







# 8

### Dispute Resolution

Problems, issues and disputes can and will arise on your project. It is critical that you negotiate with your client and memorialize in your agreement how you will handle them. Having a dispute resolution strategy can help you promptly address issues and mitigate potential claims. If not addressed in your contract, your default dispute resolution method is litigation. Rather than leaving it to the courts to decide, we recommend that you include proactive processes in your agreement:

- Include a “Meet-and-Confer” session as the first step. This session includes decision makers from both parties in an attempt to resolve an issue in its early stages.
- If the “Meet-and-Confer” session is not successful, your contract should specify that the parties will enter into formal mediation. Mediation is often successful, can save legal costs and results in a voluntary settlement.
- If the mediation process is not successful, the next step in your contract should allow the parties to move into binding dispute resolution such as litigation.

# 9

### Suspension of Services & Termination

You should have the right to suspend services in the case of non-payment of fees or other material failure of the client to perform its contractual duties (such as the failure to make a critical decision). This decision should not be made lightly; project delays caused by the design professional carry significant risk exposure.

- Clearly define a notification period and process in the contract
- Require rectification of failure (e.g., payment for services rendered)
- Disclaim liability for delays and include an equitable adjustment to schedule and fees upon resumption of services
- In the event of termination, address the clients rights and restrictions related to your instruments of service (see item 7)

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### Limitation of Liability

Limitation of Liability (LoL) clauses can be used to help balance the risks and rewards of a project. The client is the primary beneficiary of the completed project—and accordingly has a greater share of the rewards. Strive for an LoL clause on every contract, and insist on one for limited services (studies, reports, inspections, master planning, conceptual design). While LoL clauses are enforceable in most jurisdictions, here are some best practices:

- Be explicit in the contract—in some jurisdictions, it is necessary to use font treatments such as all capitals and or bold text to highlight LoL clauses
- Consider requiring initials next to the clause to demonstrate that the clause was fairly negotiated and agreed to
- You can set the limit as a lump sum—a fixed amount or your fee, typically whichever is greater
- You can set the limit to the available insurance required by your contract, which may be less than your policy limits and takes into account any erosion of your policy limits due to expenses or other claims

# BONUS

### Waiver of Consequential Damages

“Direct” damages, such as the cost to complete unfinished work, may be very small compared to the “consequential” damages, such as the loss of operating revenue a client might claim as a result of the delay. Similar to the philosophy with LoL clauses, because consequential damages can be so out of proportion with the rewards (i.e., your fees) of a typical design contract, they should be waived or limited.

- Make the clause mutual—you and your client each waive the right to claim consequential damages against the other
- Have it be applicable to any claims or disputes arising out of the contract regardless of which legal theory is applied (contract, warranty, tort, negligence, strict liability, etc.)
- If you cannot negotiate this waiver, be prepared to invest resources to carefully document all causes of delay during construction to avoid becoming a scapegoat

**[Click here to visit the Contract Review Guide Channel on BDP Risk, where you can view the full BDP Contract Review Guide and related content.](#)**

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**Berkley Design Professional** was started in 2013 by a team of people with deep roots in underwriting, loss prevention and claims handling for the Design Professional community. The genesis of Berkley DP was the combination of our team's passion for bringing fresh ideas to the products and services Design Professionals need together with W. R. Berkley Corporation's desire to commit its superior financial strength and A+ rated paper to this industry segment. Berkley DP's motto is: "Better by Design." By this we mean that our policyholders are better businesses because we've designed comprehensive coverage and current risk management solutions that make their practice less susceptible to loss.

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