

TOP TEN DROP-DEAD CONTRACT CLAUSES DESIGN PROFESSIONALS CANNOT IGNORE (AND MORE)

NSBAIDRD and AIA NEVADA

May 1, 2013: 8:00 am -12:00 pm

Jean A. Weil Esq.
jweil@weildrage.com
Weil & Drage APC
CA, NV, AZ

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,
APC



Jean A. Weil Esq.
jweil@weildrage.com
Weil & Drage
CA, NV, AZ



This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,
APC

KEY CONTRACT CLAUSES; NEW CASES

OVERVIEW OF TOPICS

- Introduction to Contracts
- Indemnity
- Defense
- Consequential Damages
- Limitation of Liability
- Sole Remedy
- Third Party Obligations
- Standard of Care
- Warranties, Guarantees & Certifications
- Attorneys' Fees
- Dispute Resolution
- Job Site Safety
- Non-Solicitation of Employees
- Prime vs Non-Prime
- Public Entity Contracts
- Other Risk Management Concerns

Introduction

- What is a contract?
 - Definition:
 - 1. An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.
 - 2. The writing that sets forth such an agreement.

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC



Introduction

Why have a written contract?

- Establishes the “rules of the game”
 - Expressly outlines duties and responsibilities of the parties
 - Allocates risk and reward
 - Develops a framework for dispute resolution in the event of a problem
 - Insurance companies require it

Introduction

- What is a proposal?
 - Definition: Something offered for consideration or acceptance
 - Generally a “bare-bones” description of scope of services and fee structure
 - Usually negotiated before the contract

Introduction

- Why have a proposal?
 - Need to know if there is a meeting of the minds on scope and fee before proceed
 - Usually proposal is incorporated by reference into the contract as an exhibit
 - Should be clear, concise and detailed
 - Often disputes occur from a fundamental misunderstanding of scope of services

Introduction

- What governs---contract or proposal?
 - Contract should govern and the contract should expressly so state “In the event of a conflict between the terms of this contract and the terms of the proposal, the terms and conditions of the contract shall govern.”

Introduction

- What are the top 10 “make or break” contract clauses?
 - Indemnity
 - Defense
 - Consequential damages waiver
 - Limitation of liability
 - Sole remedy
 - Third party obligations
 - Standard of care
 - Warranties and Guarantees
 - Attorneys’ fees
 - Dispute Resolution



Introduction



Introduction

- What are the deal breakers?
 - Indemnity, indemnity, indemnity
 - Defense, defense, defense
 - Consequential damages waiver
 - Limitation of liability
 - Attorneys' fees clauses

Indemnity and Defense

Most far
reaching
implications

Most likely to
radically shift
risk

Most likely to
radically shift
costs

Most difficult
to negotiate

Most likely to
be the “deal
breaker”

Most litigated

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,
APC

APC

Indemnity

What is Indemnity?

Definition:

1. A duty to make good any loss, damage, or liability incurred by another.
2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.
3. Reimbursement or compensation for loss, damage or liability in tort; especially the right of a secondarily liable party to recover from a primarily liable party.

Indemnity

- Pared down definition: An agreement to assume a specific liability in the event of a loss
- Shifts risk from one party to another
- Serves as a kind of “insurance” for the party getting indemnity

Indemnity

- Common Law Duty
 - Implied Indemnity:
Duty of one party who bears primary responsibility for a third party's damages to reimburse another party who bears secondary responsibility for the same damages



Indemnity


- Implied Indemnity
 - Applies in contract even if contract is oral
 - Applies in contract even if contract is written but there is no indemnity clause
 - So if you have a written contract with no indemnity clause, you still owe a common law duty to indemnify your client for your own negligence

Defense


- What is a defense?
 - Generally a contractual provision whereby one party agrees to “defend” the other party from future claims or lawsuits
 - This means picking up the costs of defending against such claims or lawsuits including attorneys fees, expert fees, hard costs, etc.
 - Depending on how the defense clause is written, it may mean paying for the other party’s defense even in the absence of fault



INDEMNITY AND DEFENSE



Courts look to intent of the parties in light of the facts—construe clauses applying same rules that govern other contracts



When parties knowingly bargain for protection, courts will respect their wishes: “We hold parties to their contracts”

INDEMNITY AND DEFENSE

- So what is the problem?
- Why not defend and indemnify your clients?
 - Professional liability insurance carriers do not insure you for liability you assume by contract to “defend” your client (unlike GL carriers)
 - Do insure you for liability that you assume by contract that you would otherwise have under common law principals or by statute (“by operation of law”)
 - Insurer will still provide a defense to you but not your client
 - Insurer will issue a reservation of rights

INDEMNITY AND DEFENSE

- Thus, if you contractually agree to “defend” your client by way of an indemnity clause, you may be “going bare” and risk paying for that loss out of pocket
- Worse, your client may have contractually bound you to pay for counsel of their choice---\$\$\$\$\$\$
- Defense costs can run into seven figures in a complex construction dispute (especially if your client gets to pick the lawyers)
- Defense costs include attorneys’ fees, expert fees and hard costs of litigation

CRAWFORD v. WEATHERSHIELD

California Supreme
Court (2008)

Homeowner CD action
against developer and
window subcontractor
(among others)

Developer cross-
complained against
subcontractors

Jury found no liability
of the window
subcontractor to HO's
or developer

CRAWFORD v. WEATHERSHIELD

- By way of later declaratory relief action, trial court found developer was not entitled to indemnity because subcontractor was not negligent
- But, the trial court found that developer was entitled to a defense for monies spent defending HO's claims
- Trial court allocated \$131,274 of defense costs plus awarded \$46,734 in fees to developer as prevailing party on its cross-complaint
- Subcontractor appealed
- Court of Appeal affirmed (split decision)
- Supreme Court granted limited review

This presentation may not be duplicated or distributed without the express written permission of Weil & Drage,

APC

CRAWFORD v. WEATHERSHIELD

- Question: Did a contract under which a subcontractor agreed “to defend any suit or action” against a developer “founded upon” any claim “growing out of the execution of the work” require the subcontractor to provide a defense to a suit against the developer even if the subcontractor was not negligent?

CRAWFORD v. WEATHERSHIELD

- “Contractor does agree to indemnify and save Owner harmless against all claims for damages...to property...growing out of the execution of the work, and at his own expense to defend any suit or action brought against Owner founded upon the claim of such damage or loss...”

