


WELCOME TO
HALL & COMPANY
Serving Architects, Engineers and Environmental Consultants

AE RESOURCES WEBINAR

The Impact of Onerous Provisions

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Beazley Group



Have you read (and do you understand) your contract?

• Today's topics:

- Scope of Services
- Standard of Care
- Indemnity
- Incorporation by Reference
- Limitation of Liability
- Waiver of Consequential Damages
- Dispute Resolution
- Use and Ownership of Documents

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Contract Language

Clearly define your responsibilities:

- Clarity
- Definition
- Competency

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Scope of Services – “CDC”

Clearly define your responsibilities

- **Clarity**
 - Avoid ambiguous language
 - Consider the client's level of sophistication
- **Definition**
 - Write a detailed scope that can help manage expectations
 - Clearly define limits of your basic services
 - Clearly define – by inclusion– the services you will provide
 - Avoid open-ended scope
- **Competency**
 - Manpower and skill set to carry out scope
 - Use consultants as necessary

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Polling Question

What contract provision is the most difficult to negotiate with your clients?

1. Standard of care
2. Indemnity
3. Limitation of liability
4. Dispute resolution
5. Use and ownership of documents

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Standard of Care

Key Points:

- The appropriate standard – “that level of usual and customary professional skill and care **ordinarily exercised** by professionals rendering **similar** services in the same geographic area”
- It is **not** the “highest” or “best” standard of care
- It is **not** a standard of perfection

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Standard of Care

SAMPLE LANGUAGE:

“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 Design Professional makes no other representations or warranties, whether expressed or implied, with respect to the services rendered hereunder.”

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Standard of Care – DANGERS

Watch out for standard of care with: 

- Warranties, guarantees, certifications
- Perform services to the “highest”, “best”, “first-class”, “first-rate” standard of care as opposed to ordinary, reasonable standard
- Perform in accordance with Client’s standards
- **Suggested qualifying language:** “...nothing herein shall be construed as holding Design Professional to a standard of care that is more stringent than the general accepted standard of professional skill and care ordinarily exercised by similarly situated professionals...”

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Indemnity

What is Indemnification?

Agreement whereby one party agrees to assume the liability of another in the event of a loss.



Polling Question

What type of indemnity obligation do you propose in your standard terms and conditions to clients as your initial negotiating position?

1. No indemnity
2. Broad provision not based on your negligence, with a duty to defend
3. Broad provision not based on your negligence, no duty to defend
4. Negligence-based provision, with a duty to defend
5. Negligence-based provision, no duty to defend

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Polling Question

What type of indemnity obligation do you typically accept in professional service agreements with clients?

1. No indemnity
2. Broad provision not based on your negligence, with a duty to defend
3. Broad provision not based on your negligence, no duty to defend
4. Negligence-based provision, with a duty to defend
5. Negligence-based provision, no duty to defend

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Indemnity

Key Points:

- Ideal position: no indemnity!
- Reality: ensure the obligation is acceptable
 - Who are the Indemnitees?
 - Agents; lenders; designees; contractors; representatives
 - Officers, directors, employees
- Duty to defend
 - Can you delete the duty to defend?
 - If not, are you willing to accept the obligation
- Is the obligation negligence-based?
 - "to the extent caused by Design Professional's negligence"
 - Ensure "negligent" properly placed in provision

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Indemnity

SAMPLE LANGUAGE:

"To the full extent permitted by law, the Design Professional agrees to indemnify and hold the Client harmless from and against any liabilities, damages and costs (including reasonable attorney's fees) to the extent caused by the negligence of the Design Professional in performance of services under this Agreement. In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable statute of repose or statute of limitations."

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Indemnity – Dangers!

Watch out for language that:

- Potentially creates liability not based on your fault: 
 - "any claim that arises in connection with Design Professional's services"
 - "any claim not caused by the negligence of the party indemnified"
- Potentially eliminates benefit of other party's contribution to the cause of damage
 - "claims caused by Design Professional's negligence regardless of the negligence of the party being indemnified"

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Indemnity

And a note on mutual indemnity provisions...
 even if mutual indemnity provision is **appropriately negligence based...** try to delete!

Remember: ideal position is **NO indemnity**

“Mutual” may not benefit you!

