

# Professional Liability Perspective

## Architects and Engineers

### Professional Liability Insurance

#### How Much Control Do You Really Have Over the Project Schedule?

Here is how it shows up in the owner's draft: "Time is of the essence in the performance of services under this Agreement." It doesn't sound like a big deal. The project schedule is important to the owner, and your co-operation is badly needed. Of course you will co-operate. The owner has a great deal riding on that schedule.

However, "Time is of the essence..." is not about co-operating in a good faith effort to help your client make a lot of money. It is about the extent to which you are willing to assume responsibility for the consequences of falling short of that goal.

You may be willing to exert every effort to meet the owner's schedule, but in the complex environment of a construction project, with its pick-up team of players driven by diverse and often hidden agendas, your efforts may be viewed as less than successful.

#### Beginning With Basics

Lawyers have a very useful tool at their disposal: *Black's Law Dictionary*. It is a compendium of terms and phrases which have been clearly defined in the law. "Time is of the essence..." can be found there.

It means that the timeliness of your performance is a contractual consideration of vital importance. A failure to design in strict accordance with an agreed upon schedule, a response to request information in anything less than the most prompt and timely fashion, a contribution to confusion and delay on the

site—any such lapse on your part could represent a material breach of your agreement. If so, the owner may be relieved of the obligation to pay your fees. If damages arise from your breach, you could be liable for those damages. Never mind the fact that the law requires only that you act with reasonable promptness. If your contract requires something more, you will be expected to deliver something more.

Is it reasonable for you to be asked to place such importance on time? A definite conflict exists if the schedule interferes with the exercise of usual and customary professional care.

#### Because It's There

Why, then, would lawyers for your clients make such a demand? They know what "Time is of the essence..." means, and they will not hesitate to incorporate it into the contracts they draft. Indeed, many will insist it is a non-negotiable requirement, perhaps without understanding that their attempt to impose this risk on you is not only contrary to your best interests, but to those of the owner as well. You do, after all, serve the same client, and building a project without deficiencies is presumably everyone's goal.

Many owners and their lawyers fail to recognize that the language they typically use in construction contracts does not necessarily apply to the performance of professional services. The rendering of an increasingly complex series of design decisions, for example, is not well served and can seldom be accelerated by throwing more workers into the breach. The options others might have in delay situations are simply not open to you.

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## Restoring Reason

What should you do with an owner's demand that time be "of the essence" in your agreement? The first thing to do is delete the offensive words. They are simply not appropriate in connection with the performance of professional services. Even if you are successful in this effort, do not stop there. If your agreement incorporates a project schedule, the dates in the schedule may be etched in stone as far as the owner is concerned. If the schedule leaves you plenty of room for false starts and blind alleys, perhaps you can live with it. A more cautious approach might be preferable.

Project schedules seldom provide for the unexpected, and unrealistic expectations have a way of growing. Those who strive for clarity would not leave either of these contingencies unattended. Neither should you. Here, subject to the advice of counsel, is a simple solution.

The Architect/Engineer acknowledges the importance to the Owner of the Owner's project schedule and agrees to put forth its best professional efforts to perform its services under this Agreement in a manner consistent with that schedule. The Owner understands, however, that the Architect/Engineer's performance must be governed by sound architectural and engineering practices.

The Architect/Engineer shall not be responsible for delay caused by circumstances beyond its reasonable control, nor for delay which may be occasioned by actions which, in the sole judgment of the Architect/Engineer, are required in the exercise of usual and customary professional care. The Architect/Engineer shall not be liable for damages arising out of any such delay, nor deemed to be in default of this Agreement as a result thereof.

Your message to the owner and his or her lawyer is a simple one: "There may be events over which I have no control, and I am not willing to be responsible for them. Nor am I willing to be placed in a position in which I am forced to choose between your schedule and sound professional practice. I simply cannot select against my own professional judgment, and I cannot accept the idea that you would want me to do so."