CRAWFORD v. WEATHERSHIELD

- Supreme Court Answer:
Yes!
- Court applied California
Civil Code § 2778:
 - Sets forth general rules for
interpretation of indemnity
contracts “unless a contrary
intention appears”



CRAWFORD v. WEATHERSHIELD

Civil Code § 2778

A promise of indemnity against claims, demands or liability “embraces the costs of defense against such claims, demands, or liability” insofar as such costs are incurred reasonably and in good faith

CRAWFORD v. WEATHERSHIELD

Civil Code § 2778

The indemnitor “is bound, on request of the [indemnatee], to defend actions or proceedings brought against the [indemnatee] in respect to the matters embraced by the indemnity” though the indemnatee may choose to conduct the defense

UDC v. CH2M Hill

Sixth District Court of Appeal (2010)

HOA sued UDC for defects including negligent planning and design of open space and common areas

CH2M Hill provided engineering and environmental planning for the project

UDC cross-complained against CH2M Hill for indemnity and tendered its defense

HOA, UDC and other cross-defendants settled

UDC and CH2M Hill went to trial

UDC v. CH2M Hill

Crawford decision came down just before the matter was submitted to jury

Parties stipulated that jury would decide the factual issue of negligence and breach of contract, but court would decide the contractual indemnity provisions in light of Crawford

Jury was unanimous: “No Negligence”

UDC v. CH2M Hill

- Trial court suggested “it would be a meaningless duty to defend if it did not arise from an accusation or complaint of negligence arising from the work”
- CH2M Hill raised the question of whether the duty exists if no evidence of such a claim by the HOA
- Court invited further briefing

UDC v. CH2M Hill

UDC urged court to apply Crawford and hold that CH2M Hill owed UDC an immediate defense upon tender

CH2M Hill argued that Crawford was distinguishable because while the indemnity provision was broad, the defense obligation was arguably triggered upon a finding of negligence and the negligence allegations in the underlying complaint did not did not implicate CH2M Hill

UDC v. CH2M Hill

- Court sided with UDC and ordered CH2M Hill to reimburse UDC for defense fees and costs incurred in defending the HOA claims related to CH2M Hill's work
- The parties then disputed who was the "prevailing party" under the cross-complaint for the cause of action for breach of the contractual obligation to defend
- After further briefing, the court found UDC be the "prevailing party" and awarded UDC fees and costs on the cross-complaint (even though it lost on negligence and breach of contract)


UDC v. CH2M Hill

- CH2M Hill appealed the lower court rulings
- Court of Appeal held that since the question of breach of the duty to defend was never presented to the jury, the jury's finding of "no negligence" did not encompass the duty to defend and it was not error for the court to reach a decision independent of the jury's verdict
- Thus held that the question was properly decided by trial court

UDC v. CH2M Hill

- “Consultant [CH2M Hill] shall indemnify...claims...to the extent they arise out of or are in any way connected with any negligent act or omission by Consultant...or upon any other legal or equitable theory whatsoever. Consultant agrees, at its own expense and upon written request by Developer or Owner of the Subject Property, to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein. Notwithstanding the above, Consultant shall not be required to indemnify Developer or Owner from loss or liability to the extent such loss or liability arises from the gross negligence or willful misconduct by Developer, Owner, or agents, servants or independent contractors who are directly responsible to Developer or Owner, or for defects in design furnished by such person.”

UDC v. CH2M Hill



CH2M Hill focused on the phrase “any claim or demand covered herein’

CH2M Hill argued that for a duty to defend to arise, there had to be an allegation by the HOA that its damages arose, at least in part, from CH2M Hill’s negligence

CH2M Hill distinguished the facts of Crawford both in the language of the clause and the fact that the HO’s in Crawford alleged negligence

UDC v. CH2M Hill

- But Court of Appeal was focused on the fact that while the indemnity clause was tied to negligence, the defense clause was not, despite the qualifying language “covered herein”
- Court of Appeal found even if “any claim or demand covered herein” did refer back to the indemnity obligation, the indemnity clause was so broad as to apply to claims “in any way connected with any negligent act or omission...or upon any other legal or equitable theory whatsoever”

UDC v. CH2M Hill

- Thus the Court found CH2M Hill's indemnity obligation was conditioned upon a finding of negligence, but the defense obligation arose when the cross-complaint attributed responsibility for the HOA's damages to CH2M Hill's deficient performance
- The HOA's general description of defects was sufficient to implicate CH2M Hill's work

UDC v. CH2M Hill

- Court of Appeal found the lower court's analysis to be consistent with Crawford and that the subject clause was sufficiently similar to the clause in Crawford
- Court of Appeal also found the lower court's ruling was consistent with California Civil Code § 2778

UDC v. CH2M Hill

- In the end, the Court of Appeal affirmed the trial court's orders including all awards of fees and costs
- CH2M Hill was ordered to pay UDC:
 - Defense fees and costs of \$154,142 for the underlying HOA action;
 - Prosecutorial fees and costs as prevailing party on the cross-complaint (duty to defend) of \$395,035
 - Total \$549,177 (OUCH)

WHAT CAN YOU DO?



- So what can you do to avoid the imposition of an indemnity or defense clause absent a finding of negligence?

CH2M Hill Clause From UDC Case:

- Consultant [CH2M Hill] shall indemnify and hold Owner, Developer, and their respective officers, directors, employees and agents free and harmless from and against any and all claims, liens, demands, damages, injuries, liabilities, losses and expenses of any kind, including reasonable fees of attorneys, accountants, appraisers and expert witnesses, to the extent they arise out of or are in any way connected with any negligent act or omission by Consultant, its agents, employees or guests, whether such claims, liens, demands, damages, losses or expenses are based upon a contract, or for personal injury, death or property damage or upon any other legal or equitable theory whatsoever. Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein. Notwithstanding the above, Consultant shall not be required to indemnify Developer or Owner from loss or liability to the extent such loss or liability arises from the gross negligence or willful misconduct by Developer, Owner, or agents, servants or independent contractors who are directly responsible to Developer or Owner, or for defects in design furnished by such person.

