Frequently Asked Questions

1. What are Statutes of Limitations?

Statutes of limitations are state statutes that establish the maximum time limits for a party to initiate a claim against another party. These statutes vary by state and by the type of action, but all statutes of limitations provide a "cut off" date after which a cause of action is time barred. If a claimant files suit beyond the applicable statute of limitations, the action is subject to dismissal. The critical issue when assessing a statute of limitations defense is establishing when the statute of limitations period began to run.

The general rule is that statutes of limitations begin to run upon accrual of the claim. However, many jurisdictions follow the "discovery rule" provides that the statutes of limitations do not begin to run until the claimant discovers, or reasonably should have discovered, the harm that is the basis of the claim.

The AIA 1997 Owner / Architect agreements contain favorable language for design professionals, providing that the statutes of limitations begins to run on the earlier of the date of substantial completion or the date of issuance of the final certificate of payment. This language helped design professionals because it fixed the date on which the statutes of limitations began to run at two easily identifiable and early dates. Of course, Owners complained that the provision obviated applicable law and negated the discovery rule. In 2007, the AIA substantially modified the provision.

The 2007 provision requires the parties to initiate dispute resolution proceedings within the time periods specified by applicable state laws, or within ten years of the date of substantial completion, whichever occurs first. Although the new language is not as favorable from the design professional's perspective, it is a reasonable compromise. The modification allows Owners the benefit of the discovery rule in states that apply the rule, but it protects the design professional from exposure to potential liability beyond ten years after substantial completion.

2. What are Statutes of Repose?

Statutes of repose are state statutes that establish the maximum time limit for a party to initiate a claim against a design professional. They typically differ from statutes of limitations in two material respects. First, they run from a fixed point in time, generally the date of substantial completion or date of occupancy of the project. Unlike statutes of limitations, statutes of repose cannot be tolled and are, therefore, absolute time bars after which no claim can be initiated against a design professional. Second, the time frames are longer. While statutes of limitations for negligence claims typically range from two to four years, statutes of repose often range from six to twelve years.

Statutes of repose offer great protection to design professionals, who otherwise would face potentially endless exposure from a temporal standpoint. Not every state has a statute of repose, and the types of claims to which they apply and the timeframes can vary greatly from state to state.

3. What is indemnity?

Indemnity is an agreement whereby one party agrees to assume the liability of another in the event of a loss. Indemnity provisions can be very difficult to negotiate and have far reaching implications. While the concept of making the client whole for losses caused by the design professional is rational, too

often, the provisions are “one-sided” in favor of the client and require the design professional to assume the liability of the client regardless of actual fault. Design professionals should reject these broadly written indemnity provisions and revise them so the indemnity obligation is limited to the extent the damages are caused by the design professional’s negligent performance of services under the agreement. If the indemnity provision is not appropriately negligence-based, the design professional may be exposed to liability beyond that for which it is insured.

4. What should I do if there is a duty to defend in the indemnity provision?

We recommend deleting any language in the indemnity provision requiring the design professional to defend the client. The word “defend” raises significant insurability issues, regardless of the insurance company involved. The duty to defend is problematic because it is broader than the duty to indemnify. Accordingly, when a design professional has a duty to defend, the design professional may be required to defend a claim based upon a mere allegation of negligence, unlike a duty to indemnity which is trigged by actual negligence. The duty to defend a client may be interpreted as a contractual obligation rather than an obligation triggered by adjudication of your negligence. As a contractual obligation, the duty to defend would not be covered by your professional liability insurance policy.

