacement architect to change and complete the drawings and seal them for permit. Under

Illinois law, an architect cannot seal the work of another architect over whom the “sealing” architect did not have control. This effectively prevents a subsequent architect from placing a seal on a prior architect’s plans. In other jurisdictions this may not be a problem as some states permit an architect to seal drawings that were merely reviewed.

H. [2.68] Architect’s Termination of Owner

AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §7.3 (2007), states that the copyright license granted to the owner by the architect is terminated if the architect “rightfully” terminates the owner for cause. Note that the word “rightfully” may be subject to interpretation. Prior versions of the AIA documents stated that the license is terminated upon any termination of the agreement. This was much more favorable to the architect and made it much more difficult for the owner to prove that it had a license to use the drawings following a termination. If a non-AIA agreement is used, or the copyright language is stricken, the owner may enjoy an “implied license.” See *I.A.E., Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996).

I. [2.69] Initial Architect’s Documents Given by Owner to Subsequent Architect

AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §7.1 (2007), contains this provision:

The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

This language should prevent an owner from giving a subsequent architect drawings prepared by someone else unless the owner actually has a license to use those drawings. Some owners have taken drawings belonging to the initial architect, had the drawings redrafted by another person, and then given the redrafted drawings (which no longer had any identification of the initial architect) to a new architect. The new architect then assumes the drawings were created by the intermediary person (which they were, but without the required license) and assumes that there is no copyright problem. The AIA language in B101 §7.1 may not prevent an architect from being sued in this situation, but the owner would have breached the warranty, thereby giving the architect a way to minimize the effect of such a suit.

J. [2.70] “Ideas” Given to Architect

Owners, particularly on small projects, often give their architect “ideas” in the form of pictures, magazine articles, and other documents to illustrate what the owner wants. The architect needs to approach these items carefully to determine if any of these documents could potentially form the basis for a copyright claim by a prior architect. Red flags should go up if the owner furnishes any drawings or sketches obviously prepared by an architect. Builder floor plans and brochures are also dangerous. If the owner has very specific information as to dimensions and materials, the architect should be cautious, as that can indicate that the owner has documents from

a prior architect and is conveying the information on those documents without the documents themselves. This could lead to a copyright infringement claim. In copyright, ignorance will not be a defense for the subsequent architect.

K. [2.71] Proper License in Place To Use Preexisting Documents

If the owner has a license to use an architect's work, any subsequent architect should be covered by that license. Obviously, a copy of that license should be obtained and closely examined by counsel. This should then be compared against the documents furnished by the owner to verify that the licensor is the party that created the original documents. It may be wise to verify that the license is legitimate and covers the intended use, so that the scope of the license is not exceeded. A party cannot convey a greater license than it possesses. In questionable cases, the subsequent architect may want to obtain an opinion letter from the owner's counsel that the owner possesses the requisite license.

XVI. [2.72] PROJECT CLOSEOUT

An architect shall continue to perform construction administration services until the date of final completion of the work. AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §3.6 (2007), defines the architect's scope of work pertaining to project closeout requirements.

An architect conducts two types of project inspections: (a) inspection to determine the date when the project is substantially complete in accordance with the requirements of the contract documents (date of substantial completion); (b) inspection to determine when the project reaches a state of final completion (final completion). The architect shall issue a certificate of substantial completion, which shall establish the date of substantial completion. It is the date on which an owner can occupy the building and utilize it for its intended purposes. This is an important period in time, as this date usually establishes when equipment warranty periods begin to run, when the statute of limitations period begins to run, and the date when the withheld retainage amounts can usually be released to the contractor.

As part of the architect's review of the contractor's last application for payment, the architect shall receive from and forward to the owner certain enumerated documents required by the contract documents to protect the interests of the owner (refer to B101 §§3.6.6.1 and 3.6.6.4 quoted below). Should the contractor fail to provide the required documents, the architect should refuse to conduct the final inspection and refuse to issue a certificate for final payment to the contractor.

An architect should also refuse to accept written warranties that are not specifically required by the contract documents and reject and return any and all volunteered warranties to the contractor. Warranties are designed to limit the liability exposure and protect the interests of the warrantor, not for the benefit of the warrantee. The architect should be judicious in requiring warranties that limit an owner's recourse to the contractor for construction defects, deficiencies,

or equipment failures. The architect should include language in the general conditions mandating that any and all warranties issued by vendors to the contractor be assigned to the owner, for the owner's benefit, and not that of the contractor.

B101 §§3.6.6.1 – 3.6.6.5 provides as follows:

§3.6.6.1 The Architect shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion; receive from the Contractor and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract Documents and assembled by the Contractor; and issue a final Certificate for Payment based upon a final inspection indicating the Work complies with the requirements of the Contract Documents.

§3.6.6.2 The Architect's inspections shall be conducted with the Owner to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the list submitted by the Contractor of Work to be completed or corrected.

