

REPRESENTING DESIGN PROFESSIONALS IN THE CONSTRUCTION LAW PROCESS

Colorado Bar Association - Continuing Legal Education

**Wednesday, October 29, 2003
9:00 a.m. – 11:45 a.m.**

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Holt & Stalder LLC**

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Introduction

Ty Holt

Bill Knapp

Who are we?

Why us?

The representation of design professionals is a fascinating, "cross-specialization" practice.

- It requires a lawyer with the following skills
 - Multi-party complex civil litigation
 - High quality legal research and writing skills
 - Excellent courtroom and trial skill and talent
 - Business and corporate deal negotiator
 - Sophisticated document drafting
 - Extensive knowledge of the customs and practices of the construction industry
 - Common sense
 - Knowledge of commonly used industry contract forms
 - Ability to deal effectively in the "Board Room" and on the construction site

The Goal for Our Design Clients:

Predictability & Consistency

“The Profession functions within a matrix of laws intended to provide a level of consistency and predictability for all involved in design and building”

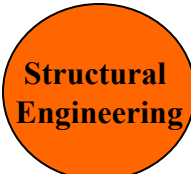
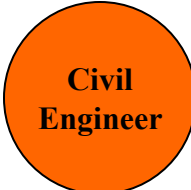
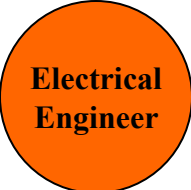
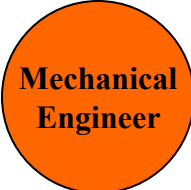
Ava Abramowitz, Esquire

Who Are “Design Professionals”

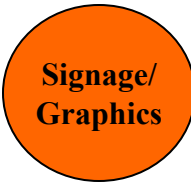
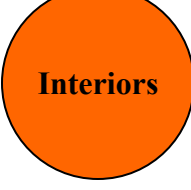
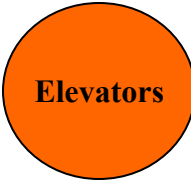
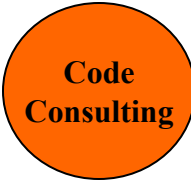
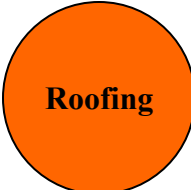
- typically licensed
- certified
- Typically regulated and subject to unique set of laws, standards, customs and protocols
- Eligible to purchase and be covered by professional liability insurance
- Typically covered by the mechanic’s lien law
- Architects
- Engineers
- Geotechnical Engineers
- Geologists
- Mining engineers
- Vertical transportation consultants
- Landscape architects
[Colorado - ?; California - Yes]
- Plumbing – certified, mechanical engineers
- Specialty Consultants – kitchen, acoustical, curtain wall, roof, etc.

Licensed professional services
Building permit requirements
Code requirements
Code, guidelines & standards
Lender requirements
Production of drawings
Contract Administration
Specifications
Responds to RFI's
Construction observation

No construction provided
No warranty or guarantees
No bonds – professional liability insurance
Safety and safety procedures for workers
Estimates of probable construction costs – no estimate or GMP's
No schedules
Work product in paper or graphic form – drawings, specification