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Consultant [CH2M Hill] shall indemnify and hold Owner, Developer, and their respective officers, directors, and employees ("Owner") ~~and agents~~ free and harmless from and against any and all claims, liens, demands, damages, injuries, liabilities, losses and expenses of any kind, including reasonable fees of attorneys, accountants, appraisers and expert witnesses ("Claimed Damages"), to the extent caused by ~~they arise out of or are in any way connected with~~ any negligent act or omission by Consultant, its agents, employees ~~or guests~~, whether such claims, liens, demands, damages, losses or expenses are based upon a contract, or for personal injury, death or property damage or upon any other legal or equitable theory whatsoever. ~~Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein.~~ Consultant shall have no upfront duty to defend the Owner but shall reimburse defense costs of the Owner to the same extent of its indemnity obligation herein. Notwithstanding the above, Consultant shall not be required to indemnify Developer or Owner from loss or liability to the extent such loss, ~~or~~ liability or Claimed Damages arises from the ~~gross~~ negligence or willful misconduct by Developer, Owner, or agents, servants or independent contractors who are directly responsible to Developer or Owner, or for defects in design furnished by such person.

INDEMNITY CLAUSE TO USE IF MUST AGREE TO PAY FOR DEFENSE:

- Consultant agrees, to the fullest extent permitted by law, to indemnify and hold the Owner harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) ("Claimed Damages") but only to the proportionate extent that such Claimed Damages are caused by Consultant's negligence or willful misconduct. Consultant shall have no upfront duty to defend the Owner, but shall reimburse defense costs of the Owner to the same extent of Consultant's indemnity obligation herein. The indemnity obligations provided under this section shall only apply to the extent such Claims are determined by a court of competent jurisdiction or arbitrator to have been caused by the negligence or willful misconduct of Consultant. These indemnity obligations shall not apply to the extent said Claims arise out of, pertain to, or relate to the negligence of Owner or Owner's other agents, other servants, or other independent contractors, including the contractor, subcontractors of contractor or other consultants of Owner, or others who are directly responsible to Owner, or for defects in design or construction furnished by those persons.

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

REYBURN v. PLASTER DEVELOPMENT

255 P.3d 268 (2011)

Nevada
Supreme
Court
decision
(2011)

HO's brought suit
against general
contractor (Plaster
Development) for
negligent
construction of
their homes

Plaster then
sued Landscape
Sub (Reyburn)
for breach of
express
indemnity

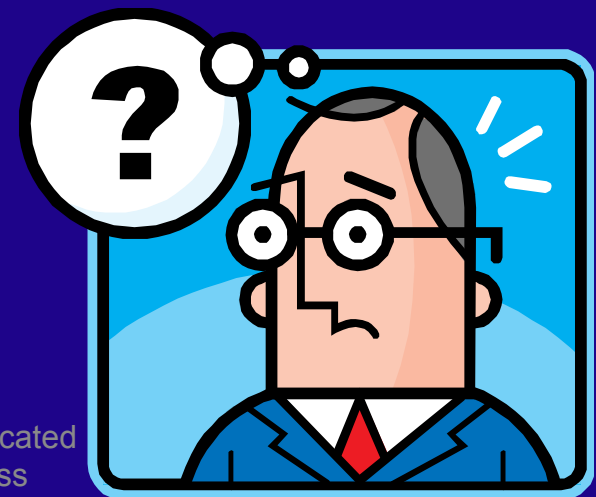
Trial court
entered
judgment in
favor of Plaster
and Reyburn
appealed

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

REYBURN v. PLASTER DEVELOPMENT

- Question: Whether an indemnity clause in a construction contract between a general and a sub obligates the sub to indemnify the general for the general's partial negligence for the construction defects, regardless of whether the sub is also negligent?



This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

REYBURN v. PLASTER DEVELOPMENT

- Nevada Supreme Closely Analyzed Indemnity Clause:
- “Subcontractor agrees to save, indemnify and keep harmless Contractor against any and all liability, claims, judgments or demands, including demands arising out of...damage to property...except claims or litigation arising through the sole negligence or sole willful misconduct of Contractor, and will...reimburse Contractor...including reasonable attorney’s fees. If requested by Contractor, Subcontractor will defend any suits at the sole cost...of Subcontractor.

REYBURN v. PLASTER DEVELOPMENT

- Supreme Court held:
- Indemnity clause did not require sub to indemnify contractor for contractor's contributory negligence because of the express wording "except claims or litigation arising through the sole negligence or sole willful misconduct of the contractor"

REYBURN v. PLASTER DEVELOPMENT

- Supreme Court Held:
- Whether the sub's work on the project might have contributed to the defects which would have triggered the indemnity clause was a question of fact for the jury
- The trial court should not have made that determination based on hypothetical questions posed to the sub's principal on cross-examination

REYBURN v. PLASTER DEVELOPMENT

- Supreme Court Held:
- On claim for breach of duty to defend, trial court was required to calculate and apportion attorney fees and costs based on what contractor actually incurred in defending claims attributable to subcontractor's negligence
- Whether sub's work triggered duty to defend was a question for the jury

WHAT IS THE COMMON DENOMINATOR?

What do Crawford, UDC and Reyburn all have in common?

The court reviewed the specific language of the indemnity and defense clauses in contract

Construed those clauses as a whole based on the plain meaning of the words

Thus, at the end of the day, the parties had contractual control over their own destinies

And so do you!

WHAT CAN YOU DO?

- What can you do when your client wants you to defend, indemnify and hold them harmless from everything and the “kitchen sink”?

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Defense and Indemnity

No Easy Answer

Ability to negotiate a fair allocation of risk (not just for defense and indemnity—but every aspect of the contract) depends on relative bargaining power of the parties

How bad do you need the job?

How bad does your client want you?

Are you willing to walk away?

Are you a doormat?

If you don't ask, you don't get!

WHAT CAN YOU DO?

- Do NOT sign a client's one-sided contract that forces you to take on risk that fails to match your economic reward
- If possible, avoid any agreement to indemnify or defend your client
- Such express agreements in your contract also extend the timeframes (statutes of limitations) wherein you can be sued by your client

WHAT CAN YOU DO?

- If you must give indemnity to your client, be sure that the indemnity is clearly tied to a finding of proven acts of negligence
- However, in California it is no longer sufficient to merely strike the word “defend” from the indemnity clause because of Civil Code 2778
- In Nevada, probably ok in light of Reyburn
- Best to show a “contrary intention” in the text of your contract that you do not intend to defend your client and that your indemnity obligation is limited to your proportionate share of negligence

WHAT CAN YOU DO?