§3.6.6.3 When the Work is found to be substantially complete, the Architect shall inform the Owner about the balance of the Contract Sum remaining to be paid the Contractor, including the amount to be retained from the Contract Sum, if any, for final completion or correction of the Work.

§3.6.6.4 The Architect shall forward to the Owner the following information received from the Contractor: (1) consent of surety or sureties, if any, to reduction in or partial release of retainage or the making of final payment; (2) affidavits, receipts, releases and waivers of liens or bonds indemnifying the Owner against liens; and (3) any other documentation required of the Contractor under the Contract Documents.

§3.6.6.5 Upon request of the Owner, and prior to the expiration of one year from the date of Substantial Completion, the Architect shall, without additional compensation, conduct a meeting with the Owner to review the facility operations and performance.

A. [2.73] As-Built Drawings

As-built drawings are drawings that are prepared by the architect as an additional service. As-built drawings indicate all known construction deviations from the architect's instrument of service. The as-built drawings are based on the deviations indicated by the contractor and its subcontractors on the record set of drawings contained at the project site. The architect does not guarantee the accuracy or completeness of the as-built drawings as they are, of necessity, based on the level of accuracy and completeness of the markup provided on the record set by the contractor and its subcontractors. As-built drawings are not normally required from the architect as a basic service.

B. [2.74] Record Drawings

During the construction phase of the project, the contractor shall maintain up-to-date shop drawings and an up-to-date set of record drawings of the project indicating all field changes and material selections made for the project. AIA Document A201, *General Conditions of the Contract for Construction* §3.11 (2007), addresses this requirement as follows:

The Contractor shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed

C. [2.75] Commissioning and Start-Up

As an additional service, the architect can assist the owner and contractor in building commissioning and start-up after substantial completion of the project is achieved. If the owner desires the architect's assistance, a separate agreement form may be utilized, such as AIA Document B211, *Standard Form of Architect's Services: Commissioning* (2007) (B211).

D. [2.76] Warranty Phase

Architects rarely, if ever, undertake to warrant their designs. The common law certainly does not impose so high a duty. However, owners enjoy warranties with the contractors for the work performed at the site. Owners may very well call for their design professionals to review the project long after "substantial completion" (or even "final completion") but just prior to the expiration of the contractor's warranty. Such service is very likely an "additional service" for which the design professional expects additional compensation, unless different provision has been specifically provided in advance. Owners may benefit substantially from paying the design professional a half-day's or even a full-day's pay for the observation. Presumably, this observation could be enhanced substantially by the owner sharing with the architect its experience in using the facility.

Design professionals, on the other hand, should approach such warranty-ending observations with care. To begin with, there is the risk that something may be overlooked in the relatively limited time frame of the observation. Furthermore, the completed project necessarily conceals many details of the design.

A more significant issue is accrual of the statute of limitations. In Illinois,

[a]ctions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property

shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission.
735 ILCS 5/13-214(a).

If the design professional purportedly misleads an owner regarding the quality of the design, then the four-year period might not commence to run as early as it might otherwise.

EXAMPLE: A design is created and executed. In the first year or so, the owner experiences problems that cause the owner to question the correctness of the design. If at this point the architect is called out to the site for a discussion regarding the problematic feature of the design, a court might hold that the discussions at the site negated the owner's actually knowing or that the owner should reasonably have known of such purported act or omission. So much may turn on how and what was said as to create a "genuine issue of material fact" to prevent entry of summary judgment.

Contract drafters would be well advised to review decisions such as *Axia, Inc. v. I.C. Harbour Construction Co.*, 150 Ill.App.3d 645, 501 N.E.2d 1339, 103 Ill.Dec. 801 (2d Dist. 1986).

The same might hold for application of the statute of repose. Consider *Zielinski v. A. Epstein & Sons International, Inc.*, 179 Ill.App.3d 340, 534 N.E.2d 644, 128 Ill.Dec. 462 (1st Dist. 1989). In *Zielinski*, an injured worker fell through an access door in a suspended ceiling. The defendants moved for summary judgment based on the statute of repose, 735 ILCS 5/13-214(b), claiming that the ceiling access doors were installed more than the then 12 years' (now 10 years') repose. Among other arguments, the plaintiff argued that "the continuation of a special relationship offering the possibility of correction of the injury may postpone [the critical] date further." [Brackets in original.] 534 N.E.2d at 646. The architect successfully argued that the statute of repose begins to run when the allegedly wrongful act is committed, not when unrelated construction is finally completed. The appellate court agreed, noting that the statute of repose focuses on the precise act or omission not the project in its entirety. Thus, in *Zielinski*, the appellate court rejected the argument that defendants were under a duty to correct any problems that would have thus postponed the critical date.

A broad tour of a facility in advance of the running of the warranty period is probably within the protection of *Zielinski*. However, a specific focusing on a discrete design feature might very well give rise to a later argument of an owner contending it was misled by the design professional's statements, and thus the applicable statute did not yet run out.