5. What is appropriate language on a shop drawing stamp?

We recommend a design professional’s shop drawing stamp contain language mirroring that found in the standard AIA Owner / Architect agreements. In particular, the stamp should state that the review is only for general conformance with the contract documents and is not conducted to determine accuracy of details. The language below is an example of appropriate shop drawing stamp language:

ARCHITECT'S REVIEW

___NO EXCEPTIONS TAKEN
___MAKE CORRECTIONS NOTED
___REJECTED
___REVISE AND RESUBMIT
___SUBMIT SPECIFIED ITEM

SUBMITTAL WAS REVIEWED ONLY FOR GENERAL CONFORMANCE WITH THE INFORMATION GIVEN IN THE CONTRACT DOCUMENTS. IT IS NOT CONDUCTED FOR THE PURPOSE OF DETERMINING THE ACCURACY OF DETAILS SUCH AS DIMENSIONS AND QUANTITIES, OR FOR SUBSTANTIATING INSTRUCTIONS FOR INSTALLATION OR PERFORMANCE OF EQUIPMENT OR SYSTEMS. CONTRACTOR REMAINS RESPONSIBLE FOR THE ACCURACY OF CONTENT IN SUBMITTED DOCUMENTS, COORDINATION OF HIS WORK WITH OTHER TRADES AND CONFIRMING AND CORRELATING DIMENSIONS AT THE JOB SITE. THE REVIEW SHALL NOT CONSTITUTE APPROVAL OF SAFETY PRECAUTIONS OR CONSTRUCTION MEANS, METHODS, TECHNIQUES, SEQUENCES OR PROCEDURES.

6. What is the standard of care?

The standard of care is the standard by which a design professional’s performance is judged. The standard is not one of perfection. Rather, the standard is negligence-based and guided by what a reasonable, practicing design professional would do under similar conditions. The test for whether a design professional breached the standard of care is whether the design professional’s actions were

reasonable and prudent under the circumstances. We recommend design professionals include a standard of care provision in every agreement, as follows: "The Design Professional's services shall be performed in a manner consistent with that degree of skill and care ordinarily exercised by practicing design professionals performing similar services in the same locality, at the same site and under the same or similar circumstances and conditions. The Consultant makes no other representations or warranties, whether expressed or implied, with respect to the services rendered hereunder."

The design professional should diligently monitor standard of care language and be wary of any client's attempts to modify the standard with warranty or guarantee language. Any language calling for the design professional's "best services"; "highest degree of skill and care"; "first-class services"; or "technical accuracy" should be stricken since these words may inappropriately elevate the standard of care.

7. What is a limitation of liability?

Limitation of liability provisions drafted in the design professional's favor are very beneficial because they contractually limit the design professional's liability to its client to a specific dollar amount or measurable threshold. Options include limiting the design professional's liability to the total fee, the amount of insurance available, or some arbitrary amount upon which the parties agree. We generally recommend the following language: "To the fullest extent permitted by law, the total liability, in the aggregate, of Design Professional and Design Professional's officers, directors, employees, agents, and consultants to Client and anyone claiming by, through or under Client, for any and all injuries, claims, losses, expenses, or damages whatsoever arising out of or in any way related to Design Professional's services, the Project or this Agreement, from any cause or causes whatsoever, including but not limited to, negligence, strict liability, breach of contract or breach of warranty shall not exceed the total compensation received by Design Professional under this Agreement, or the total amount of $_____, whichever is greater."

Clients often will not accept these types of provisions. However, for certain projects, such as casino projects and limited scope projects such as peer reviews, they represent fair and equitable risk allocation because the realistic exposure to the design professional far outweighs the reward. States vary as to whether they will enforce these provisions and clients almost always assert that the provisions are unenforceable because they "are against public policy" or the client did not understand or know the provision was present in the agreement. Obviously, the design professional will want to be familiar with the applicable state law's position regarding enforcement of limitation of liability provisions. We also recommend the provision be conspicuously placed in the agreement to thwart client arguments that the client was unaware of the provision. The design professional may also consider requiring the client initial its acceptance of the provision in the agreement, although such verification cuts both ways because the client may then refuse to accept the highlighted provision.