- mutual provision benefits client more than design professional because client is more likely to seek indemnity from design professional since client is vicariously liable for the negligence of the design professional

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Incorporation by Reference

– **Inherently Dangerous!**

Key Points:

- May create significant risk management and liability issues
- Effectively makes the incorporated document part of Design Professional's agreement
- Has the Client provided the document incorporated by reference?
 - If so,
 - Is the document acceptable and consistent with your contract?
 - Make sure your agreement governs if inconsistent
 - If Client objects, list provisions you agree to incorporate (preferred tactic) OR those you reject after thorough review and evaluation of document
 - If not, do not execute agreement

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Agreed Remedy a.k.a. Limitation of Liability

Key Points:

- Will it provide any (significant) protection?
 - Limitation amount options
 - Be aware of any exceptions to the limitation
- Is it enforceable?
- What can you do?
 - Include Design Professional's officers, directors, employees, agents, and consultants
 - Include all causes of action
 - Ensure the limitation amount is reasonable
 - Entitle provision “Agreed Remedy”

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Agreed Remedy a.k.a. Limitation of Liability

SAMPLE 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.”

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Waiver of Consequential Damages

Key Points:

- Push for these on projects that rely on stream of commerce and profits
- Should be a mutual waiver
- Beware of any exceptions to the waiver

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Waiver of Consequential Damages

SAMPLE LANGUAGE:

“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.”

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Dispute Resolution

Key Points:

- Recommend mediation as condition precedent to litigation

☑ Mediation:

- » Voluntary
- » Non-binding
- » Confidential
- » Opportunity for Creative Resolution

☒ Arbitration:

- » No rules of evidence or discovery
- » Binding
- » Arbitrary Decisions
- » No appeal

Dispute Resolution

SAMPLE LANGUAGE:

"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."

Dispute Resolution

-What if client insists on arbitration?

- Require limited discovery and that parties follow rules of evidence
- No consolidation/joiner without agreement by both parties
- Limit scope of claims to a certain dollar threshold e.g. \$100,000
- Delete attorney's fee shifting provisions
- What if Client wants to be able to join Design Professional in other proceedings?
- "...the foregoing is contingent upon Design Professional being afforded the opportunity to fully and meaningfully participate in the proceeding, including the selection of arbitrators..."



"Then it's settled. She gets the house, he gets the cars and the video games go to the winner of a game of 'Guitar Hero'."

Use and Ownership of Documents

Key Points:

- Ideal position: maintain copyright and ownership
- Reality: ensure the Design Professional has necessary protections
 - ☑ Get paid prior to transferring ownership
 - ☑ Limit client's use to completion and use of project
 - ☑ Include indemnity protection in event of unauthorized use of documents

Use and Ownership of Documents

Key Points:

- Electronic documents
 - Same considerations as hard-copy documents, PLUS:
 - Specific language for e-docs:
 - ✓ E-docs may be unintentionally altered
 - ✓ Provided for informational purposes only, not as end product
 - ✓ No warranties regarding fitness or suitability
- Copyright
 - If must give copyright to client, clarify Design Professional's right to use of standard details

Use and Ownership of Documents

SAMPLE LANGUAGE:

"All reports, notes, drawings, specifications, data, calculations, and other documents, including those in electronic form, prepared by Design Professional are instruments of Design Professional's service that shall remain Design Professional's property. The Client agrees not to use Design Professional-generated documents for marketing purposes, for projects other than the project for which the documents were prepared by Design Professional, or for future modifications to this project, without Design Professional's express written permission. Any reuse or distribution to third parties without such express written permission or project-specific adaptation by Design Professional will be at the Client's sole risk and without liability to Design Professional or its employees, subsidiaries, independent professional associates, subconsultants and subcontractors. Client shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Design Professional from and against any and all costs, expenses, fees, losses, claims, demands, liabilities, suits, actions, and damages whatsoever arising out of or resulting from such unauthorized reuse or distribution."

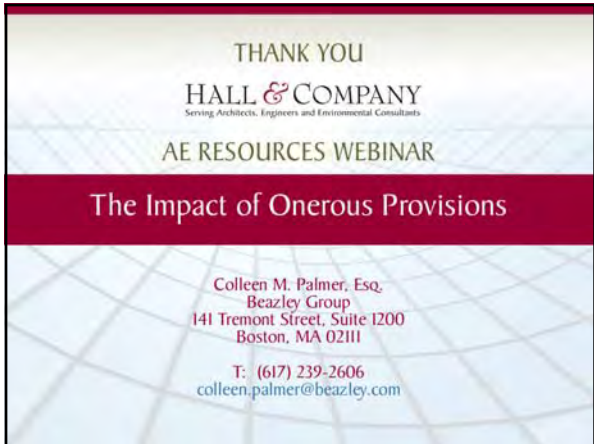




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AE RESOURCES WEBINAR

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