



Annotated Glossary of Terms

Related to

Agreements between the Consultant and the Owner

Agreement: A mutual contract between two or more parties to do or not do something. Design professionals tend to refer to their contract with the Owner as an “Agreement” to differentiate from the “Contract” between the Owner and Contractor comprising the “Contract Documents”.

Assignment: Transfer of rights under the contract from one party to another party.

Arbitration: A process in which a disagreement between two or more parties is resolved by impartial individuals, called arbitrators, in order to avoid costly and lengthy litigation. Arbitration is less structured than court proceedings; however, the findings are binding on the parties.

Breach: A failure to perform some promised act or obligation.

Casualty Insurance: Another name for General Liability Insurance.

Certification: A representation (usually written) that a fact in relation to a transaction is as stated or promised.

Claims Made Policy: Liability Insurance that only covers claims that are reported during the policy period. Coverage is for the policy amount in place when the claim is made. The loss may have happened many years in the past, but is accounted during the current policy term and subject to the policy limits currently insured. (See Occurrence Policy)

Consultant: Someone who gives professional advice or services. A “Consultant” is held to a standard of care.

Contractor: Someone (a person or firm) who contracts to do or not do something. A “Contractor” is held to warrant and certify his work. To avoid ambiguity, design professionals should be referred to as consultants.

Contractor Responsibilities: The Contractor is typically responsible for the execution of the project including methods, means, sequences, techniques, procedures and job site safety. Consultants must avoid taking additional responsibility for these issues.

Contract Types: Oral, Letter, Purchase Order, Task Order, Standard Form, Custom Form – all are legally binding to some degree. Contracts should at minimum identify the parties, describe the scope of services & location of project, address the schedule, and clarify payment amounts and terms.

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Defend: Indemnification clause that requires you to provide legal defense for the client. It is not tied directly to your negligence and could be interpreted as an obligation on your part to retain an attorney for your client and pay his or her defense – even before your legal liability for actual negligence has been established. Professional Liability Insurance (E&O) coverage provides defense for your own negligent acts, errors or omissions, but not for third parties; consequently, a contract agreement to “defend” the client is usually not covered by E&O insurance. Because 90+% of disputes are settled out of court, defense costs are difficult to recover. You are on your own.

Duty: An obligation imposed by rule of law.

General Liability Insurance: Coverage in case of bodily injury to someone or damage to someone's property. (GLI is also known as casualty insurance.)

Guarantee/Guaranty: A contract that some particular thing shall be done exactly as it is agreed to be done, whether it is to be done by one person or another. It is an assumption of responsibility, as one given by a manufacturer, for the quality, worth, or durability of a product. Guarantees establish liability even in the absence of negligence

Harm – Physical, psychological, or financial injury or damage.

Hold Harmless: A promise to pay costs or claims which result from an agreement. Hold Harmless is often used interchangeably with Indemnification. Technically, hold harmless is broader than an agreement to indemnify

Indemnification: A promise to provide security against loss or damage which may occur in the future, or to provide compensation for loss or damage already suffered; to insure; to hold harmless. A guarantee against a loss which another might suffer.

Liability: Any legal responsibility, duty or obligation. To prove liability for damages a claimant must establish the professional standard of care, your obligation (duty) to adhere to that standard of care, establish your failure to do so (breach) and then prove the failure resulted in injury or damage to the claimant (harm). Remember “Liability = Duty + Breach + Harm”.

Litigation: The process of bringing and pursuing a lawsuit. “Litigation often proceeds much like trench warfare; initial court papers define the parties' legal positions as trenches define battlefield positions. After the initial activity, lawyers sit back for several months or years and lob legal artillery at each other until they grow tired of the warfare and begin settlement negotiations. If settlement is unsuccessful (90+% of all lawsuits are settled without trial), the case goes to trial, and the trial may be followed by a lengthy appeal.” (www.lectlaw.com/def/1055.htm)

Mediation: A non-binding, voluntary method of dispute resolution using an independent facilitator. Non-binding Mediation should be engaged prior to arbitration. Dispute resolution should be outlined in detail.





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Negligence: Failure (breach) to exercise that degree of care which a person of ordinary prudence would exercise under the same circumstances (duty). Remember “Negligence = Duty + Breach”.

Occurrence Policy: Liability Insurance that only covers events that happen during the policy period. The key is when the loss happened: The loss can be reported years later, but is accounted to the policy in place at the time of the loss. (See Claims Made policy.)

Partnering: A dispute avoidance process initiated at the beginning of the project involving all parties.

