

Contracts and Contract Provisions: Other Important Aspects to Consider

Colleen M. Palmer, Esq.
Beazley Group
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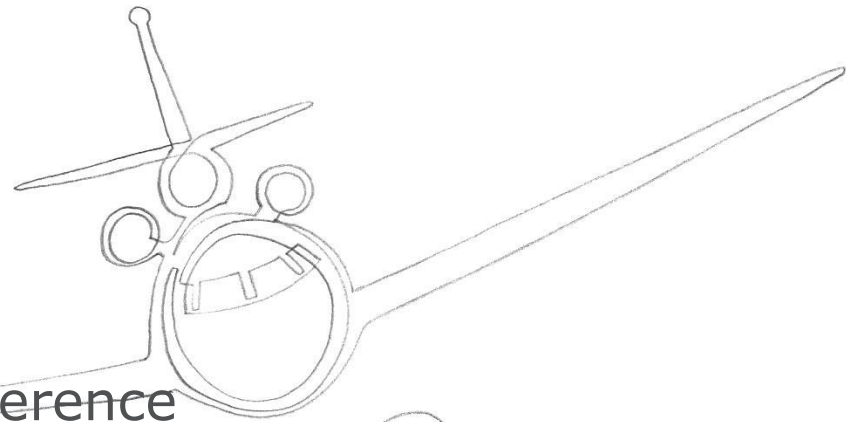
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Where we've been...

- ❖ Scope of services
- ❖ Standard of care
- ❖ Indemnity
- ❖ Incorporation by reference
- ❖ Dispute resolution

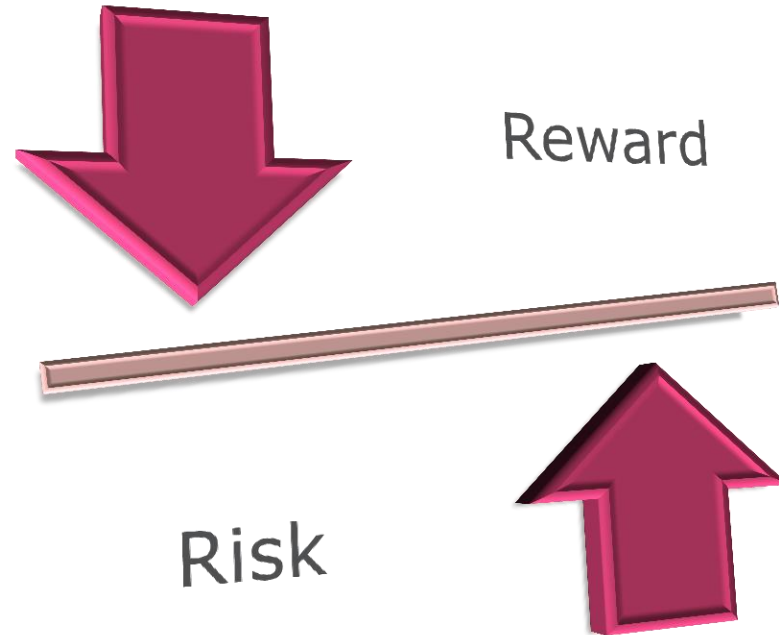


What's on the agenda today?

- ❖ Standard of care
- ❖ Indemnity
- ❖ Use and ownership of documents
- ❖ Limitation on time to bring claims
- ❖ Contract assignment

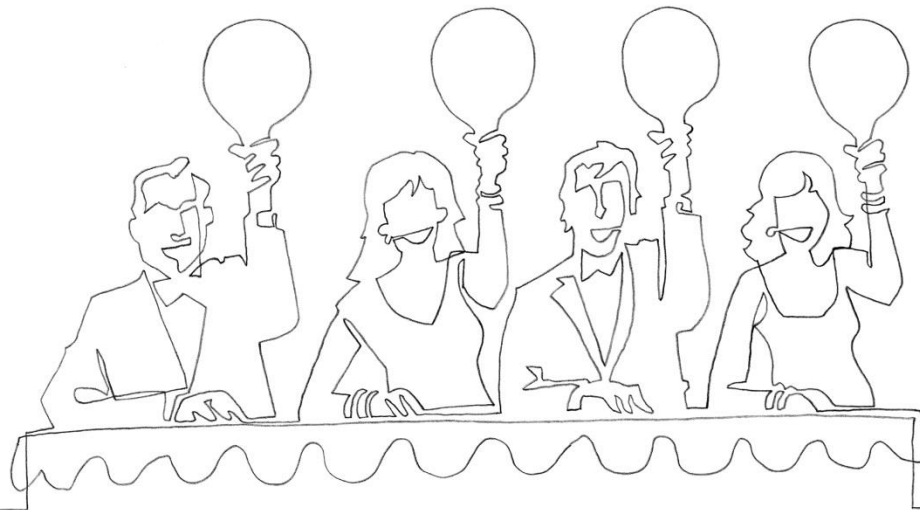


Contracting Practices



Contract Negotiation and Execution

Trust your instincts!



