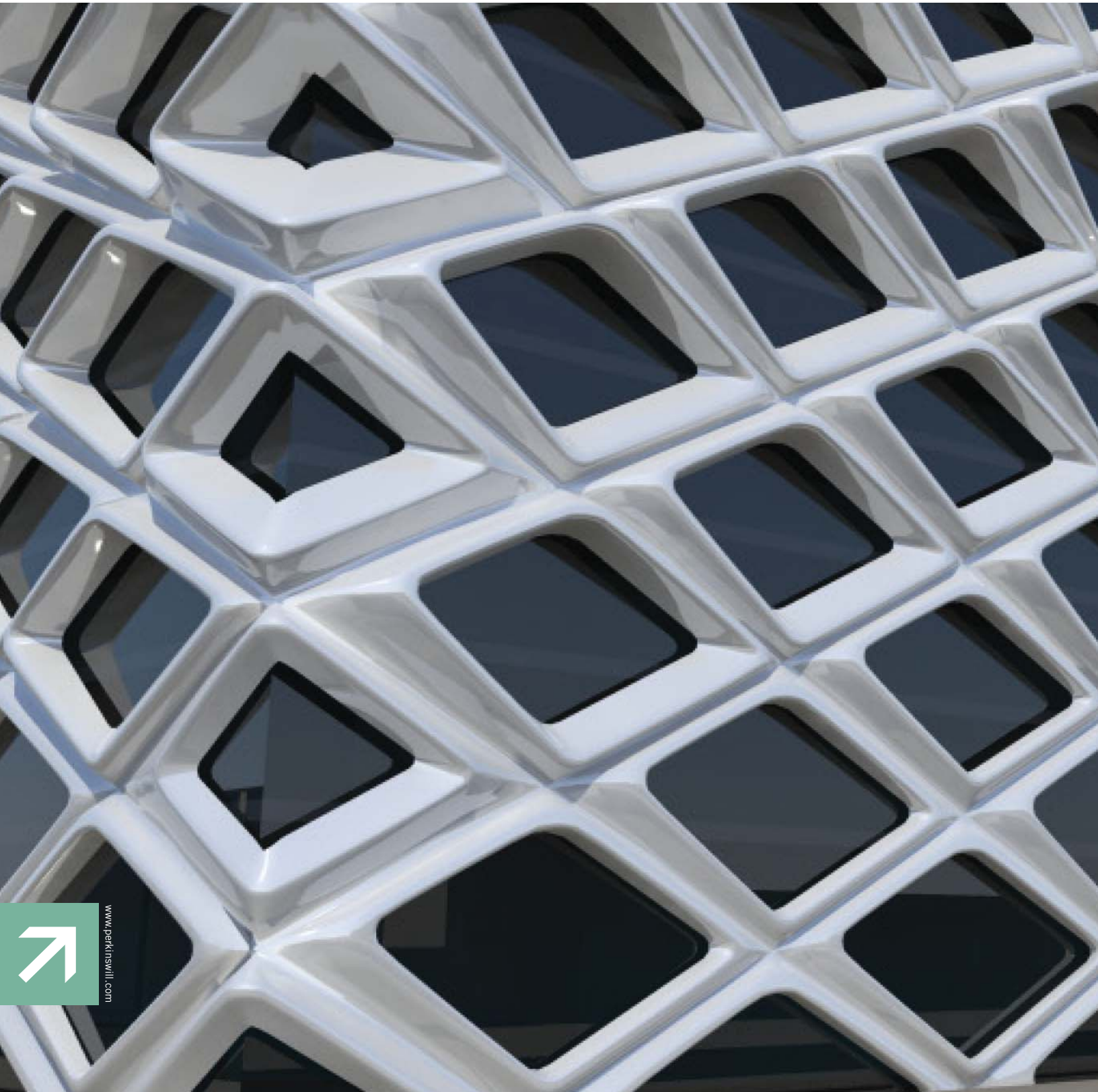


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01.

ARCHITECTURAL SERVICES DURING CONSTRUCTION:

Duties and Liability

Helena O'Connor, CAU-RJ, LEED AP BD+C, helena.oconnor@perkinswill.com

ABSTRACT

The objective of this paper is to investigate architect's responsibilities and obligations during construction, resulting in a better understanding of the scope and limits of architects' services and the risk architects face. Understanding of the architect's duties is important to establishing reasonable expectations thus reducing exposure to liability. The paper provides a literature review on this topic discussing information and resources gathered from books, AIA standard form agreements, AIA white papers and law reviews. Conclusions indicate that architects should clearly define their contractual responsibilities and conform their services to such duties.