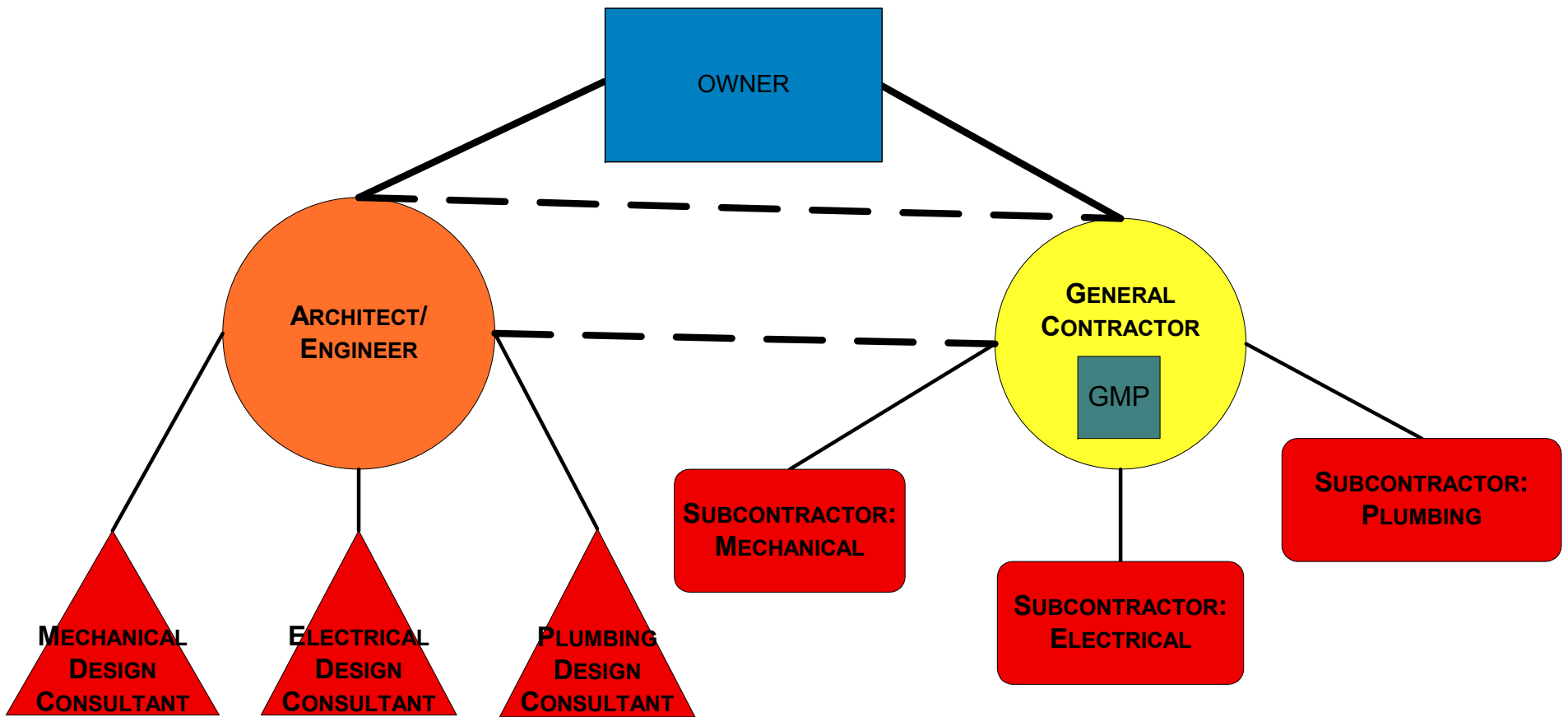
Planning, land use
Architecture
Engineering
Code Compliance
Life Safety
Specialty Designs