- If you must accept the defense obligation, be sure that your intention is clear that both the indemnity and defense obligation is limited to your proportionate share of negligence
- If you must agree to indemnify and defend, attempt to negotiate a limitation of liability that caps your exposure to a sum certain for all damages including those associated with both indemnity and defense
- If all else fails, don't be a doormat, just say "NO"

WHAT CAN YOU DO?


- Consult or discuss with your lawyer or broker to help negotiate
- Suggest a bifurcated indemnity provision
 - Defense obligation ok for general liability---will be covered under GL policy
 - Defense obligation not ok for professional liability---will not be covered under PL policy
 - Bifurcated indemnity clause (essentially two separate clauses) provides a defense to client for claims and damages arising out of non-professional acts (GL) but no defense to client for claims arising out of professional acts (PL)

WHAT CAN YOU DO?

Explain that the defense obligation is not covered under your professional liability policy



Explain that your professional liability policy is there to protect both you and your client and it does not benefit them to force you to contract for a risk that is not covered



Explain that the defense obligation in an indemnity clause may put you in immediate breach of contract

WHAT CAN YOU DO?

- Tips to modify onerous indemnity clauses:
 - Strike the word “defend”
 - Best to show intention not to defend
 - Limit the scope of what A/E must indemnify against
 - Strike the “kitchen sink” provisions
 - Limit indemnity to proportional extent of A/E’s negligence
 - Limit to AE’s proven acts of negligence
 - Do not want obligation to be triggered until proven
 - Defers reimbursement of damages and attorneys’ fees to end
 - Limit who will be indemnified to client (owners, directors and employees) and not the universe including “agents”
 - Limit whose negligence the A/E will indemnify against (subconsultants only) not the universe
 - If must defend, limit defense obligation to non-professional acts only (covered under GL policy)

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

Indemnity and Defense

- Sample Mutual Indemnity clause:
- “Consultant agrees to indemnify and hold harmless the Client, its officers, directors, and employees (collectively “Client”) against all damages, liabilities and costs, including reasonable attorneys’ fees, but only to the extent caused by the Consultant’s negligence performance of its professional services under this Agreement and that of its subconsultants or anyone for whom Consultant is legally liable.”

Indemnity and Defense

- Sample Mutual Indemnity clause continued:
- “Client agrees to indemnify and hold harmless the Consultant, its officers, directors, and employees (collectively “Consultant”) against all damages, liabilities and costs, including reasonable attorneys’ fees, but only to the extent caused by the Client’s negligence acts in connection with the Project and the acts of its contractors, subcontractors, consultants or anyone for whom the Client is legally liable.”

Indemnity and Defense

- Sample Mutual Indemnity clause continued:
- “Neither the Client nor the Consultant shall be obligated to indemnify the other party in any manner whatsoever for the other party’s own negligence.”

Indemnity and Defense

- Questions

Consequential Damages

- Consequential Damages
 - Definition: Losses that do not flow directly and immediately from an injurious act, but that result indirectly from the act
 - Can easily be foreseeable

Consequential Damages

- What is the problem?
- Law protects expectancy interests of the parties
- Goal is to return the non-breaching party to position would have been absent breach
- Damages are those reasonably foreseeable at the time of the contract
- Problem: All damages arguably “foreseeable” with 20/20 hindsight

Consequential Damages

- Breaching party is responsible to pay:
 - direct damages—such as cost of repair or diminution in value plus out-of-pockets
 - consequential damages—those damages that a breaching party knew or should have known at time of contracting
 - other damages specified by contract, case law or statute

Consequential Damages

Consequential damages include all reasonable and foreseeable damages that flow from the breach. May include:

- Delay damages
- Acceleration damages
- Lost profits
- Loss of use/loss of enjoyment
- Damage to business reputation or creditworthiness
- Etc, etc, etc

Consequential Damages

The potential for consequential damages creates risk far in excess of the rewards in most construction contracts

It is commercially reasonable in construction contracts to allocate risk commensurate with reward

It is commercially reasonable to allocate risk to client who enjoys most of the reward and is best situated to mitigate damages

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Consequential Damages

How do you avoid the possible imposition of consequential damages which could far exceed your available insurance coverage???

- Never screw up
- Never let anyone you hire screw up
- Or, negotiate a consequential damages waiver

Consequential Damages

- Long Form Mutual Waiver
 - Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, neither Client nor Consultant, their respective officers, directors, partners, employees, contactors or subconsultants shall be liable to the other or shall make any claim for incidental, indirect or consequential damages arising out of or connected in any way to the Project or to this Agreement. This mutual waiver of consequential damages shall include, but is not limited to, loss of use, loss of profit, loss of business, loss of income, loss of reputation or any other consequential damages that either party may have incurred from any cause of action including negligence, strict liability, breach of contract and breach of strict or implied warranty. Both the Client and Consultant shall require similar waivers of consequential damages protecting all the entities or persons named herein in all contracts and subcontracts with others involved in the Project.

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

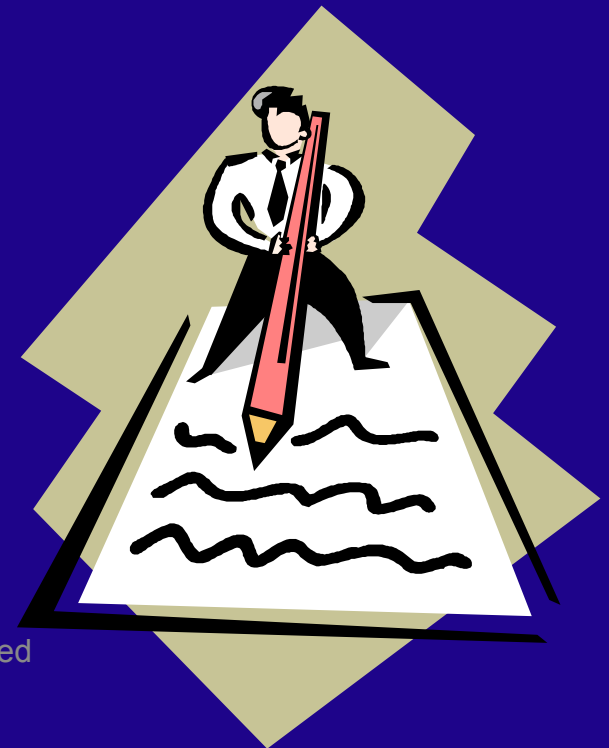
Consequential Damages

Short form mutual waiver

- Client and Consultant waive consequential damages for claims, disputes or other matters in question arising out of or related to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with the termination provisions of this Agreement.