KEYWORDS: architect duties, breach, negligence, liability

1.0 INTRODUCTION

Architects have a legal duty to provide services in accordance with their professional standard of care. Although defined by applicable law, language in an architect's agreement can increase this standard, thus creating risk that is difficult to manage. Likewise, contractually imposed duties beyond standard architectural practice can increase an architect's risk. Architects must follow their legal standard of care and carefully consider contract language to understand and align their duties with their legal and professional obligations. This paper examines architects' duties and responsibilities under an industry standard owner/architect agreement and reviews limitations to architects' authority. After analyzing several court cases involving claims of professional negligence, this paper presents different circumstances in which architects were found negligent and others in which they defended against these claims. Finally, this paper offers ideas on how to limit risk through management and quality control strategies.

2.0 ARCHITECTS' DUTIES AND RESPONSIBILITIES

2.1 The Law

Although architects' legal responsibilities differ from jurisdiction-to-jurisdiction, in general neither state nor federal law require architects to guarantee, warrant or ensure results, but expects them to use reasonable skill and care when providing professional services.

During their practice, architects are exposed to administrative law, which includes "regulations developed to implement civil statutes"¹. Public officials follow established regulations when reviewing architects' submitted documents and address adopted code and regulatory requirements specific to each project.

2.2 Standard of Care

The standard of care is the level of performing services expected of architects by law. A contractual statement of this legal duty might read: "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"². Even though this statement can be modified by contract or conduct, architects should conform their contracts to this standard; otherwise they might increase their exposure to liability. Compliance with this standard is judged based on what a reasonable architect would do, at the same time and circumstances, and is decided on a case-by-case basis in court. The architect who fails to exercise reasonable care may be held liable for professional negligence.

2.3 Before Construction - Scope of Architect's Basic Services

The scope of architect's services is defined in the agreement between the architect and the owner. The most common industry standard agreement form is the AIA B101 - 2007 Standard Form of Agreement Between Owner and Architect, developed by the American Institute of Architects (AIA).

The following are the Scope of Architect's Basic Services under AIA B101-2007³:

- The Architect's Basic Services include "usual and customary structural, mechanical, and electrical engineering". The Architect may choose to hire consultants outside the Architect's firm to perform these services, and enter into agreements with those parties.
- The Architect will manage his own services, consult with the Owner, research design criteria, attend meetings, communicate with the Project team, report progress of the Work to the Owner, and will submit a schedule of services showing anticipated dates for start of construction and substantial completion.
- The Architect will coordinate his services with the services provided by the Owner and Owner's consultants, and is permitted to rely on the accuracy of these services.
- The Architect is not responsible for changes made by the Owner without the Architect's consent.
- During Schematic Design phase, "the Architect shall prepare a preliminary evaluation of the Owner's program, schedule, budget for the Cost of the Work, Project site, and the proposed procurement or delivery method and other Initial Information, each in terms of the other". The Architect will also make recommendations on environmentally responsible design options available and applicable to the Project and discuss with the Owner the feasibility of incorporating these options. He will also consider materials, building systems and equipment consistent with owner's budget, and schedule.
- The Design Development phase follows the Schematic Design phase, and the Architect submits drawings and specifications showing the development of the design to the Owner, and updates the estimated pricing.
- The Construction Documents phase follows the Design Development phase approved by the Owner, and documentation of the Project continues in a

more detailed manner. An updated estimated Cost of the Work is included. These documents will be sent to the Owner, who will forward to various contractors during the Bidding or Negotiation phase.

- The Architect shall assist the Owner during the Bidding or Negotiation phase, and offer substitutions of materials.

2.4 During Construction

The architect's role during construction is described in both the AIA B101 – 2007 and in the AIA A201 - 2007 General Conditions of the Contract for Construction. Even though the architect is not a party to the construction contract, he develops the construction documents, including drawings and specifications that the contractor uses to construct the project. Under the AIA B101 and A201 – 2007, during construction the architect provides administration of the contract for construction to, among other things, observe if the work meets the architect's design intent. The architect is the point of communication between the contractor and the owner in matters regarding the contract including changes, acceptance of the work and payments to the contractor.

