



Collinsworth Insurance
& Risk Management Services

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AIA
Florida

The Architect's Professional Liability Toolbox

An Insurance/Risk Management Primer 2.0

a/k/a inside Erinn's crazy little brain



Collinsworth Insurance
& Risk Management Services
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On behalf of AIA Florida
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AIA
Florida

Course Participants will

1. Learn risk management fundamentals that are not only easily accessible, but unique to Architects.
2. Learn how risk management supports the firm's practice, running of the business and service of their clients.
3. Discuss evolving contract language fundamentals in a "post"-COVID environment.
4. Explore insurance coverage concerns specific to contract negotiations and insurability.

Starting Point

- 1. What do I want?**
- 2. What do I need?**
- 3. How do get there?**

Starting Point

1. “What I want” is a different goal for each of us – but for me, I want everyone to learn something new that adds value to their practice, value to their PLI insurance program.
2. To find value, “everyone needs” – knowledge, experience, resources and trusted advisors.
3. We get there by recognizing our needs and pulling from the support provided within the framework of the PLI community and programs.

2021 Primer
Small Firms < \$100,000 Revenue

First Things First

**The services, knowledge,
experience available is NOT
limited to large firms!**

2021 Primer

Small Firms < \$100,000 Revenue

Small Firm Programs Exist

- Two-Year / Condo Interiors
- Three-year / No Condos

2021 Primer Insurance / PLI Resources

Contract Review

Risk Management Materials

Circumstance Reporting

Pre-Claims Assist

Supplemental Payments

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2021 Primer Application / Contracts

Do you use a written agreement on all projects? If no, what percentage is verbal_____%
X-Ref internal procedures

Please indicate the percentage of contracts used by your firm in the last fiscal year.

- Firm's Standard Form Agreement
- Client (owner) agreements
- Standard industry agreement (AIA, EJCDC, etc.)
- Client purchase orders
- Letter Agreements
- Verbal agreements
- Client (Prime Architect) agreements
- Other

Are non-standard contracts reviewed by the firm's legal counsel (*insurer's contract review services, agent*)? Y / N

BerkleyDP.com Form BDP0417003

2021 Primer

Application / Contracts / Standardization



Standardized Forms

The association docs have been litigated, there is case law

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2021 Primer Applications / Contracts / Standard of Care

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.

B101-2017

2021 Primer Contracts / Covid

Remember

Even in an emergency situation, the Standard of Care remains what other similar professionals would have done under the same or similar situations at the time the services were provided

Travelers, 2021

2021 Primer Applications / Contracts

**Negligence v. Strict Liability
i.e. Standard of Care**

**Are you assuming more liability in a contract than
available coverage, than legally required?**

Are you avoiding Warranties & Guarantees?

2021 Primer

Applications / Non-Standard Contracts / Exclusion

Why is warranty / guaranty an issue?

Based upon, arising out of, or in any way relating directly or indirectly to any warranty or guarantee by You; however, this exclusion will not apply to any guarantee that Your Professional Services conform with the generally accepted standard of care applicable to that Professional Service.

- Hanover

2021 Primer

Applications / Non-Standard Contracts / Exclusion

Policy includes contractual liability exclusion

Assumption of Contractual Liability of Others:

arising out of or resulting from the liability of others assumed by the **Insured** under any contract or agreement either oral or written, including any hold harmless or indemnity agreements, except:

1. ...
2. to the extent the **Insured** would have been liable in the absence of such contract or agreement.

Beazley

2021 Primer

Applications / Non-Standard Contracts / Solution

Warranties / Guarantees Disclaimer

Notwithstanding any other representations made elsewhere in this Agreement or in the execution of the Project, the Standard of Care shall govern, and Consultant expressly disclaims all express or implied warranties and guarantees with respect to the performance of professional services

**2021 Primer
Contracts / Scope / Compliance**

Warranties & Guarantees Cont'd

**Compliance With Law
Issues & Solutions**

2021 Primer Contracts / Compliance

2.1.3 As to all services provided to this Agreement...[the architect] ...shall exercise a degree of care and diligence in the performance of these services ...AND in compliance with any and all applicable codes, laws, ordinances, etc....