Limitation of Liability

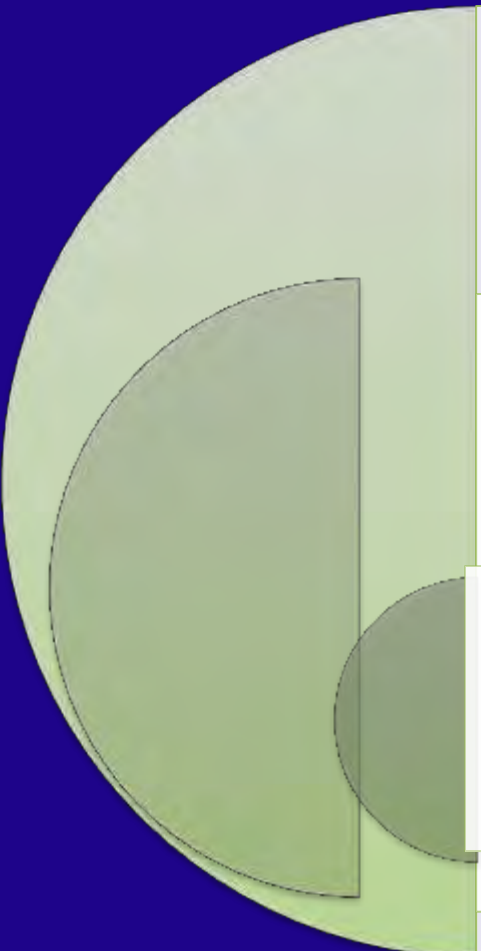
- Definition: A contractual provision by which the parties agree on a maximum amount of damages recoverable for a future breach of the agreement



This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Limitation of Liability




Permissible in Nevada as long as not an unconscionable provision

Must be able to show that both parties were plainly and clearly notified of the terms, particularly the party with less bargaining power

Obstetrics & Gynecologists William Wixted, M.D., et al. v. Pepper, 101 Nev. 105 (1985)

Limitation of Liability



Nevada courts will look to relative bargaining power of the parties

More conspicuous the better

If initialed, even better

If consideration paid, even better

This presentation may not be duplicated or distributed without the express written permission of Weil & Drage,

APC

Limitation of Liability

- Can limit to specific sum
- Can limit to the greater of (or lesser of) your fee or \$____
- Can limit to “available” policy limits
 - Do NOT forget the word “available” if limiting liability to policy limits
 - You can never know what will be left on the policy

Limitation of Liability

- Sample LOL clause:
 - Owner agrees to limit the liability of Consultant, its principals, employees, and subconsultants, to Owner and to all contractors and subcontractors on the Project, for any claim or action arising in tort, contract, or strict liability, to the sum of \$50,000 or Consultant's fee, whichever is greater. Owner and Consultant acknowledge that this provision was expressly negotiated and agreed upon.

Limitation of Liability

- Sample LOL clause:
 - In recognition of the relative risks and benefits for the Project to both the Client and the Consultant, the risks have been allocated such that Client agrees, to the fullest extent permitted by law, to limit the liability of the Consultant to the Client for claims, losses, costs, damages, of any nature whatsoever or claims expenses from any cause or causes, including attorneys' fees and costs and expert-witness fees and costs, so that the total aggregate liability of the Consultant to the Client shall not exceed \$____, or the Consultant's total fee for services rendered on this Project, whichever is greater. It is intended that the limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

Limitation of Liability

- Limitations on LOL
 - “Life preserver in shark infested waters”
 - Only enforceable as between contracting parties even if clause says otherwise
 - Clause can state that limit apply to claims by client and “others” but will only have teeth if client agrees to defend and indemnify you from such claims by others

Sole Remedy

In Nevada, like most states, A/E's can be held personally liable for errors and omissions in the plans they seal or stamp

True even if A/E acting in the course and scope of employment with his/her corporation

Sole Remedy

- Thus, plaintiffs not limited in their remedies to suing just the corporation
- Can name the corporation, the A/E individually or both
- Basically looking for certainty that any judgment will be paid

Sole Remedy

What is the problem?

Usually not a problem if the corporation is adequately insured or if has adequate assets

Big problem if no coverage, inadequate coverage or inadequate assets

- Insurers generally defend and indemnify both corporation and individual A/E so long as within course and scope and no intentional acts
- Note, “moonlighting” exclusion in policy

This presentation may not be duplicated or distributed without the express written permission of Weil & Drage,

APC

Sole Remedy

How do
you
protect
yourself?



Limit recovery
by your client
to the
corporate
entity only,
and bar
recovery
against
individual
A/E's, officers,
directors,
employees
etc.



Unilateral
limitation
best of all



Mutual
limitation
more
sellable
to the
client

Sole Remedy

Sample sole remedy unilateral clause:

- It is intended by the parties to this Agreement that the Consultant's services in connection with the Project shall not subject the Consultant's individual employees, officers, directors or shareholders to any personal legal liability or exposure for risks associated with this Project. Therefore, notwithstanding anything to the contrary contained herein, the Client agrees that as the Client's sole and exclusive remedy, any claim, demand, suit or judgment shall be asserted only as against Consultant's corporate entity, and not against any of the Consultant's individual employees, officers, directors or shareholders.

This presentation may not be duplicated

or distributed without the express
written permission of Weil & Drage,

APC

Sole Remedy

- Sample sole remedy mutual clause:
 - Notwithstanding anything to the contrary contained herein, Client and Consultant agree that their sole and exclusive claim, demand, suit, judgment or remedy against each other shall be asserted against each other's corporate entity and not against each other's shareholders, A/E's, directors, officers or employees.

Third Party Obligations

What is
the
problem?

Other parties,
not parties to
your contract,
may claim that
you owe them
an independent
duty of care

Non-clients
will sue
you if they
can

Usually that
“non-client”
is the
contractor---
but not
always

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Third Party Obligations

- Short waiver of third party claims:
 - Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Consultant.

Third Party Obligations

- Long waiver of third party claims:
 - Client and Consultant are the only intended beneficiaries of the rights and obligations of this Agreement. The parties hereby agree that (1) this Agreement shall not be construed to give rise to any rights, claims or benefits to any person or entity not a signatory to this Agreement, and (2) there are no third-party beneficiaries to this Agreement and no terms or provisions may be enforced by or for the benefit of any person or entity not a signatory to this Agreement.