The following are the Architect's Responsibilities under AIA B101 and A201 – 2007⁴:

- The Architect will provide administration of the Contract for Construction, and, when granted authority, will be the Owner's representative, acting on the Owner's behalf during construction until the final Certificate for Payment is issued.
- The Architect will visit the site at appropriate intervals to become generally familiar with the progress and quality of the Work completed, observing if it complies with the Contract Documents. The Architect is not responsible for the means and methods of construction, or for safety precautions at the job site. These are the Contractor's sole responsibilities.
- The Architect will keep the Owner informed about the progress of the Work and will report deviations, defects and deficiencies. The Architect is not responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.
- The Architect will investigate matters regarding site conditions that are different than expected found by the Contractor during the performance of the Work. The Architect will then recommend an adjustment of the Contract Sum and/or Contract Time based on these unanticipated conditions.

- The Architect is the point of communication between the Owner and Contractor, and the Architect's consultants.
- The Architect will review, then accept or reject, the Contractor's Application for Payment. If accepted, the Architect will issue a Certificate of Payment to the Owner, in order to initiate payment to the Contractor. The issuance of this Certificate means that the Architect represents, to the best of his knowledge, information and belief, that the Work has progressed to a certain point and is in accordance with the Contract Documents.
- The Architect has authority to withhold payment if portions of the Work are defective, if third party claims may be or are made against the Owner, if Subcontractors have not been paid, if the Work cannot be completed for the unpaid balance of the Contract Sum or in the remaining Contract Time, if there is damage to the Owner or a separate contractor, or by repeated failure of the Contractor to carry out the Work in accordance to the Contract Documents.
- The Architect has the authority to order inspection or testing of the Work. The Owner may be obligated to pay for these inspections and tests, but if Contractor's work had been done incorrectly, then the Contractor shall be responsible for these costs and the Architect's additional time.
- The Architect will review Shop Drawings, Product Data and Samples submitted by the Contractor for compliance with the design intent only.
- The Architect is not responsible for the means and methods of construction or for safety precautions and will not be responsible for the Contractor's failure to perform the Work in accordance with the Contract Documents.
- The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes that do not affect the Contract Sum and/or Contract Time.
- The Architect will inspect the Work to determine the dates of Substantial Completion and Final Completion, check if the Contractor finished his punch list, and if the Work conforms to the Contract Documents.
- The Architect will receive and forward to the Owner all close out requirements, and will issue the final Certificate for Payment.
- The Architect will interpret and decide matters concerning the Contract Documents, decide matters regarding performance, and will respond to contractor's requests for information regarding the Contract Documents.
- The Architect may be the Initial Decision Maker, who will be responsible for providing initial decisions on claims between the Owner and Contractor. The initial decision maker may be another individual, but will be the Architect if no other individual is selected and named in the Construction Contract.

2.5 Authority of the Architect and its Limitations

During construction, the architect may perform functions at the job site as an owner's representative and will act on owner's behalf with certain authority. The architect's authority might be actual, implied or apparent.

Actual authority is when the owner expressly gives authority to the architect to represent the owner at the job site. Both the AIA B101 and A201 – 2007 spell out the scope of this authority. For example, 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 time.

Implied authority allows the architect to exercise authority incidental to his actual authority. Apparent authority is when the owner leads others to believe that the architect has more authority than he really has.

Rejecting contractor's work if work does not conform to the contract documents is a common authority granted to architects by contract. During construction, an architect often makes several site visits in order to become familiar with the progress of the work and generally determine that contractor's work is progressing in accordance to contract documents⁵.

3.0 LIABILITY

3.1 General

An architect is negligent when he fails to perform his duties consistent with the degree of care and competence generally expected of a reasonably skilled member of the profession providing similar services under similar circumstances. Acts of negligence arises out of architect's acts or failure to act and he may be held liable for negligence if all the following have been found to exist: duty, breach, cause and damage. In other words, the architect owed a legal duty to the complaining party; architect failed to perform his duty; that failure is the proximate cause of harm; and an actual harm or damage happened as a result⁶.

Depending upon causes of action permitted by applicable law, architects may face a negligence action by the owner, the contractor or third parties. Depending on the claim and type of damages sought, privity of contract may be required to impose liability on architects.

Applicable law and/or contracts may obligate architects to maintain insurance, such as worker's compensation, professional, general and automotive policies. Typically if an owner asks an architect to carry additional insurance and/or limits, the owner reimburses the architect for the corresponding costs. Professional liability insurance protects architects from negligence claims. Most professional liability policies require that the architect notify its professional liability carrier if a claim is made against the architect. The definition of a claim depends upon the architect's policy but in general to be considered a claim, the event must have three elements: injury to a person or property that has been proved; allegation that the architect was the one who caused the damage; and demand for compensation⁷.