Standard of Care

Yep, we're **STILL** talking about it!



Let's remember...

Standard of care: "In law of negligence, that degree of care which a reasonably prudent person should exercise in same or similar circumstances." - Black's Law Dictionary, 6th edition

Standard of Care:

"The Engineer's services shall be performed in a manner consistent with that degree of skill and care **ordinarily exercised by practicing design professionals performing similar services** in the same locality, at the same site and under the same or similar circumstances and conditions. The Engineer makes no other representations or warranties, whether expressed or implied, with respect to the services rendered hereunder."

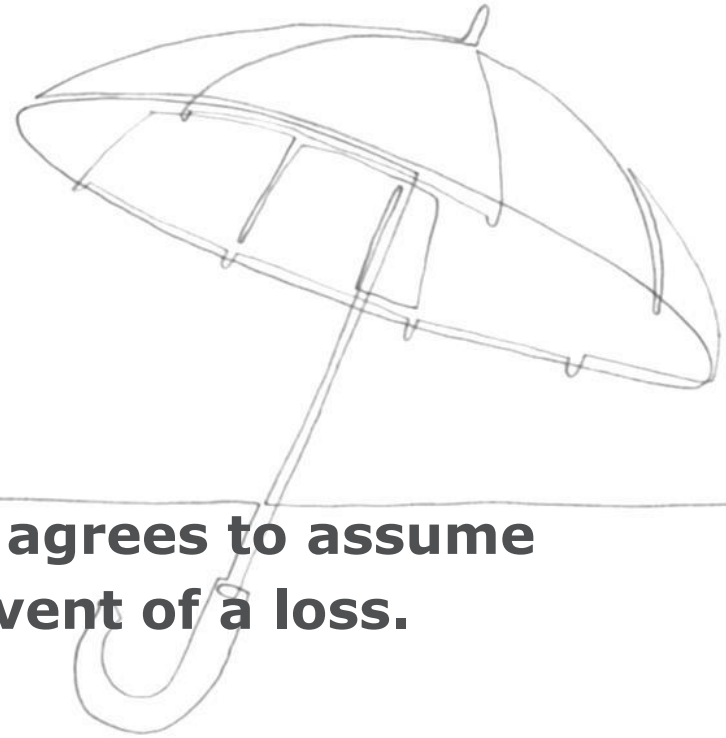
Standard of care

Should not include:

- ✗ Warranties, guarantees, certifications
- ✗ Superlatives
- ✗ Performing “to satisfaction of Client”
- ✗ Performing “in accordance with Client’s standards”
- ✗ Fiduciary duty obligation