2.1.4 Comply with all applicable laws, statutes, rules and regulations, building codes and Owner's [the school board] guidelines and regulations, which apply to or govern the Project.

2.1.5.1 ...be in accordance with all applicable codes, laws, and regulations of any governmental entity, including, but not limited to, [list of regulatory entities] with the Owner serving as the interpreter of the intent and meaning of ... any other applicable code[.]”

2021 Primer Contracts / Compliance

Synopsis

Contract language provided Architect would comply with Standard of Care AND would comply with code requirements.

Two distinct compliance requirements.

ConstructionRisk LLC – 2018 Newsletter

2021 Primer Contracts / Compliance - Solutions

In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Architect and which result in a substantive change to the construction documents, the Architect shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.

2021 Primer

Contracts / Compliance - Solutions

Architect shall exercise the reasonable standard of care to comply with requirements of applicable codes, regulations, and current written interpretation thereof published and in effect during the Architect's services.

In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Architect and which result in a substantive change to the construction documents, the Architect shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.

2021 Primer Contracts / Compliance - Solutions

The client acknowledges that the requirements of federal, state, and local laws, rules, codes, ordinances, and regulations, including the Americans with Disabilities Act, are subject to various and possible contradictory interpretations. The Consultant will use reasonable professional efforts and judgment to correctly interpret and apply such requirements. Consultant, however, cannot and does not warrant or guarantee that the work will comply with the interpretation of such requirements by others.

2021 Primer

Standard/Non-Standard Contracts / Scope – Clearly Define:

1. Services you will perform for the negotiated fee, i.e. the basic services
2. What services you can perform for an additional fee, i.e. supplemental or additional services
3. What services you will NOT perform, i.e. excluded services
4. Services to be performed by others

2021 Primer Contracts / Scope



Beware of Scope Creep

Especially requests to provide services that may fall outside your scope of expertise and experience.

2021 Primer Applications / Risk Management Qs



Limitation of Liability
Waiver of Consequential Damages
Risk Management Courses

2021 Primer Applications / RM Credits / LoL Q-1

What percentage of firm's professional service agreements includes the following:

Limitation of Liability clauses: _____ %

2021 Primer

Applications / Risk Management / LoL 558

Florida Statute 558

Outcome of Witt v. LaGorce

Every contract “should” include – regardless of source,
regardless of client

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2021 Primer
Applications / Risk Management / LoL 558

**"PURSUANT TO FLORIDA STATUTE § 558.035,
AN INDIVIDUAL EMPLOYEE OR AGENT OF
[INSERT NAME OF FIRM] MAY NOT BE HELD
INDIVIDUALLY LIABLE FOR DAMAGES
RESULTING FROM NEGLIGENCE OCCURRING
WITHIN THE COURSE AND SCOPE OF
PROFESSIONAL SERVICES RENDERED
UNDER THIS PROFESSIONAL SERVICES
CONTRACT."**

2021 Primer Applications / RM Credits / LoL Q-2

What percentage of last year's gross receipts included a signed contract limiting the firm's liability to less than \$250,000? _____%.

Attach a sample clause for consideration of Limitation of Liability credit.

2021 Primer

Applications / RM Credits / LoL Q-2

To the fullest extent permitted by law, the total liability of Architect and Architect's officers, directors, employees, and agents to Owner and any one claiming by, through or under Owner, for any and all injuries, claims, losses, expenses, or damages arising out of or in any way related to Architect's services, the project, or this Agreement, from any cause or causes whatsoever, including but not limited to, the negligence, errors, omissions, strict liability, breach of contract, breach of warranty of Architect or Architect's officers, directors, employees, or agents, or any of them, shall not exceed \$250,000.