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

Standard of Care

- Definition: The degree of care and skill ordinarily exercised, under similar circumstances, by reputable professionals practicing in the same discipline, in the same locality, in the same timeframe.

Standard of Care

Not perfection

What would the “average” A/E do?

Evolves over time

Unique to discipline or sub-discipline

Requires expert testimony to prove breach in the standard of care

Standard of Care

So What is the Problem?

- Sometimes clients want A/E to contract to a “super” standard of care i.e. “highest degree of skill and training” or “highest standard of practice”
- Not insurable
- Creates potential for unlimited liability
- Any mistake arguably becomes a breach of the standard of care

Standard of Care

What Can You Do?

- Avoid any and all contractual promises to perform to the standard of care
- If client insists, avoid contractual promises to perform above and beyond the standard of care
- Not insurable

Standard of Care

- Sample clause:
 - In providing services under this Agreement, the Consultant will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. The consultant makes no warranty, express or implied, as to its professional services rendered under this Agreement.


Warranties, Guarantees & Certifications

- In most states, the concept of “warranties” or “guarantees” stems from products liability law
- A manufacturer or retailer of goods may “warrant” or “guarantee” the fitness or quality of its goods
- If the goods fail to meet expectations and the consumer suffers injury or damages, may have a cause of action for breach of implied or express warranty

Warranties, Guarantees & Certifications

- Some states (but not Nevada) provide either by statute or case law that an A/E impliedly warrants the accuracy and/or constructability of the plans and specifications
- Generally, an A/E may contractually disclaim such a warranty
- Note: Under federal common law (known as the *Spearin* doctrine) owners impliedly warrant to contractors the accuracy of plans and specs
 - Applies in cases involving federal projects
 - Nevada courts have not extended the doctrine to A/E's

Warranties, Guarantees & Certifications

A fountain pen with a dark, textured barrel and a silver-colored nib is positioned diagonally across the frame. It rests on a document that features a large, cursive signature in the lower-left corner. The document is filled with faint, illegible text, suggesting it is a legal or professional document. The overall lighting is dim and blue-toned, creating a professional and serious atmosphere.

- In Nevada, no statute or case law exists that holds that an A/E impliedly warrants the accuracy of the plans and specifications

Warranties, Guarantees & Certifications

So what
is the
problem?

- Creative plaintiffs will still assert a cause of action for breach of implied warranty---argument has some topical appeal to some judges
- But, so long as the contract is silent, you (or your lawyer) can argue that A/E provides a “service” not a “product” and does not “warrant” the result---too many factors outside his or her control
- Can usually get claim dismissed

Warranties, Guarantees & Certifications

But what is the real and bigger problem?

- Sometimes your client will ask you to expressly provide a warranty and/or guarantee in your contract
- Essentially is a backdoor way for your client to contractually demand performance above and beyond the standard of care---maybe even perfection
- If you agree to such a clause, may not be covered by insurance (since you have assumed an obligation by contract that would not otherwise have by operation of law)

Warranties, Guarantees & Certifications

What is the solution?

- Avoid any and all contractual promises to warrant or guarantee your performance
- Explain that A/E's provide a service not a product and that you cannot promise a result (especially when you have limited control over the end product)
- Add a clause disclaiming all warranties and guarantees

Warranties, Guarantees & Certifications

- Sample Disclaimer Clause:
 - “Consultant shall perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. Consultant makes no warranties or guarantees, either express or implied, with respect to the providing of its professional services.”

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

Warranties, Guarantees & Certifications

“Certifications” are like warranties and guarantees---should be avoided where possible

Some “certifications” intrinsic to work i.e. civil engineers “certify” line and grade; geotechnical engineers “certify” fills

Should limit to what is known factually

Avoid terms such as “I certify” or “I assure”

Use terms such as “to the best of my knowledge” or “in my professional opinion”

Warranties, Guarantees & Certifications

- Sample Disclaimer Clause:
- “If the Owner requests the Consultant to execute certificates, the proposed language of such certificates shall be submitted to the Consultant for review at least ten (10) days prior to the requested dates of execution. The Consultant shall not be required to execute certificates that would require knowledge, services or responsibilities beyond the scope of this Agreement. Consultant shall not be required to sign any documents, no matter by whom requested, that would result in Consultant's having to certify, guarantee or warrant the existence of conditions whose existence Consultant cannot ascertain. **As used herein, the words/terms “certify” or “certificate” shall mean an expression of Consultant's professional opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by Consultant. Consultant makes no warranty, express or implied, as to its professional services.”**

Attorneys' Fees

- In Nevada, absent a statute or express agreement, attorneys' fees generally not recoverable by the prevailing party
- Parties can freely contract to “award attorneys' fees to prevailing party”
- Statutory Offers to Compromise available for courts to award reasonable attorneys' fees

Attorneys' Fees

So What
is the
Problem?

- Double edged sword
- Can never be made whole without opportunity to recover attorneys' fees, but...
- Drives stakes up
- Makes settlement more difficult

Attorneys' Fees

Insurance Issues

- Will not be covered
- Insurers exclude from coverage
- Insurer will issue reservation of rights
- Insurer will demand you pay any award of attorneys' fees

Attorneys' Fees

What Should You Do?

- Discuss with your lawyer or broker
- Discuss with your client
- Delete all references to recovery of attorneys' fees to prevailing party in your contracts

Dispute Resolution

- Most common types:
 - Mediation
 - Arbitration
 - Knock down, drag out, full blown, scorch the earth litigation
 - Any combination of the above

Dispute Resolution

- Good news and bad news
- Only “real” winners are:
 - The lawyers
 - The experts
 - Mediators/Arbitrators



Dispute Resolution

Express dispute resolution procedures:

- Mediation as a condition precedent
- Binding or non-binding arbitration
- Arbitration for fee disputes only
- Anti-joinder of third parties
- Choice of law provisions
- Choice of venue provisions
- Jury trial vs Judge trial

Dispute Resolution

- How do you avoid being dragged into owner/contractor monster litigation?
 - Negotiate dispute resolution terms which are at odds with the owner/contractor agreement
 - If owner/contractor's agreement has binding arbitration, make sure owner/consultant agreement has something else (and vice versa)
 - Remember, only parties to an arbitration agreement can compel arbitration---others entitled to freely litigate (unless contract says otherwise)

Job Site Safety

- What is the problem?
 - A construction worker injured on the job cannot sue his employer
 - His sole remedy is workers' compensation insurance which seldom covers 100% medical expenses, loss of income, pain and suffering and future disability
 - Thus, an injured worker will try to sue as many other "deep pockets" as possible including A/E's
 - Workers' Comp Insurer will place a lien on the settlement or file a complaint-in-intervention

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

Job Site Safety

What is the solution?