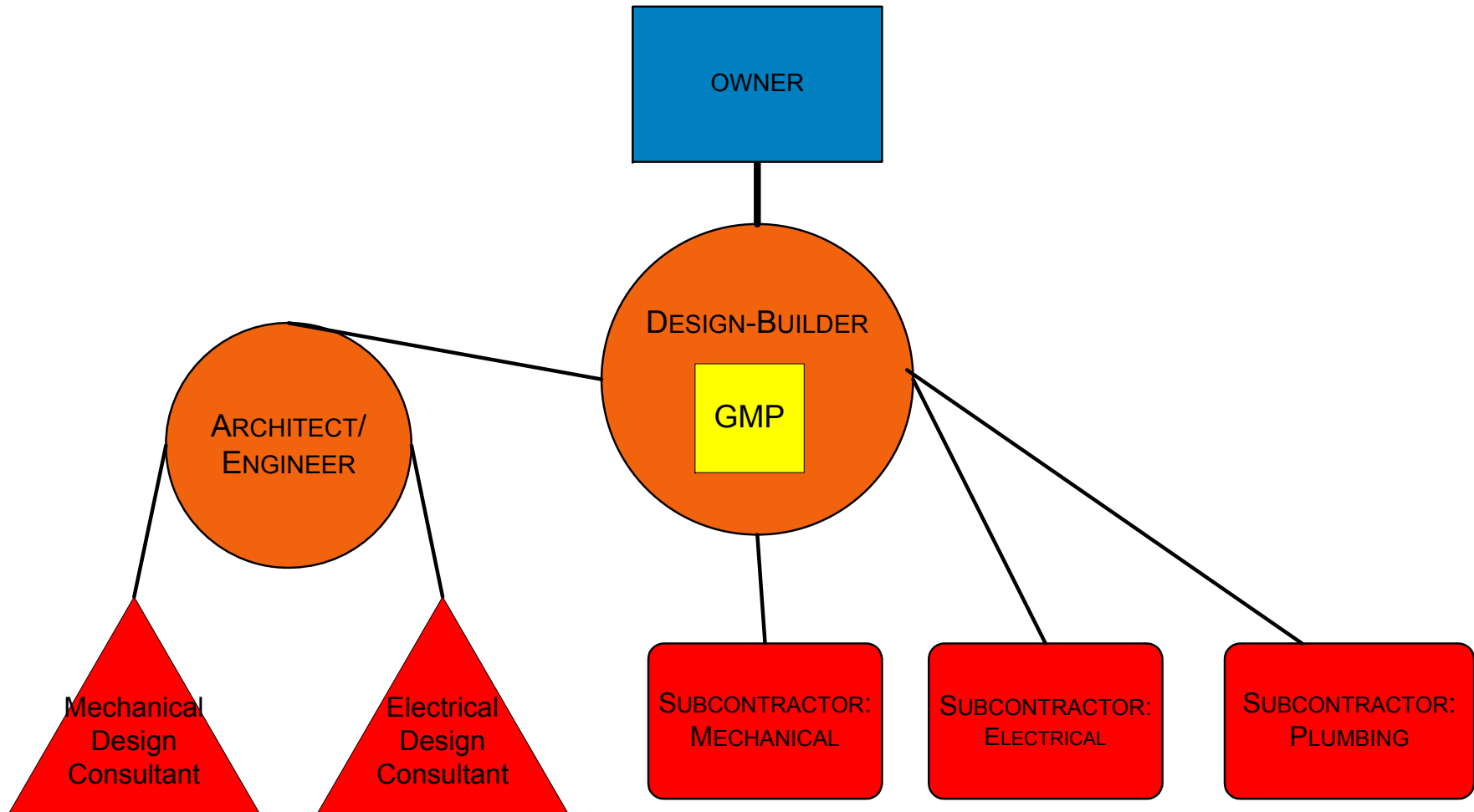
Where Do They Fit In the Construction Process

- Land Use and Master Planning Services
- Pre-Design Services, including Programming
- Preliminary Design
- Construction Documents: Plans & Specifications
 - Plan Check
 - Permitting
- Contract Administration
- Commissioning
- Forensic Design Services
- Special Projects