Sample / Review by Counsel Required

2021 Primer Applications / RM Credits / LoL

NOTES – PRACTICAL PERSPECTIVE:

1. Statute 558 – “should” be achievable in any contract, although some Clients & Owners will not understand and push back.
2. Public contracts are not permitted to include an LoL to fee, insurance limits or dollar amount. It’s against the public good.
3. Alternate language – not tied to premium credits, although it would suffice for the first sample question – include limiting to a multiplier of fee, insurance limits, or better to the insurance limits available.
4. Finally, it is questionable if an LoL outside of the 558 language is enforceable in Florida. But, here, we’re discussing an understanding of the application and applicable credits.

2021 Primer

Applications / RM Credits / Waiver of Consequential Damages

What percentage of firm's professional service agreements includes the following:

Waiver of Consequential Damages: _____%

2021 Primer Credits

Waiver of Consequential Damages

Keystone Airpark Authority v. Pipeline Contractors,
Inc.

2021 Primer

Credits / Consequential Damages

January 2019 – Florida appellate court certified this question to the Florida Supreme Court
Not Accepted / Decision by 1st District Court of Appeals Currently Stands as Florida Law

Where a contract expressly requires a party to inspect, monitor and observe construction work and to determine the suitability of materials used in the construction, but the party fails to do so and inferior materials are used, are the costs to repair damage caused by the use of the improper materials general, special, or consequential?

2021 Primer Credits / Consequential Damages

Key Language Engineer's Contract

Passero shall have no liability for indirect, special, incidental, punitive or consequential damages of any kind.

2021 Primer Credits / Consequential Damages

Sample Language / Mutual

Notwithstanding anything in this Agreement to the Contrary, it is agreed that neither party shall be liable in any event for any special or consequential damages suffered by the client arising out of the services hereunder. Special or consequential damages as used herein shall include, but not be limited to, loss of capital, loss of product, loss of use on any system, or other property, or any other indirect, special or consequential damage, whether arising in contract, tort (including negligence), warranty or strict liability.

Construction Risk LLC / Kent Holland

2021 Primer

Credits / Consequential Damages

Sample Language / Mutual Waiver

Neither the Client nor the CONSULTANT shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.

Beazley

2021 Primer

Applications / Risk Management / Internal Procedures – Biz
Practices / Claim Prevention / Premium Credits



2021 Primer

Applications / Risk Management / Internal Procedures – Biz Practices

Internal Loss Prevention - Does the firm have **written procedures** for the following:

1. In House quality control procedures Yes No
2. Change Order procedures Yes No
3. *BIM quality control procedures or guidelines* Yes No
4. *Green Design and sustainability quality control procedures* Yes No
5. Do you use a written agreement? Yes No
6. Screening/pre-qualification of clients, consultants, and contractors - **i.e. a formal Go/No-Go Client Selection** Yes No
7. Procedure for monitoring and collecting outstanding fees Yes No

2021 Primer

Client Selection - Go / No-Go

RLI Insurance Co – Brief Overview



CLIENT / PROJECT SELECTION

- Identifies 20 issues – Project, Place, People and Process
- Suggests a scoring system
- From the scoring develop a risk mitigation strategy – eec comments regarding contract negotiation, one of first steps addressing client expectations

Client Selection - Go/No-Go

RLI Insurance Co

Issue	Risk Score: 1 (low) 3 (medium) 5 (high)	Explanation
PROJECT		
General Risk Assessment of Project Type		High risk project types include multi-family residential, bridges, large public use projects, educational, and high-security facilities.
Knowledge of/Comfort Level with this Specific Project		Evaluate your capabilities and experience relative to the project and the services you're being asked to provide. Relevant experience should yield a lower risk score.
Knowledge of/Comfort Level with this Project Delivery Method		Lack of familiarity with the project delivery mode (e.g., design/build, multi-prime, or IPD) can pose higher risks.
Knowledge of/Management of Pre-Existing Conditions		Renovation or addition projects may pose higher risk. Some of this risk can be mitigated for the design team if the Owner permits the design team to rely upon prior information such as record drawings.
Overall Risk Assessment of the Specific Project/Services		Evaluate your "gut feeling" about this specific project and the associated professional services. When you look back on this project ten years from now, what will you think? Does this project help meet strategic goals?
Category Sum	0	