8. What type of dispute resolution mechanism should I use in my agreements?

We generally recommend a dispute resolution provision requiring mediation as a condition precedent to litigation, as follows: "Prior to the initiation of any legal proceedings, the parties agree to submit all claims, disputes or controversies arising out of or in relation to the interpretation, application or enforcement of this Agreement to non-binding mediation. Mediation shall be conducted under the auspices of the American Arbitration Association or such other mediation service or mediator upon which the parties agree. The party seeking to initiate mediation shall do so by submitting a formal written request to the other party to this Agreement. This Article shall survive completion or termination of this Agreement, but under no circumstances shall either party call for mediation of any claim or

dispute arising out of this Agreement after such period of time as would normally bar the initiation of legal proceedings to litigate such a claim or dispute under the applicable law."

Mediation allows the parties the opportunity for a creative dispute resolution process that is confidential, voluntary, and non-binding. Unfortunately, clients sometimes prefer arbitration as the binding dispute resolution mechanism. There are numerous drawbacks to arbitration, including little or no discovery or rules of evidence and no rights to appeal. More so than in a courtroom setting, the parties are subject to the whims of the arbitrators. If the Owner insists on arbitration as the binding dispute resolution procedure, we recommend requiring limited discovery proceedings and adherence to the rules of evidence, and limiting the scope of arbitration to claims less than a certain dollar threshold such as $100,000.

9. What are consequential damages?

Consequential damages are those damages that are not direct. For example, if you own an apartment building that is damaged due to a flood and you must replace the carpet and flooring, the cost of those repairs is considered direct damages. Contrastingly, using the same flooded apartment example, if you are unable to rent out several of the apartments due to the damages, the loss of rent or loss of revenue is considered consequential damages.

The potential for substantial consequential damages is particularly acute on projects that rely heavily on the stream of commerce and profits, such as casinos, shopping malls, hotels, and restaurants. It is not unusual for clients to assert significant consequential damages claims in connection with those types of projects, often originating from delays in opening dates. When providing services on projects that rely on the stream of commerce, we recommend including a mutual waiver of consequential damages provision whereby both the design professional and client waive their rights to seek incidental, indirect, and consequential damages. An example of a mutual waiver of consequential damages is as follows: "Neither the Client nor the Design Professional shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty."

10. What should I do if my client insists on owning my work product?

We recommend the design professional maintain sole ownership of its work product. Although maintaining ownership of the work product is not necessarily a deal breaker from a risk management and professional liability perspective, the design professional should insist on payment for services rendered prior to transferring ownership of its work product, limit the client's use of the work product to completion and use of the project, and insist on indemnity protection in the event of unauthorized use of the documents.

11. What is subrogation?

Subrogation claims are essentially claims for reimbursement. In the design professional context, these types of claims are typically filed by insurance companies in an effort to recoup costs the insurance company has paid on covered losses incurred by its insured. Subrogation can be illustrated by the following scenario: An owner of a resort hotel files a claim with its insurance company for damages the

hotel suffered due to water infiltration. The insurance company paid the insured's claim based on the covered loss and subsequently files a subrogation action against the design team and contractor seeking to recover the costs it paid to its insured. We recommend design professionals include mutual waiver of subrogation provisions in contracts with their clients, as follows: "The Client and Design Professional waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, but only to the extent covered by any property or other insurance. The Client and Design Professional shall each require similar waivers from their contractors, consultants and agents."

This type of mutual waiver of subrogation provision may benefit the design professional more than the client because subrogation actions tend to "skip" the owner-client level. Referring to our hotel example, note that the insurance company did not include the hotel owner as a party in its subrogation action. Rather, the insurance company excluded the owner and filed the subrogation action against the design professional team and contractor.