Indemnity

Indemnity

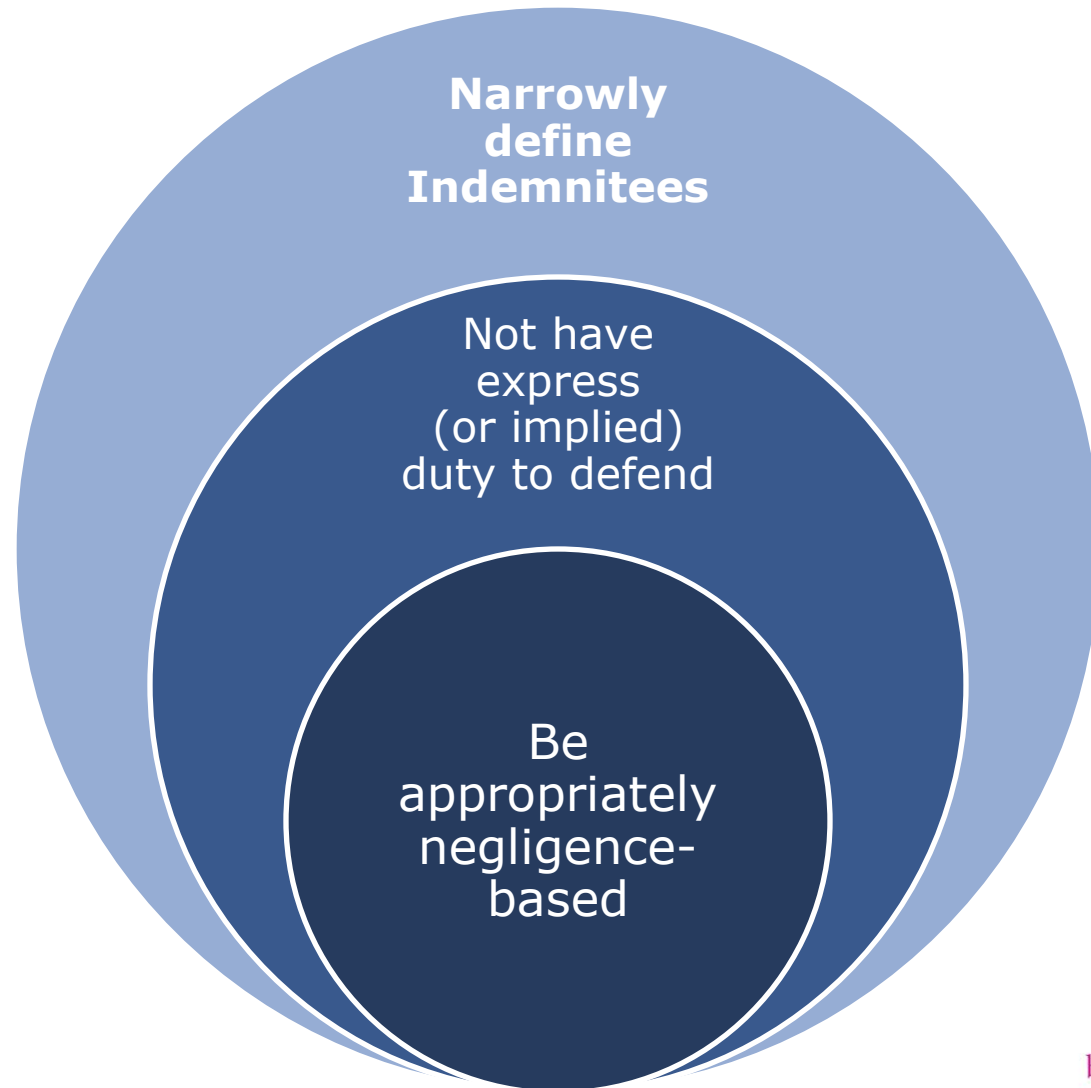


What is Indemnification?

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

Indemnity

Should:



Indemnity...if you have to have one

SAMPLE LANGUAGE:

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

Indemnity

- ❖ Three aspects to consider – definition of Indemnitees; duty to defend; negligence-based obligation
- ❖ Indemnitees – limit to design professional's client and client's officers, directors, and employees
- ❖ Duty to defend – not covered by professional liability insurance, but ultimately a business decision
- ❖ Negligence-based provision– critical from risk management perspective
- ❖ Mutual indemnity – delete if possible, ensure design professional's obligation is appropriately negligence-based
- ❖ Incorporation by reference – ensure indemnity is appropriate since it becomes part of design professional's agreement

Use and Ownership of Documents

Use and Ownership of Documents

- ❖ Ownership vs. copyright
- ❖ Electronic documents
 - ❖ To the client
 - ❖ To a third party
- ❖ The client's confidential documents

Use and Ownership of Documents

If you do transfer copyright:

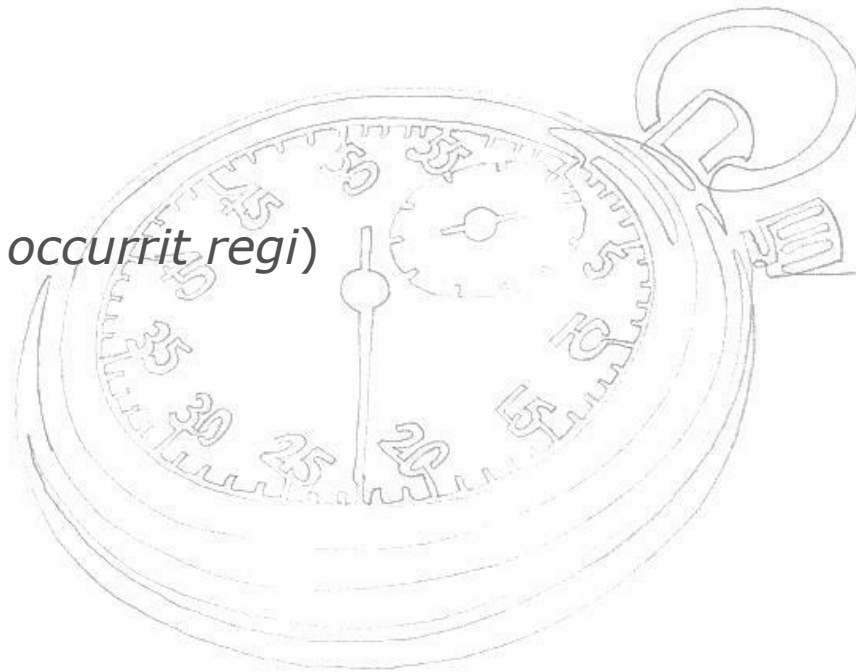
“If the Client subsequently reproduces project-related documents or creates (or causes others to create) a derivative work based upon project-related documents created by the Engineer, the Client shall completely remove the original professional seals, logos and other indications on the documents of the identity of the Engineer. The Client agrees that any future use, reuse, or modification of the Engineer’s work product without retaining and maintaining the retention of the Engineer shall be at the Client’s sole risk and without liability to the Engineer and the Client agrees to waive any and all claims against the Engineer and release, defend, indemnify and hold the Engineer harmless from any and all claims or liabilities arising therefrom. Notwithstanding any other provision in this Agreement, the Engineer shall not be in violation of this Agreement if the Engineer utilizes any standard details that may be incorporated into the work product generated by the Engineer in connection with this Project. The Client understands that regardless of any transfer of ownership or copyright rights granted to the Client pursuant to the terms of this Agreement, the Engineer shall in no way be restricted or prohibited from future use of any such standard details.”

Limitation on time to Bring Claims

Limitation on time to bring claims

Governed by:

- Statute of repose and statute of limitation
- Contract
- Case law
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Contract Assignment

Contract assignment issues

Clients may tell you:

This is an “emergency” and:

- ✓ No changes can be made to the document; and
- ✓ It must be signed immediately!

Lenders want these to ensure project progresses in event Borrower (i.e., your client) defaults

Contract assignment issues

Remember:

These documents should **NOT**:

- ✓ be an expansion of your duties, obligations, or responsibilities that it had under its contract; or
- ✓ give Lender any greater rights than your client had under its contract

If Lender exercises its rights:

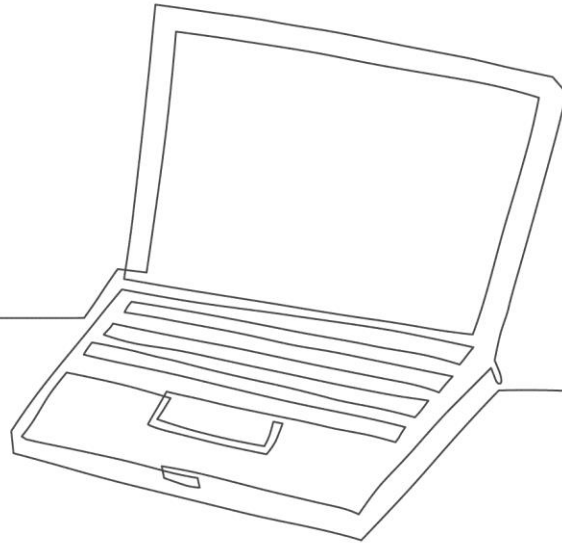
- ✓ it needs to fully step into the client's shoes, including payment of outstanding invoices

****BONUS TOPIC – Email protocol****

- ✓ Think before you send it
- ✓ Stick to the facts, keep your feelings and opinions out
- ✓ Be professional
- ✓ Don't send emails when you're angry
- ✓ **DO NOT SHOUT IN YOUR E-MAILS**
- ✓ Don't try to be funny
- ✓ Use spell check
- ✓ Avoid the "Reply all"
- ✓ Avoid long email chains
- ✓ Don't forget about using your phone

Resources

www.beazley.com/aeriskinfo



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Do you have any questions?

Contact:

Colleen M. Palmer, Esq.
Beazley Group
1270 Avenue of the Americas
12th Floor
New York, NY 10020
T: (617) 239-2606
colleen.palmer@beazley.com

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