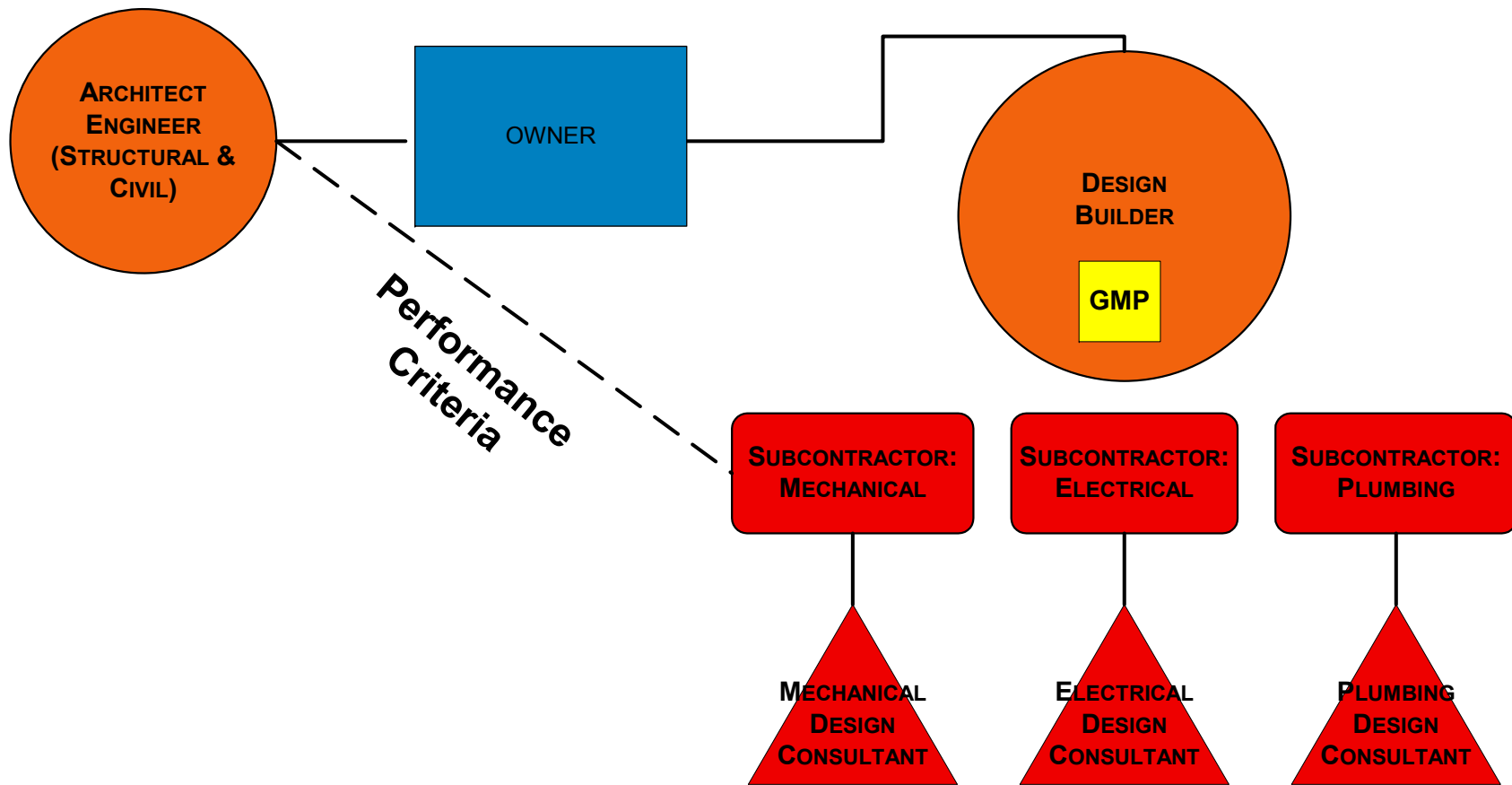
TRADITIONL: DESIGN - BID/NEGOTIATE - BUILD W/GMP



DESIGN-BUILD GENERAL CONTRACTOR AS DESIGN-BUILDER W/ GUARANTEED MAXIMUM PRICE



DESIGN - NEGOTIATION - BUILD WITH MEP SUBCONTRACTOR DESIGN BUILD



What do we do for Design Professionals?

Services Provided To Design Professionals

Construction Dispute Resolution

- Litigation in state and federal trial court systems
- Arbitration
- Mediation
- Special ADR Procedures
 - Mini-trials
 - Contractually specified dispute resolution procedures
 - “Med/Arb”
 - “Arb/Med”
- Appellate Practice in State and Federal Courts

Services Provided To Design Professionals

Insurance Related Services

- Defense
- Insurance Selection/Renewal and Coverage Advice
- Loss Prevention and Client Education Services

Services Provided To Design Professionals

Construction Transaction Practice

- Routine Contract Review, Negotiation and Comments
- Deal Formation Structuring and Documentation
 - Entity Formation – Joint Ventures, Joint Associations, Corporations, Out of State Corporations and Foreign Corporations
- Form based contract drafting and negotiation
- Custom Agreements

Standard Contract Forms Available for Typical Procurement Methods

- American Institute of Architects (AIA)
- Association of General Contractors (AGC)
- Building Owners and Managers Association (BOMA)
- Engineers Joint Contract Document Committee (EJCDC)
- Design-Build Institute of America (DBIA)
- Construction Management Association of America (CMAA)

Services Provided To Design Professionals

Subcontracting – Sub Consultant Issues

- Subcontractor-sub consultant Contracts
- Collection actions
- Indemnity and related actions

Services Provided To Design Professionals

Other Services

- Licensing advice, disciplinary proceedings
- Multi-state Technical/Corporate Compliance and Licensing for Design Professionals
- Labor and Personnel Services for Design Professionals
- Corporate Services, including Records Maintenance Services for Design Professionals
- Mechanic's lien and owner collection actions

Services Provided To Design Professionals

Other Services

- Licensing advice, disciplinary proceedings
- Intellectual Property & Copyright Registration Advice
- Strategic and Business Successorship/Transition Planning
Services for Design Professionals

Legal Issues for Design Professionals

Basic Theories of Legal Liability for Design Professionals In Colorado

[Breach of Contract, Tort or Negligence and Breach of Warranty]

Breach of Contract - Overview of Contract Law

Basic Theories of Liability Against Design Professionals

Breach of Contract

- Form of contract
- Oral contracts
- Implied contracts

Negligence or Tort

- A. Standard of Care
 - i. The duty to exercise reasonable care
 - ii. The breach of the duty of due care
 - iii. The breach must be a proximate cause of the injury.
 - iv. The injury must result in damage or loss.