Client Selection - Go/No-Go

RLI Insurance Co

PLACE		
General Risk Assessment of Project Location		Projects in litigious states like CA, CO, FL, IL, LA, MO, NJ, NY, PA, and TX pose higher risk. Assess the risk of both the state and the specific region for the project.
Concerns About this Specific Project Location		Higher risks exist in areas with dense populations, hazardous soil conditions, extreme weather conditions, sensitive neighbors, etc.
Knowledge of/Comfort Level with this Specific Project Location		Has your firm worked on previous projects in this location? Do you understand the politics and the community? Relevant experience lowers risk.
Overall Risk Assessment of the Project Location Based on External Factors		Evaluate your "gut feeling" about the project location in the foreseeable future. Consider population, resource availability, and similar location-related concerns. When you look back on this location ten years from now, what do you anticipate you'll think?
Category Sum	0	



Client Selection - Go/No-Go

RLI Insurance Co

PEOPLE		
General Risk Assessment of Client/Owner Type		Clients who are inadequately financed, unethical, highly risk averse, in transition, or noncollaborative are all difficult to impossible to satisfy and thus higher risk.
Knowledge of/Comfort Level with this Specific Client/Owner		Working with repeat clients typically lessens the risk. If this is a new client, research important criteria like financial strength and litigation history.
Availability of a Dedicated, Decisive Client Decision Maker		Clients may be impossible to satisfy and therefore higher risk if the decision maker is inexperienced, unavailable, indecisive, or changes during the project.
General Risk Assessment of Design/Construction Team Members		Do you have an adequate number of qualified staff to manage the risk? Are other team members equally adept as your firm at communication, project management, analysis, and technical performance?
Financial Evaluation of Other Team Members		Failure to work with financially strong and adequately-insured project team members puts your firm at greater risk of being the "deep pocket" in the event of a claim.
Overall Risk Assessment of the Project Team Members		Will the project team members be good business partners for the duration of this project and beyond?
Category Sum	0	



Client Selection - Go/No-Go

RLI Insurance Co

PROCESS		
General Risk Assessment of the Procurement Process		A client who procures professional services without giving significant consideration to quality (as opposed to purely price-based selection) indicates higher risk.
General Risk Assessment of the Contracting Process		Projects with no written contracts, clients with onerous or one-sided contracts, or clients who approach contracting on a "take it or leave it" basis are often foreshadowing a lack of risk management.
General Assessment of the Risk Allocation Process		Is due consideration being given to which party is in the best position to assume particular responsibilities (e.g., surveys and soils) and risk being allocated accordingly?
Risk-Reward Assessment		Is your firm being adequately compensated for the services you are being asked to provide and the risks you are being asked to assume? Higher risks arise from inadequate compensation.
Overall Risk Assessment of the Processes Associated with this Project		Evaluate your "gut feeling" about the project procurement, contracting, etc. When you look back on this project ten years from now, what do you anticipate you'll think?
Category Sum	0	
OVERALL SUM	0	Risk scores vary, but generally, a score below 40 indicates a lower risk project, a score between 41 and 70 indicates a middle risk project, and a score of 71 or greater indicates a higher risk project



2021 Primer Applications / Risk Management Qs



2021 Primer

Applications / Risk Management Qs

TOTAL OPERATIONS Total Gross Billings

- i. Permanently Abandoned Projects \$ **Credit**
- ii. Direct Reimbursables (e.g. travel per diem, etc. *Do you purchase furniture & fixtures?*) \$ **Credit**
- iii. Sub-consultants \$ **Credit, IF insured**
- iv. All Other Billings \$ **Firms direct revenue**

