

The Importance of a Contract For Design Professionals

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A contract, although sometimes a difficult document to negotiate, is a vital part of a design professional's practice because a contract between the design professional and the client is the document that sets forth the terms of the business relationship on a project and how that relationship is to be governed. The goal, and certainly the hope, of the design professional and client in signing a contract is that the contract can be signed and put in a drawer with no need to refer to it again as the design professional performs the services requested and the client pays in a timely fashion. However, in the event that a problem, dispute or concern arises during the course of the project, then the design professional and his client will refer back to the contract. It is at this point that the design professional will want to re-encounter a well drafted contract.

A well crafted contract has many parts but some of the essential areas that the design professional should look for in reviewing a contract are the following:

- I. Scope of work
- II. Change in scope of work/change orders
- III. Negligence standard
- IV. Limitations liability
- V. Consistency

This article will address these specific and important aspects of a well-drafted contract below.

I. Scope of Work

A contract should clearly delineate the scope of work. A clear scope of work allows the design professional to know what is expected from him by the client. Also by working together to put the scope of work in writing the design professional and client can remove any misunderstands as to what work the design professional will perform and what work the client expects to be performed. If the scope of work is described more fully in an attachment to the contract, then the contract should clearly state and identify the attachment as being a part of the contract so that there is no confusion or disagreement as to the scope of work that was agreed upon before work started. One additional benefit of a specific, clearly defined scope of work is that by default, it shows what work or tasks and design professional would not be responsible for. A design professional should be cautious when asked to agree to a vaguely-worded scope of service such as one that requires a design professional to do "all things reasonably

necessary to accomplish the client's purposes.” This type of scope of work, which is overly general and broad, can lead the design professional to be potentially responsible for things that a design professional would not consider to be within his scope of work.

II. Change in Scope of Work - Change Orders

There should be a section that explains how the design professional and client can mutually agree in writing to a change in the scope of work. Any change in scope should be memorialized in writing so that there will not be any disputes as to what change in scope was agreed upon. It is particularly important that in any contract between a design professional and a governmental entity in the State of Florida, whether it is city, county or state, any changes in the scope of work or any change orders are required to be documented in writing. **Florida law will not allow a design professional to recover for work provided to any state governmental entity based on a change in scope of work or change order that was not documented in writing.** Governmental entities do not have to pay for undocumented changes in scope of work or change orders under the theory of sovereign immunity. Thus, when dealing with governmental entities of the State of Florida, it is vitally important for a design professional to document, in writing, any requested changes in scope of work or change orders in order to be paid for additional work. It is good practice to document in writing such changes with private clients as well.

III. Negligence Standard

Florida law provides that the standard of care for a design professional. The standard of care is that the design professional must perform in a manner that is consistent with that degree of care and skill ordinarily exercised by design professionals currently practicing under similar circumstances at the same time and in the same or similar locality. Thus, the design professional will not be legally liable for a mistake or error unless it can be proven that the design professional was negligent. Therefore, the design professional should review the contract to make sure that this standard of care remains intact in the contract and that the design professional is not guaranteeing or warranting his work. Note that for design professionals, professional liability insurance typically provides coverage for acts of negligence and not contractual breaches such as the breach of a warranty or guarantee. Design professionals should seek to change contractual language which removes the negligence standard and subjects the design professional to guaranteeing or warranting the work.

IV. Limitation of Liability

In addition, it is important that a contract contain a limitation of liability clause. This type of clause is important because the design professional certainly wants to limit his liability in the event of allegations of negligence. Although recent court decisions seem to make a limitation of liability clause unenforceable as to a design professional personally, the case law is not clear as to whether a limitation of liability is unenforceable as to the design professional's company. Thus, the limitation of liability clause should still be included if possible naming the design professional and the design professional's firm.

V. Consistency

Lastly, in reviewing a contract the design professional should read through the contract carefully to make sure it is consistent and uniform. Consistency and uniformity mean that the same terms are used consistently throughout the document. If the design professional is referred to as “design professional,” he should always be referred to as “design professional” throughout the document where appropriate. If the design professional is referred to as a “consultant,” then the term “consultant” should be used. Terms such as “design professional” and “consultant” should not be mingled throughout the contract as it may not be clear what is being required of the design professional. In addition, it should be made clear in the contract what, if any, attachments or indexes are made a part of the contract by clearly noting in the contract that such documents are a part of the contract as well. Thus, if a contract is a two page contract that also contains an exhibit A, it should state in the two pages of the contract that the contract consists of exhibit A as well. This is important so that it is clear at the beginning of the business relationship what documents constitute the contract.

By carefully reviewing a contract and keeping in mind these areas of concern, a design professional can achieve better, more useful contracts.

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