- B. Contributory vs. comparative negligence

Standard of Care

“Appropriate professional practice standards”
“Pursuant to prevailing architectural/engineering
practices standards”

A design professional is negligent when he or she does an act which a reasonably careful architect would not do or fails to do an act which a reasonably careful architect would do.

To determine whether a design professional's conduct is reasonably careful, that conduct must be measured against what an architect having and using that knowledge and skill of architects practicing architecture at the same time, would or would not have done under the same or similar circumstances. Colo. Jur. Inst. 4th § 15:23 (1998).

Negligence vs. Breach of Contract

- A. Written contracts
- B. Implied contracts
- C. Express oral contracts

Warranties - Express and Implied

- A. Express Warranties
 - B. Implied Warranties
 - C. No implied warranties on professional services
- Colorado, California

Basic Theories of Liability Against Design Professionals

Additional And More Unusual Theories

- Colorado Consumer Protection Act
- Breach of express or implied warranty
- Site Safety Claims
- Personal Liability Claims
- “Professional Stamp” Claims
- Personal Liability
- Other “Theories”

The Role of Professional Liability Insurance

Overview of Insurance for Design Professionals

Forms and types of insurance typically required in the design professional's practice.

Obtaining and maintaining insurance coverage
Rating and Underwriting
Coverage of Practice Policy

Professional Liability Insurance Policies

The Basic Practice Policy

Coverage
Limits
Deductibles

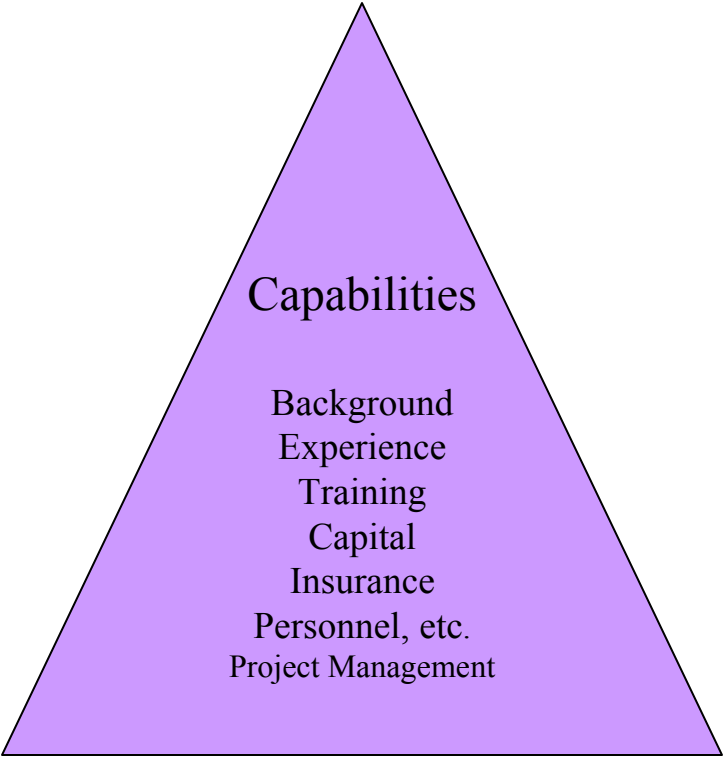
Typical Scope of Coverage of Design Professional's Professional Liability Insurance Policy

1. The Company will pay on behalf of the Insured all sums in excess of the Deductible that the Insured becomes legally obligated to pay as damages and claims expenses as a result of a wrongful act in the performance of Professional services anywhere in the world, provided that:
.....
2. The Company has a right and duty to defend any Claim against the Insured even if any of the allegations are groundless, false, or fraudulent. Defense Counsel may be designated by the Company. The payment of Claims Expenses Reduces the applicable limit of liability
3. The Company will not settle any claims without the Insured written consent such consent not to be unreasonably withheld.