Product Liability: the responsibility of manufacturers, distributors and sellers of products to the public, to deliver products free of harmful defects and to make good on that responsibility if their products are defective. The key element in product liability law is that a person who suffers harm need prove only the **existence of a defect** in the product to make the seller, distributor and/or manufacturer liable for damages. An injured person usually need only sue the seller and let him/her/it bring the manufacturer or distributor into the lawsuit or require contribution toward a judgment. However, all those possibly responsible should be named in the suit as defendants if they are known.

Professional Liability Insurance (PLI): Insurance designed to provide coverage for negligent acts, errors and omissions of a professional. PLI does not extend to a non-professional, i.e. most owners and contractors.

Professional Practice Approaches: Value systems or firm cultures characterized by the primary motivations of the owners. David Maister (www.davidmaister.com) characterizes these management perspectives as two centers. Practice-centered firms emphasize qualitative performance: How do we feel about what we are doing? How did the job come out? Business-centered firms emphasize quantitative performance, more focused on the tangible rewards for their efforts: How did we do?

Practice-Centered Practice: the emphasis of the firm is mostly on the discipline with the minimization, or possible neglect, of the business aspects.

Practice Centered Business: discipline emphasized over business aspects.

Business Centered Practice: business aspects emphasized over discipline.

Business Centered Business: the emphasis of the firm is mostly on the business aspects with the minimization of the discipline.

Agreements between consultants with different professional practice approaches should be approached thoughtfully to clarify intent and expectations.





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Record Documents: The final file copy of the Contract Documents. Record documents often include transcription of the Contractor's red-lined drawings and incorporation of addenda and change orders. The term "as-built" should be avoided as it may imply that the record drawings were prepared based on rigorous field inspection and measurement, which is not ordinary. The Agreement should define the basis of information used to prepare record documents.

Red Flag Words: Words found in proposed agreements that tend to expand liability for performance beyond a reasonable and ordinary standard of care. Red Flag words should be carefully considered, and eliminated or modified in context to limit their impact. Think twice about these: (absolutes & superlatives) all, best, complete, every, equal, final, full, highest, maximize, minimize, none, optimize, periodic, safe, shall, will; (ambiguities) any, suitable, sufficient; (promises for performance) assure, ensure, insure, certify, guarantee; warrant; (responsibilities) administer, advise, approve, control, direct, estimate, inspect, oversee, represent.

Rights: Something to which one has a just claim: the power or privilege to which one is justly entitled. Note that Rights imply Duty, for example: A consultant who has the "right" to stop work also has the "duty" to stop work if that is the prudent choice. Not all "rights" are desirable.

Services: The activities and deliverables of the Consultant.

Standard of Care: Applied to design professional, the ordinary and reasonable care required and established by expert testimony of what a reasonable and prudent professional would have done under the same or similar circumstances at the same time in the same locality. It is the measure by which behavior is judged in determining legal duties & rights.

Statute of Limitations: The legal time limitation on the right to bring an action after damage or injury occurs. The clock starts with the damage or injury.

Statute of Repose: A legislative enactment that bars a claim against a party unless the claim is brought within a specified period of time following some event described in the statute, regardless of whether or not the statute of limitations period for that claim has expired. The clock starts with a project milestone, often substantial completion.





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Subrogation: Entitlement of a party to be substituted for one of the original parties to a transaction. An insurance carrier may reserve the "right of subrogation" in the event of a loss. This means that the company may choose to take action to recover the amount of a claim paid if the loss was caused by a third party.

There are certain situations where it makes sense to waive the right of subrogation ("waiver of subrogation"). For example, employers are typically required to maintain worker's compensation insurance. The Consultant and Owner may waive rights of recovery against one another to the extent the loss is covered by insurance, or agree to obtain insurance policies in which the insurance company waives any rights of subrogation it may have against either the Consultant or Owner. These are two ways to reach the same result -- namely, to make sure the insurance company doesn't have a right of subrogation with respect to either the Consultant or Owner. A Waiver of Subrogation endorsement is not typical on professional liability policies.

When do you want a waiver of subrogation? General Liability, Auto and Workers Comp Claims. The insurance company charges a fee for a specific waiver plus a percentage of the payroll associated with the project

When not? Professional liability (E&O), which typically covers sub-consultants.

Work: The activities and output of the Construction Contractor.

Work Product: Any tangible item that results from working on a project function, activity, or task. This could include software developed for the project, workbooks, reference materials, email, personal notes, catalogs or samples obtained from suppliers, and other items that are not traditionally delivered.

Warranty: An assurance, promise, or guaranty by one party that a particular statement of fact is true and may be relied upon by the other party. Warranties establish liability even in the absence of negligence.