12. How should I handle the new AIA 2007 requirement for the Architect to consider sustainable design?

Sustainable design is new to the 2007 AIA documents, consistent with the AIA's public policy to protect the earth's resources. (See, AIA Board of Directors, *AIA Directory of Public Policies and Position Statements*, 2005). The 2007 documents require the Architect to consider incorporating environmentally responsible design approaches into the project during the schematic design phase and as part of the Architect's basic services. (See, B101-2007, Article 3.2.5.1; B201-2007, Article 2.2.5.1).

The Architect does not have the sole burden of achieving environmentally responsible design since the Owner ultimately decides the level of environmentally responsible design that will be utilized. Further, if the Owner requires extensive design alternatives such as unique system designs, in-depth materials research, energy modeling, or LEED certification, the Architect may provide those as additional services under the 2007 documents.

We recommend adding language to address the Architect's responsibilities with respect to achieving certification for LEED Green Building Rating System or other similar environmental guidelines. The Architect should clarify that it will perform services consistent with the applicable standard of care, but it does not warrant that the Project will achieve LEED certification or realize any particular energy savings. The Architect should not be responsible for any environmental or energy issues that arise out of the Owner's use and operation of the completed project. Finally, the Architect should incorporate a mutual waiver of consequential damages provision requiring both parties to waive incidental, indirect, and consequential damages in connection with the project and the agreement.

13. Is it acceptable for the client to require me to keep the client's information confidential?

Clients often insist on provisions requiring the design professional not to disclose the client's confidential information. Even the 1997 AIA Owner / Architect agreements require the Architect to keep the Owner's information confidential except under certain defined circumstances. The 2007 AIA agreements follow suit, but eliminate many of the exception. The requirement to maintain the client's confidential information is acceptable as long as the duty is not absolute. To avoid a breach of contract allegation, we recommend clarifying that the confidentiality provision does not restrict the design professional from disclosing the information if the information is in the public domain, if disclosure is required by law, or if disclosure is reasonably necessary for the party to defend itself from any suit or claim.

14. Is it necessary for me to comply with all laws, codes, and regulations?

Design professionals do have a duty to comply with laws, codes, and regulations when providing design services. However, clients often insist that design professionals comply with "all" laws, codes, and regulations. Inserting the word "all" is problematic from a risk management and liability perspective due to the probability of conflicting laws, codes, and regulations and the overwhelming, if not impossible, task of discovering, reviewing, and complying with "all" laws, codes, and regulations.

The solution to this problematic language is to tie the design professional's duty to comply with laws, codes, and regulations to the standard of care. We recommend deleting "all" and replacing with "applicable". In addition, we recommend adding language stating that the design professional will exercise its professional skill and care consistent with the generally accepted standard of care to provide a design that complies with such regulations and codes, but that the design professional does not warrant that all documents issued by it shall comply with the regulations and codes.

15. Can I agree to provisions stating that "time is of the essence"?

We recommend design professionals delete "time is of the essence" statements. Clients often include this sentence in the schedule provision of the agreement to emphasize the importance of the client's proposed schedule. This sentence is problematic because it implies that the design professional guarantees it will comply with the client's schedule regardless of any intervening factors. If you are unable to delete this sentence in its entirety, we recommend you add a sentence stating that the client recognizes that the design professional's performance must be governed by sound professional practices. This qualifying language provides the design professional with some protection and negates the implied warranty by tying the design professional's responsibility to comply with the schedule to the applicable standard of care. However, this contracting tactic requires the design professional to ensure the standard of care provision does not contain warranty language and is appropriately negligence-based.

16. Do I have to name the client as an additional insured on my professional liability insurance policy?

Clients often draft convoluted and detailed insurance provisions requiring, among other things, the design professional name the client as an additional insured on its professional liability insurance policy. Clients may expect the design professional to name the client as an additional insured because they are used to general contractors being able to name them as additional insureds on their commercial general liability policies. This request is an indicator that the drafter of the agreement is inexperienced with the limitations of professional liability insurance. Clients have to be educated that industry standards preclude design professionals from naming additional insureds on their professional liability insurance policies.