Some Recurring Ethical Issues for Lawyers Who Provide On-going Advice and Insurance Defense For Design Professionals

- Who do you represent?
- What do you do when you have business conflict?
- What do you do when you have an ethical conflict?

Negotiating Contracts with Owners, Sub Consultants, Developers and Governmental Entities



Standard of Care

“Appropriate professional practice standards”
“Pursuant to prevailing architectural/engineering
practices standards”

Contract Terms

Basic Provisions:

Parties
Project Definition
Scope of Services
Compensation
Insurance

Risk Allocation Provisions

Indemnity Clauses

Risk Sharing Provisions

Special Contract Language

Project Specific Provisions

Capabilities

Background
Experience
Training
Capital
Insurance
Personnel, etc.
Project Management

Contract Terms

Basic Provisions:

Parties
Project Definition
Scope of Services
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Risk Allocation Provisions

Indemnity Clauses

Risk Sharing Provisions

Special Contract Language

Project Specific Provisions

Variables:

Procurement Method

Jurisdiction

Private vs. Public
Sector

Liability & Contract Issues Requiring Contract Language

- Allocation of professional liability by task, scope, competency and assumption of duty
- Indemnification provisions
- Insurance limits, coverage and certificate issues
- Compliance with subcontractor provisions
- Fee, Scope and Schedule
- Coordination, management of services
- No supervision
- Contract Administration – duties
- Additional Services

Negotiating Contractual Relationships Between Design Professionals and Their Consultants

Three Basic Types of Subconsultants

- **Principal/Major**, e.g., structural, civil, electrical, mechanical, plumbing
- **Specialty**, e.g., fire protection, vertical transportation, landscaping, transportation
- **Limited or Shared Risk**, e.g., geotechnical, surveying, environmental, hazardous materials

Contract Administration

Can we build it?

An opportunity

Loss Prevention Concepts
For
Design Professionals

Design Phase

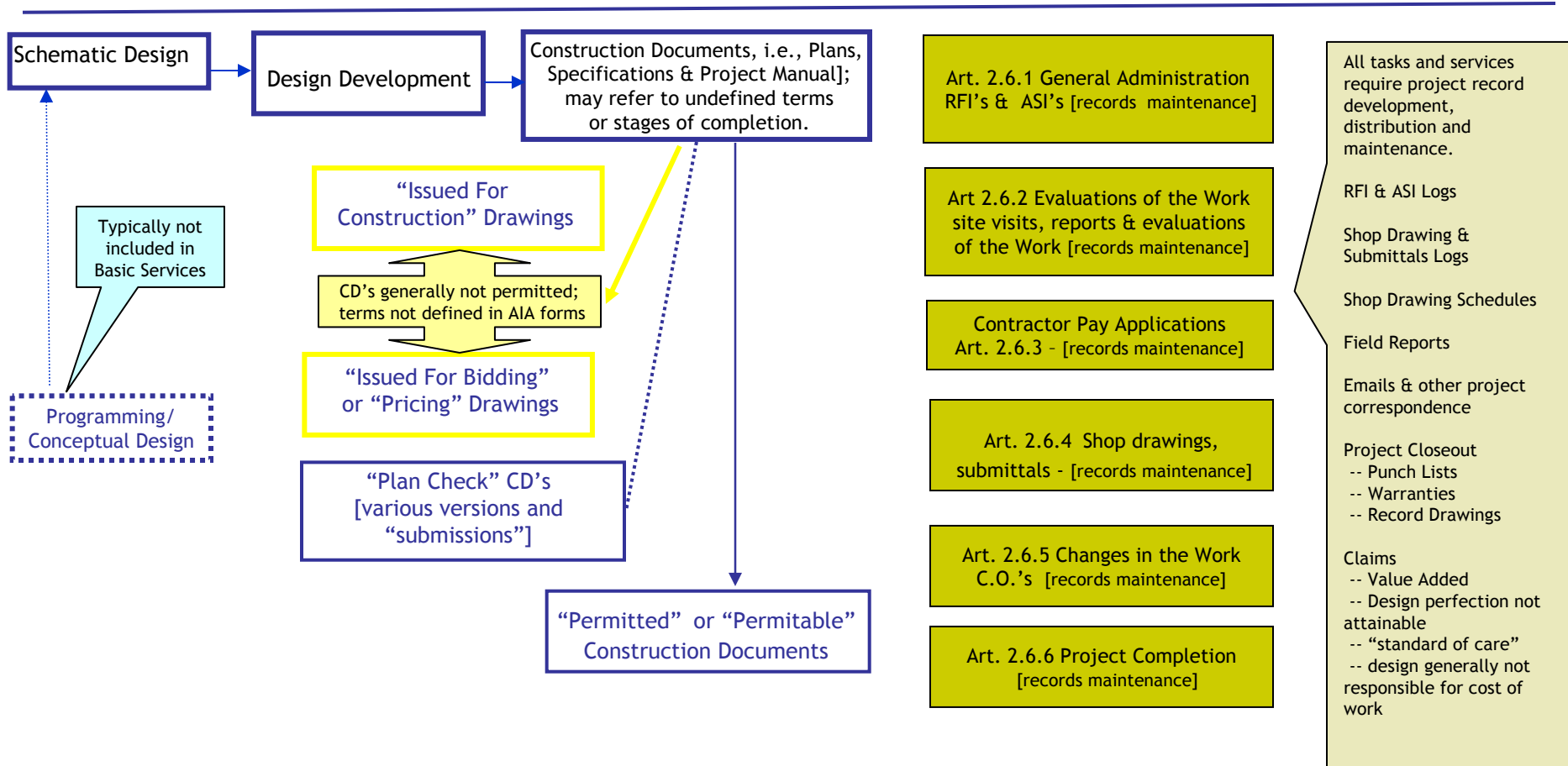
The opportunity to make a profit presents itself here, if at all.