Professional liability insurance coverage is very specific and "often excludes coverage of claims for a design professional's general negligence in the performance of its duties"⁸. Certain acts are covered, but others are not. If architect execute services outside the policy's covered services, he may not have coverage against claims arising out of these services. Intentional torts acts are usually not covered in these policies.

Statutes of limitations and statutes of repose are two concepts that relate to when a claim can be filed. "Statutes of limitations establish the period of time within which a suit can be filed upon the discovery of the act or omission giving rise to the claim"⁹ and "statutes of repose establish an outer time limit beyond which the design professional cannot be held liable for design and construction defects after the completion or substantial completion of a project"¹⁰.

3.2 Liability During Construction to the Owner, to the Contractor or to Third Parties

Contractors supervise construction and architects observe the work to determine if it is in accordance with the contract documents. This distinction is critical to accurately reflect industry practice and the contractor's and architect's liability exposure during construction. That is why it is imperative for the architect's role to be clearly and correctly defined in the contract. An architect does not supervise construction, such as in Case #1¹¹, where

contract provisions clarified that the architect was not responsible for workers' safety at the job site. The architect was not liable for worker's injury after the worker fell from a ladder, since the contract documents uniformly and clearly limited architect's responsibility to design and determination as to design conformance, which do not extend to worker safety. The court agreed that the architect was not in charge of the means and methods of construction or safety precautions.

If it is determined that architect is supervising the work, he can suffer inappropriate legal consequences. "If a design professional has agreed to perform supervisory tasks on a construction project, the contractor on the project may have a right to rely on the competence of that supervision"¹².

In order to receive payment from the owner, a contractor issues an Application for Payment that the architect reviews. After visiting the site and observing the work, the architect issues the owner a Certificate of Payment based on the progress of the work stated by contractor. Owner will pay the contractor based on those certificates issued by the architect and will rely on architect's professional opinion that the work has progressed to the point indicated and that the work is in accordance with contract documents. If architect issues certificates for payment without proper observation of the work, he may be liable to the owner for injury caused by defective work. In Case #2¹³, the contractor installed insulation too close to recessed light fixtures, which violated the building code and caused a fire. A provision in the contract stated that architect must visit the site at appropriate intervals to become familiar with the quality and progress of the work in order to keep the owner informed. Not paying attention to how the insulation was installed was an omission on part of the architect and that was considered as negligence. "The architect's obligation to issue certificates of payment required him to be familiar with both the quantity and quality of the work", therefore the architect approved payment for defective work, breaching his duties towards the owner. Even though the contract also stated that architect was not responsible for the means and methods of construction, based on Case #3¹⁴ "where liability is predicated on a breach of the duties the architect owes to the owner, the exculpatory language does not absolve an architect from liability for a contractor's failure to carry out the work in accordance with the contract documents." Architect may reject contractor's Application for Payment if the architect finds non-conforming work.

Architect must exercise care when reviewing shop drawings and submittals. Even though the architect is usually not liable to subcontractors when mistakenly approving shop drawings, in certain jurisdictions he may be held liable to the owner if the scope of the work is changed during the review of shop drawings, resulting in built work that is not in accordance with the contract documents. The architect may also be held liable to third parties for injuries resulting from approving shop drawings that have faulty information, and may not be able to receive indemnification from a joint tort-feasor. In Case #4¹⁵, the architect was not relieved from liability when he approved subcontractor's shop drawings that contained incorrect gauge information for the supports of a stair landing. The landing collapsed and two workmen were injured. The architectural firm was ordered to pay the two workmen damages on their lawsuit against the architect, who later brought this action against the contractor and subcontractor for indemnification. The court ruled that "the architectural firm's conduct was an omission, which constituted active negligence" and prevented the architects from receiving indemnification from the contractor and subcontractor. "Each failed to perform an affirmative duty undertaken by contract", so one party would not receive indemnification from the other. The court referred to another lawsuit, Case #5¹⁶, where that court ruled "if a person seeking indemnity personally participates in an affirmative act of negligence or is physically connected with an act of omission by knowledge or acquiescence in it on his part or fails to perform some duty in connection with the omission that he was undertaken, he is deprived of the right of indemnity".

3.3 Defenses

There are a variety of defenses that architects have successfully used to defend against negligence claims.