17. What is a certificate of merit?

Although not mandatory in all jurisdictions, many states require claimants to file certificates of merit with the court either at the time of filing the complaint or within a certain prescribed time after filing. The certificate of merit statutes require the claimant to consult with a third-party design professional who will review the facts of the claimant's case and provide an expert opinion that the claimant's allegations have merit. They are intended to discourage claimants from filing meritless claims against design professionals. The action is subject to dismissal if a claimant does not comply. However, jurisdictions

vary by how stringently they enforce certificate of merit requirements and courts often may extend the filing deadlines to allow claimants to comply with the statutes.

18. Will my entire agreement be void if a specific provision is found unenforceable?

Jurisdictions vary in their treatment of agreements when a contract provision within the agreement is deemed illegal or unenforceable. Although many jurisdictions sever the unenforceable provision and consider the remaining terms and conditions of the agreement valid, some jurisdictions may declare an entire agreement void. In order to prevent a court from invalidating an entire agreement, contracting parties often include a severability provision specifically stating that any unenforceable provision will be stricken from the agreement, while the remaining terms and conditions will continue in full force and effect as if the unenforceable provision were never included in the agreement. An example of a severability provision is as follows: "In the event any term or provision of this Agreement is found to be illegal or otherwise unenforceable, the unenforceable provision will be stricken from the Agreement. Striking such a provision shall have no effect on the enforceability of the Agreement and the remaining terms and conditions shall continue in full force and effect as if the unenforceable provision were never included in the Agreement."

19. Can I provide warranties, guarantees, and certifications to my client?

Design professionals should not give warranties, guarantees or certifications of their services. It is typical for suppliers of goods to provide various warranties. Thus, clients often expect design professionals to provide them as well. Clients may need to be educated that the role and standard of care for design professionals is distinct from that of suppliers of goods. Design professionals provide services (not goods) and should be held to a negligence-based standard of care that is guided by what a reasonable design professional would do under similar conditions. Language requiring the design professional to guarantee or warranty services may inappropriately elevate the standard of care to a perfection standard.

The AIA documents address certificates and provide that the design professional is not required to execute certificates or consents that would require knowledge, services or responsibilities beyond the scope of the agreement. In addition to the AIA language, we recommend deleting words such as "guarantee"; "warrant"; "ensure"; and "certify" with respect to your services. If the client requires you to provide certifications for the project, we recommend tying the certification to the applicable standard of care and modifying the language to certify "to the best of the design professional's information, knowledge, and belief".

20. How can I protect myself if my client demands access to or ownership of my work product in electronic form?

We recommend the design professional maintain sole ownership of its work product, regardless of whether the work produce is in hard copy or electronic form. As with hard copies, we recommend insisting on payment for services rendered prior to transferring ownership of electronic work product, limiting the client's use of the electronic work product to completion and use of the project, and insisting on indemnity protection in the event of unauthorized use of the electronic documents. In addition, electronic documents present special concerns to design professionals due to the possibility of alteration of the electronic documents and the client's desire to rely upon them as contract deliverables. If the client demands the design professional's electronic documents, we recommend additional language stating that the electronic documents are provided to the client for convenience and

informational purposes only and not as an end-product, and that they do not constitute “Contract Documents.”

21. Do I have authority to stop the contractor’s work?

Design professionals should not have the authority to stop the contractor’s work and should refuse any effort to delegate such authority to it. Not only is there potential liability to the contractor if the design professional wrongfully stops the work, it can open the design professional up to potential exposure under OSHA. OSHA review commissions have cited authority to stop the work as a factor in finding design professionals liable for site safety issues. However, the design professional may assume the authority to reject work as part of its construction phase services. The AIA documents include appropriately worded provisions granting the design professional authority to reject work that does not conform to the Contract Documents. For further protection, the design professional may want to limit its responsibility to recommending that the client reject work, rather than the design professional rejecting the work itself.