A reasonable business deal, with good documents and competent professional management will make Architect money, i.e., a reasonable profit.

Contract Administration Phase

Anticipated profit is easily lost during this Phase

Liability is often created or exacerbated during this Phase through mismanagement and lack of attention to good communication skills including: not listening, failure to document confer internally and intelligently document.



AIA Design Phase

Establish and document a reasonable and profitable relationship
Produce a constructible set of permitted drawings and specifications
Effectively manage all disputes and problems in design phase

“Business Deal Formation Phase”

ADDRESS THE FOLLOWING:

Scope of Services:

- clear and well defined
- within firm’s competence

Fees

- Fees by Phase
- Additional Services Terms
- Payment Terms

Contract:

- Type or form of Contract
- Economic & liability impact of
- Other contract provisions

Establish Relationship with Client:

- Establish realistic mutual expectations
- Be alert to available information
- “Listen” to the client and express your concerns.
- Document agreements & understandings

Get all of the initial paperwork done

- negotiated and executed
- client & consultant agreements

“Technical Development & Document Preparation Phase”

ADDRESS THE FOLLOWING:

Architect Internal Team Selections:

- Staff for success
 - Select the “right team” for the job and the client
 - Do not kid yourself.]
- Lead client and team persons

Manage:

- Client communications
- Client expectations
- Make changes as necessary
- Do not “live in hope”.
- Budget development
- Design development
- Consultants

Produce:

- A “good” or better set of drawings & specifications

Quality Control:

- Authentic internal “QC”
- Plan Checked & “permissible”

Issue Documents:

- Stamped & signed

AIA Contract Administration “CA” Phase

Understand and provide written responses to questions about the permitted documents. Deal with submittals in a timely way. Observe, document and report on the progress of the Work. Develop an effective communication scheme with all construction phase personnel.

ADDRESS THE FOLLOWING:

Architect Internal Team Selections:

- Staff for success
 - Select the “right field person” for the job, client & contractor [Do not kid yourself.]
- *This is a tough job - make sure you have the right person.*

Creation & distribution of project records - fundamental element

- Schedules [project, submittals & updates]
- Shop drawings & submittals
- RFI/ASI/C.O.
- Meetings & minutes for them
- Pay applications
- Observation reports

Listen & be alert to:

- Design issues
- Owner/Contractor/CM/Owner’s Rep. Relations

“Defense of the design

- practically & intelligently

Identify & document all “Add. Services”

Close out the Project at S.C./F.C. 40

- Punch Lists, warranties, “record drawings”

Questions