XVII. [2.77] TERMINATION OR SUSPENSION

Should the owner fail to make timely payments to the architect for professional services performed, the architect has the contractual right to suspend further work on the project or to terminate the agreement. The prudent architect will exercise caution before suspending or terminating the agreement. Suspension of the project or termination of the agreement will often cause the matter to be litigated or arbitrated. If an owner or architect desires to suspend the

project or terminate the other party, the suspension or termination provisions should be explicitly followed. Failure to follow the procedures exactly may lead to a claim of improper suspension or termination. The owner and the architect should seek legal counsel from their respective attorneys prior to any suspension of the project or professional services and prior to any termination of the agreement.

Project suspension, resumption of services, and termination provisions are covered in Article 9 of AIA Document B101, *Standard Form of Agreement Between Owner and Architect* (2007). The owner's failure to make timely payments for work performed is found in B101 §9.1 as follows:

If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

The owner's suspension of the project and adjustments to the architect's fee and time are found in B101 §9.2 as follows:

If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

An owner can strengthen its position by altering B101 §9.2 as underscored below, to eliminate any adjustment of the architect's fees for the remaining services:

If the Owner suspends the Project for any reason other than the fault of the Architect, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for actual expenses incurred in the interruption and resumption of the Architect's services. The Architect shall provide the Owner with documentation of such interruption and resumption of service expenses, as an attachment to the Architect's next request for payment. Failure to do so shall constitute the Architect's waiver of such expenses. The Architect's time schedules shall be increased by the number of actual calendar days the project was suspended.

A. [2.78] Termination of Agreement by Architect Due to Owner's Lengthy Suspension of Project

Section 9.3 of AIA Document B101, *Standard Form of Agreement Between Owner and Architect* (2007), covers the termination of an agreement by the architect due to the owner's lengthy suspension of the project as follows:

If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.

An owner may desire to revise the number and type of days in the above paragraph to make it more difficult for the architect to terminate the agreement due to project suspension. "Cumulative days" can be revised to "consecutive days," and the time period specified can be expanded from 90 days to a length of time agreed on by the parties. A sample revision of B101 §9.3 might read as follows:

If the Owner suspends the Project for more than 180 consecutive days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days' written notice.

B. [2.79] Termination by Either Party for Cause

AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §9.4 (2007), covers termination by either party as follows:

Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

Either party may desire to increase the amount of time for the written notice in B101 §9.4.

C. [2.80] Termination of Agreement for Owner's Convenience and Without Cause

The owner may terminate the agreement solely for its own convenience and without cause. However, such termination has an impact on the owner's right to utilize the instruments of service to complete the project. Section 9.5 of AIA Document B101, *Standard Form of Agreement Between Owner and Architect* (2007), must be coordinated with B101 §11.9 (see §2.82 below).

The Owner may terminate this Agreement upon not less than seven days' written notice to the Architect for the Owner's convenience and without cause. B101 §9.5.

D. [2.81] Termination Fees

Article 9 of AIA Document B101, *Standard Form of Agreement Between Owner and Architect* (2007), covers termination fees as follows:

§9.6 In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 9.7.

§9.7 Termination Expenses are in addition to compensation for the Architect's services and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.

§9.8 The Owner's rights to use the Architect's Instruments of Service in the event of a termination of this Agreement are set forth in Article 7 and Section 11.9.

E. [2.82] Coordination with Copyright Provisions

An architect can attempt to curtail an owner's termination for convenience and without cause, by the inclusion of a provision for compensation for the continued use of the terminated architect's instruments of service to complete the owner's project after termination for the owner's convenience. AIA Document B101, *Standard Form of Agreement Between Owner and Architect* §11.9 (2007), requires payment of a licensing fee from the owner in order for the owner to continue using the architect's instruments of service as follows:

If the Owner terminates the Architect for its convenience under Section 9.5, or the Architect terminates this Agreement under Section 9.3, the Owner shall pay a licensing fee as compensation for the Owner's continued use of the Architect's Instruments of Service solely for purposes of completing, using and maintaining the Project.

Some owners will attempt to negotiate the deletion of B101 §11.9 in order to avoid paying the architect a licensing fee for the continued use of the architect's instruments of service after termination for convenience. Other owners will simply allege that the termination is for cause, not convenience, and continue to use the instruments of service without paying for that privilege. A termination for cause does not negate the nonexclusive license granted to the owner to utilize the architect's instruments of service to complete and maintain the project. B101 §11.9 applies only to an owner's termination for convenience and does not apply to terminations for cause. B101 §7.3 states the following:

Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations,

including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

In B101 §7.3, no mention is made relating to any termination of the nonexclusive license granted to the owner when the owner terminates the architect for cause. The owner still retains a nonexclusive license to use the instruments of service after the architect is terminated for cause. Also, the provisions of B101 §11.9 do not apply, and the owner is not obligated to pay a licensing fee as compensation for its continued use of the instruments of service, after the architect's termination for cause.