Architect can assert that he should not be liable to contractors and subcontractors, since they are not in privity of contract and the architect does not owe a duty to them, especially when the architect does not have a job site supervisory duty under his agreement with the owner. In Case #6¹⁷, the architect had advised the owner in good faith not to accept subcontractor's request to substitute suppliers without using the stricter substitution standard procedures required under the construction contract. That caused delays to the project and the subcontractor claimed that he lost money. Then, the contractor brought a tort action against the architect for negligent interpretation of contract provisions, but architect was not considered the proximate cause

of subcontractor's monetary damages. It is necessary "that supervisory duties exist in order to allow a case to be tried under a tort theory where the plaintiff lacks privity or status as an intended third-party beneficiary".

Architect may not be considered negligent if he can prove that his plans were not used accordingly. In Case #7¹⁸, contractor used trenching technique to remove brick from the front of the building, resulting in the removal of all support for a parapet causing it to collapse, along with a part of the building. Since trenching was a deviation from the architect's drawings, the architect was not held liable for the fall of the building or for the injuries that resulted from that collapse. "The plans and designs of a professional are not the proximate cause of an injury if the work was not constructed or performed according to the plans."

Architect may avoid liability if he proves that he was not responsible for supervising construction activities at the job site. In Case #8¹⁹, under the contract with the owner, the architect clearly defined his limited role during construction to provide supervision only for compliance with the plans and specifications. The architect was supposed to check the progress of the work in terms of the design intent and not regarding means and methods or safety measures, which were both the contractor's responsibility. "In the absence of any contractual right to supervise and control the construction work as well as site safety, the architect cannot be held liable in negligence for plaintiff's injuries"²⁰. Before a party is required to provide a safe workplace, it must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition"²¹.

4.0 PREVENTING AND LIMITING LIABILITY

4.1 Risk Assessment

Architects should set goals for their practice, assess the risks involved with potential projects and clients, and plan to manage those risks. Architects must understand what they can and cannot do and avoid engagements where they cannot practice in accordance with the legal standard of care. They should not worry that the client will be offended; being honest will earn architect credibility with those clients who will be able to rely on that architect for specific types of projects.

When assessing risks, architects should pay attention to the scope of the project and its requirements, firm's experience, client attributes, influences on project de-

livery, compensation for design services, the project budget and schedule, attitude of the community and government to new projects, the overall political situation, local laws, rules and regulations. After analyzing all the potential risks, the architect should evaluate if it is possible to provide design services and still satisfy the client and the architect's internal company policies. "The best way to handle risk management is to identify potential risks and plan for them ahead of time"²².

4.2 Quality Control

The following items can lead to professional liability claims. Architects should carefully pay attention to these problem areas and try to address them during quality control activities in their practice²³:

- Inadequate supervision of inexperienced employees – Design errors are caused mainly by inexperienced architects who did not receive enough supervision and direction during the performance of the work.
- Inadequate project coordination – Poor communication and the separation of tasks within the design team cause each team member to understand very little about the project as a whole causing coordination problems within the design documents.
- Inadequate communication between architects and consultants is a major problem.
- Inadequate design quality control – Sometimes architects are requested to make lots of changes within unreasonable time frame, affecting the ability to revise drawings adequately to check and coordinate all the changes.
- Inadequately worded contract documents – Using non-standard contract documents can cause problems if an architect does not understand his duties and responsibilities listed in these documents.

4.3 Signs of Potential Claims

Not all claims can be anticipated, but if an architect wants to try to avoid claims he should try to find out if either the owner or the contractor is under financial difficulties and carefully pay attention to owner's litigation history and unexpected site conditions²⁴.

5.0 CONCLUSION

It is important to note that architects provide services, not products. Even when exercising his reasonable professional judgment, an architect might be mistaken unfortunately buildings cannot be pre-tested and guaranteed they will work as planned. Architects are liable for negligent services, but will not be liable for errors or

omissions that a reasonable practitioner might have also made under similar circumstances. An architect will be held liable for its negligence when he fails to exercise reasonable professional judgment, resulting in harm to persons or properties. Architects should be very careful when preparing contracts to clearly define their role for all phases of the project and while exercising their duties before and during construction. Courts consist of people with their own opinions and interpretations of the law, which explains why almost identical cases have had opposite outcomes. Architects play a pivotal role in a highly complex industry where "interpretation" is a continuous activity exercised by all project participants, each paying attention to their own interests, even though the success of a project's construction should be the ultimate goal.

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