- A/E's must be absolutely sure their contracts and the contractor's general conditions place responsibility for the means, methods, techniques, sequences and procedures, as well as job site safety, squarely on the contractor

Job Site Safety

- Sample Clause:
- “Neither the professional activities of the Consultant, nor the presence of the Consultant or his or her employees and subconsultants at a construction/project site, shall relieve the General Contractor of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. The Consultant and his or her personnel have no authority to exercise any control over any construction contractor or their employees in connection with their work or any health or safety precautions. The Client agrees that the General Contractor is solely responsible for jobsite safety, and warrants that this intent shall be carried out in the Client’s agreement with the General Contractor. The Client also agrees that the Client, the Consultant and the Consultant’s consultants shall be indemnified and shall be made additional insureds under the General Contractor’s general liability insurance policy.”

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Non-Solicitation of Employees

- What is the problem?
 - Your key project manager or other employees are wooed away by your client during a long project
 - May diminish your role and revenues through balance of a project
 - Internally disruptive---others may jump ship

Non-Solicitation of Employees

- Sample Clause:
- “During the term of this Agreement and for a two (2) year period following the completion of services and/or termination of this Agreement, Owner agrees not to, directly or indirectly, through another entity or otherwise, induce or attempt to induce any employee of the Consultant to leave the employ of the Consultant, or in any way interfere with the relationship between the Consultant and any employee.”

Non-Solicitation of Employees

Limitations:

- Difficult to enforce especially when project is ongoing and you need to preserve the relationship with the client
- Difficult to calculate damages in the event of a breach
- May use primarily for purpose of “moral- suasion”

Prime vs Non-Prime

- What is the problem?
 - Being prime and not being prime both have pros and cons
 - If A/E is prime, has more control but may have derivative liability for subconsultants
 - If A/E not prime, less control but can rely on prime consultant as first line of defense

Prime vs Non-Prime

- When team members all prime to owner, risk factors may include:
 - Disjointed team
 - Poor coordination
 - Poor quality control

Prime vs Non-Prime

Solution

- If team members all prime to owner
 - Seek input as to composition of team
 - Insure compatible technology
 - Develop clear channels of communication
 - Develop clear flow of information
 - Make sure all contracts clearly define scope

Prime vs Non-Prime

When A/E is Prime:

- Select team based on experience and qualifications---need right “chemistry” of team
- Coordinate between Owner/Consultant contract and Consultant/Subconsultant contracts
 - Make sure your own consultants review prime contract
 - Incorporate prime contract into subconsultants’ contracts including indemnity provisions
 - Ensure dispute resolution procedures are compatible
 - Ensure adequate insurance requirements
 - Reject subconsultants’ standard terms and conditions

Prime vs Non-Prime

When A/E
not prime

- Do NOT sign a subconsultant contract w/o reviewing the prime contract
- Seek input into the prime contract
- If prime contract bad, do NOT incorporate it by reference into your own contract to avoid being bound by it
- May want different dispute resolution procedures than prime contract

Public Entity Contracts

- NRS 625 and 623 Definitions of “Design Professional”:
 - Licensed professional engineer
 - Licensed professional land surveyor
 - Registered architect, landscape architect, interior designer or residential designer
 - A business entity that practices in one or more of the above disciplines

Public Entity Contracts

- NRS 338.010 defines “contractor” as a person licensed pursuant to NRS 624
- NRS 624.020 includes within the definition of “contractor” a “construction manager who performs management and consulting services on a construction project for a professional fee”

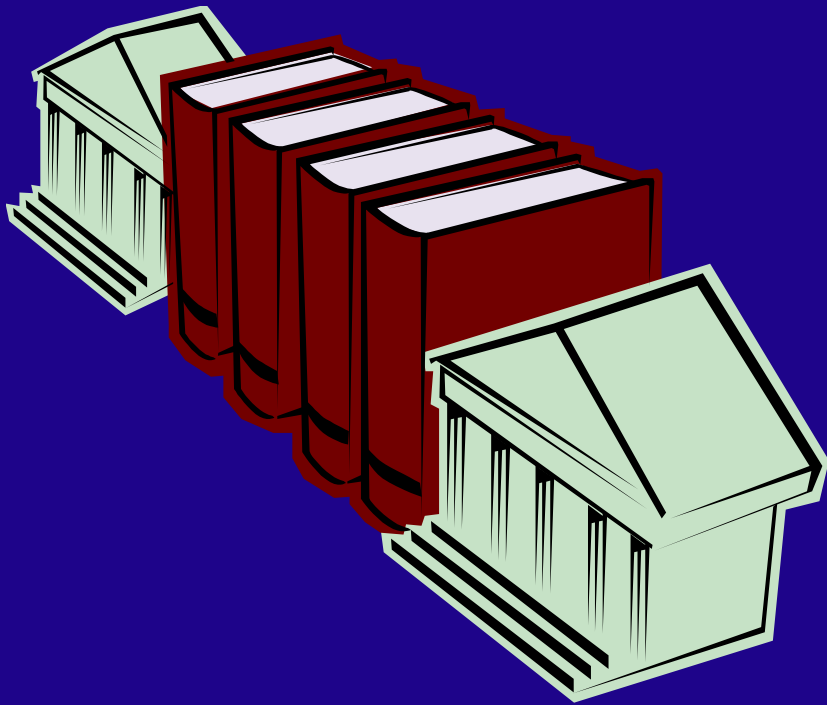
Public Entity Contracts

- What is the problem?
- NRS 624.020 does not distinguish between two types of construction managers:
 - At-risk CM's (retained by owner to construct works of improvement via subs)
 - Agency CM's (retained by owner as agent to oversee works of improvement)

Public Entity Contracts

- Generally, Public Agencies in Nevada understand the conceptual difference between At-risk and Agency CM's
- Make sure contracts with Public Entities do not refer to A/E as a “contractor” if performing Agency CM services

Public Entity Contracts



- NRS 338 limits the contents of specifications drafted for bids on public works

Public Works Contracts

Specifications
shall not be
drafted:

- So as to limit bidding to any one concern
- So as to require single source product or materials unless followed by “or equal”
- So as to hold successful bidder responsible for extra costs as a result of errors or omissions in contract documents
 - Thus “no damage for delay clause” in contractor’s contract likely not enforceable

Public Works Contracts

Mandatory Arbitration for Contractors

- NRS 338.10 requires that specifications for a public work must include in the specifications a clause requiring arbitration of a dispute arising between the public body and the contractor engaged on a public work if the dispute cannot otherwise be settled

Public Works Contracts

- NRS 338.155 mandates certain contract provisions for “design professionals” who are not members of a “design-build” team
- Thus NRS 338.155 is a checklist for A/E’s as to what must, may, and must not be included in their public entity contracts

Public Works Contracts

- Per NRS 338.155 a contract with a design professional MUST set forth:
 - Specific period for payment of A/E
 - Specific period and manner for disputed payments
 - Terms of penalty against public entity for failure to pay A/E
 - That prevailing party in an action to enforce the contract is entitled to reasonable attorneys' fees and costs
 - Note, since attorneys' fees clause compelled by statute, arguably should be covered by PL policy

Public Works Contracts

- Per NRS 338.155 a contract with a design professional MAY set forth:
 - The terms of any discount the public agency will receive if it pays the A/E within a specific period
 - The terms by which the A/E agrees to name the public entity as an additional insured under A/E's policy (if policy permits)

Public Works Contracts

Per NRS 338.155 a contract with a design professional MUST NOT:

- Require that the A/E defend, indemnify or hold harmless the public entity (and its employees, agents) from liability and damages caused by the negligence, errors, omissions, recklessness or intentional misconduct of public entity (and its employees, agents)

Public Works Contracts

Per NRS
338.155 a
contract
with a
design
professional
MAY:

- Require that the A/E defend, indemnify or hold harmless the public entity (and its employees, agents) from liability and damages, including, w/o limitation, reasonable attorneys' fees, caused by the negligence, errors, omissions, recklessness or intentional misconduct of the A/E (and its employees, agents)

Public Works Contracts

- BUT...per NRS 338.155:
 - IF the A/E's Professional Liability insurer does not so defend the public entity AND the A/E is adjudicated to be liable by a trier of fact, the trier of fact SHALL award reasonable attorneys' fees to the public entity in an amount which is proportional to the A/E's liability

Public Entity Contracts

- Bottom line on NRS 338.155:
 - Avoid giving defense and indemnity to public entities if you can
 - If must give indemnity, avoid defense
 - Attorneys' fees to prevailing party required by statute so probably covered by PL policy
 - If you are adjudicated liable and have to reimburse public entity for fees, costs and damages to the extent of your proportional liability, probably covered by PL policy

Public Entity Contracts

- NRS 338.180 requires all plans and specs for public works projects MUST:
 - Provide facilities for the physically handicapped so that public buildings have accessible ramps, toilets, fountains, doors and phones
 - Comply with Americans with Disabilities Act of 1990, 42 USC 12101 et. seq. and ADAAG (Part 36 of Title 28);
 - Comply with Minimum Guidelines and Requirements for Accessible Design 36 CFR 1190.1 et. seq. and;
 - Comply with Fair Housing Act 42 USC 3604

Other Risk Management Concerns

- Use of E-Mail
- What is the problem?
 - In a lawsuit, all job file documents, including e-mail, are discoverable to the other side
 - Do not send inappropriate e-mails to anyone, internally or externally
 - Watch use of slang, jokes, snide remarks
 - Never bad mouth client, contractor or subs
 - Imagine your e-mail blown up as a trial exhibit
 - E-mails must be as professional as letters on letterhead

Other Risk Management Concerns

Other Concerns:

- Clients w/o real assets
 - Shell Corps
 - LLC's
 - Fly by nights
 - A/E's left holding the bag

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

Other Risk Management Concerns

Solution:

- Choose clients wisely
- Should be reputable and stable
- Should be able to stand behind project
- Adequately Capitalized
- Adequately Insured
- Realistic Expectations

Other Risk Management Concerns

Other Concerns:

- State laws that increase risk factors
 - Example: Nevada's Chapter 40
- State laws that disallow certain provisions
- Courts will strike contract terms against state law or in violation of public policy
- "Standard Form Contracts" not a "one size fits all" in all jurisdictions

Other Risk Management Concerns

- Solution:
 - Check with your lawyer as to special laws in foreign states
 - Insure contract consistent with state law
 - Negotiate choice of law provision
 - Negotiate choice of venue provision
 - Waiver of Sovereign Immunity in contracts with Tribal Nations

Other Risk Management Concerns

A few words
about:

- Project Policies
- Owner Controlled Insurance Programs (OCIP)
- Wrap Policies

Other Risk Management Concerns

Project Specific Policies

- Ideal method for design professionals to transfer risk on a project
- Concept is one policy insures whole design team with specific limits for specific project
- Request Owner secure project policy as a condition of the contract
- Unfortunately, very very expensive

Other Risk Management Concerns

OCIP or Wrap Policies

- General Liability policies purchased by Owner/Developer of a project
- Designed to cover contractors
- Professional liability (such as errors and omissions of design team) is usually excluded
- Occasionally, can get exclusion deleted for a high price
- But, generally will only cover bodily injury and property damage---not consequential damages (i.e. delay, lost profits, loss of use, etc.)

Other Risk Management Concerns

Solutions

- Don't accept Owner/Developer promise that OCIP or Wrap policy covers the design team
- Ask for copy of policy and review exclusions
- Ask your lawyer to review project coverage and/or negotiate a project policy that covers design team

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

Questions

- Indemnity
- Defense
- Consequential Damages
- Limitation of Liability
- Sole Remedy
- Third Party Obligations
- Standard of Care
- Warranties, Guarantees & Certifications
- Attorneys' Fees
- Dispute Resolution
- Job Site Safety
- Non-Solicitation of Employees
- Prime vs Non-Prime
- Public Entity Contracts
- Other Risk Management Concerns

This presentation may not be duplicated
or distributed without the express
written permission of Weil & Drage,

APC

THANK YOU!



NEVADA

2500 Anthem Village Drive
Henderson, NV 89052
(702) 314-1905 phone
(702) 314-1909 fax

CALIFORNIA

23212 Mill Creek Drive
Laguna Hills, CA 92653
(949) 837-8200 phone
(949) 837-9300 fax

ARIZONA

1717 E. Bell Road, Suite 1
Phoenix, AZ 85022
(602) 971-0159 phone