TOTAL BILLINGS (i. through iv.) **YES, total sum of above (or whatever is asked on carrier application) – the credit questions are built into the rating system**

2021 Primer Applications / Risk Management Qs

Subconsultants

What percentage of last year's fees were paid to subconsultants _____%

What percentage of your subconsultants are insured for professional liability coverage:
_____%

Do you obtain certificates of insurance from your subconsultants? Y/N

2021 Primer Applications / Risk Management Qs

Subconsultants

Do you use a written agreement with all subconsultants? Y/N

If not asked with revenue:

What percentage of last year's fees were paid to subconsultants
_____%

What percentage of your subconsultants are insured for professional liability coverage: _____%

Do you obtain certificates of insurance from your subconsultants?
Y/N

BerkleyDP.com Form BDP0417003

2021 Primer
Contracts / Scope / Construction Phase



**Construction Phase
Services**

2021 Primer Contracts / Scope / Construction Phase

Cost Estimate Limitation

It is understood and agreed, however, that the Architect has no control over market, bidding and negotiation conditions and, therefore, cannot and does not warrant or represent that actual costs will not exceed any estimates

2021 Primer Contracts / Scope / Construction Phase

If CONSULTANT performs any services during the construction phase of the project, CONSULTANT shall not supervise, direct, or have control over Contractor's work. CONSULTANT shall not have authority over or responsibility for the construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work of the Contractor. CONSULTANT does not guarantee the performance of the construction contract by the Contractor and does not assume responsibility for the Contractor's failure to furnish and perform its work in accordance with the Contract Documents.

2021 Primer Contracts



Force Majeure

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2021 Primer Contracts / Force Majeure

“The Architect shall not be responsible for delays caused by factors beyond the Architect’s reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, *government ordered industry shutdowns, power or server outages, acts of nature, widespread infectious disease outbreaks (including, but not limited to epidemics and pandemics)*, failure of any governmental or other regulatory authority to act in a timely manner, failure of the Client to furnish timely information or approve or disapprove of the Architect’s services or work product, or delays caused by faulty performance by the Client’s or by contractors of any level. When such delays beyond the Architect’s reasonable control occur, the Client agrees that the Architect shall not be responsible for damages, nor shall the Architect be deemed in default of this Agreement.”

Beazley Insurance Company / Mar 2021

2021 Primer
Contracts - Reminder

Termination Clauses
For cause
v.
For convenience

2021 Primer Insurance / PLI Resources

Contract Review

Risk Management Materials

Circumstance Reporting

Pre-Claims Assist

Supplemental Payments

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2021 Primer Insurance / PLI / Rating



REPEAT SLIDES FROM 2020
Overview of Other Rating Factors

2021 Primer Insurance / PLI / Rating

Rating Credits

Risk Management Credits: Carrier webinars / Risk Mgmt Courses (like this)

Limitation of Liability: % use limited to \$250,000 or less

Waiver of Consequential Damages

Membership in a Professional Association - AIA, NCARB

2021 Primer Insurance / PLI / Rating

Rating Debits

Project Types: Condos - Developer or Association /
most guidelines include individual units as condo

Uninsured Subs

Low percentage of written agreements - with Client /
with Sub

Claims: Five-year loss ratios

2021 Primer

Insurance / Contract Coverages / Cyber

CYBER STATISTICS *Florida Trend / 2019-01-25*

**300,000 Consumer Complaints (FBI) \$1.4B Reported
Losses / \$110.6M Floridians**

**Business Email Compromise \$62.7M
Corporate Data Breach \$5.1M**

Backup / Train / Cyber-Insurance

2021 Primer

Insurance / Contract Coverages / Cyber

CYBER EXPOSURES

Network Security
Network Business Interruption / 3rd Party Provider
Interruption
Cyber Extortion (Ransomware)
Fraudulent Wire Transfer

Questions?



AIA
Florida

Disclaimer:

This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

