



# Managing Professional Exposure as a Small Project Practitioner

Presented by:

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In conjunction with:

**The AIA Trust**  
[www.TheAIATrust.com](http://www.TheAIATrust.com)

October 28, 2015

## **FRANK MUSICA**

Frank Musica has a professional degree in architecture from the University of Notre Dame. After working for design firms in Chicago, he returned to Notre Dame to teach and to obtain both a Masters in Business Administration and a law degree. Frank's education and practice experience have been devoted to working with architects, consulting engineers and other design and construction professionals.

Following a decade of practice in architecture, engineering and planning, Frank held staff positions in the national professional organizations for architects and engineers. At the American Institute of Architects and the American Society of Civil Engineers he managed programs in government relations, federal and state regulations and legislation on procurement, practice management and professional liability issues. From 1984 through 1990, Frank served as the staff director of the National Society for Professional Engineers division for individual consulting engineers—the Professional Engineers in Private Practice.

Since 1991, Frank has worked as the senior risk management attorney with Victor O. Schinnerer & Company, Inc. Schinnerer, the world's largest provider of professional liability insurance for design professionals and design liability insurance for construction firms, brought Frank into its program to develop risk management information from its base of professional liability claims information and to look ahead at changes in the marketplace for professional services, in the legal treatment of design professionals, and in the interaction between technological and information management advances and practice management techniques and responsibilities. Frank works directly with policyholders by providing educational and management assistance services, interacts with associations, government agencies and clients of the design industry, and creates serial and special interest publications on risk management techniques including the website publications on [www.Schinnerer.com/AERiskmanagement](http://www.Schinnerer.com/AERiskmanagement).

Frank also has served on the AIA Contract Documents Committee as an insurance advisor since 1991 and has worked closely with the AIA and The AIA Trust on education and management assistance programs to prepare architects to recognize and manage their professional liability exposures.

# Managing Professional Exposure as a Small Project Practitioner

## A Webinar by Victor O. Schinnerer & Co., Inc. and The AIA Trust – October 28, 2015



### Learning Objectives



This webinar is provide by The AIA Trust. For more information go to [www.TheAIATrust.com](http://www.TheAIATrust.com)

- Understand the legal expectations placed upon them by state registration laws and the US legal system.
- Appreciate the sources of professional liability claims and the costs they cause to professional service firms and the public
- Recognize how negligently performed services can result in professional liability claims while contractual obligations can distort normal legal liability and jeopardize insurance coverage.
- Conform their performance of professional services to reduce claims and protect public health and safety.

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### Professional Liability Exposures

- The Legal Status of Architects
- Statistics and Comments on Claims
- Risk Management Procedures
- Contractual Obligations
- Practice Management Issues

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### Architects and the Law

The Two Things About the Law:

1. The law protects the reasonable expectations of the parties.
2. You are responsible for foreseeable costs of your wrongful conduct.

The Two Things About Design Practice:

1. It's all about trade-offs.
2. The trade-offs are all about money, time, and quality.

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**Tort and Contract Law**

- Basic protection of negligence standard
  - Legal framework of protection
  - Based on standard of care
- Freedom to assume contractual obligations
  - Changing or creating rights
  - Exceeding normal legal liability

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**Negligence and Liability**

- Was there a breach of a duty?
  - What duty existed?
  - Was the standard of care met?
- If there was a breach of a duty, did it cause damage?
  - Can the damage be traced to the breach?
  - Could such damage have been expected?

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**Breach of Contract**

- Did a valid contract exist?
  - Was there an agreement?
  - Was there consideration?
- If a contract existed, was it breached?
  - Was there a failure to fully perform as promised?
  - If not performed, what is an adequate remedy?

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### **Breach of Warranty**

- Was a promise made?
  - About time, cost, result?
  - Related to the services?
- Was there a right to rely on it?
- Did the party actually rely on it?
- Did the promise prove to be false?
- What harm did reliance cause?
- What remedy is adequate?

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### **Extent of Exposure**

- Who can recover?
  - Negligence: anyone harmed
  - Contract: anyone in privity
  - Warranty: anyone with reliance
- How much can they recover?
  - Direct and consequential damages
  - Insurance, business and personal assets
- How long before exposure ends?
  - Limited by statutes of repose/limitations
  - By contract risk can be unlimited

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### **Statistics and Comments on Claims**

**How often do firms like ours  
face and pay claims on  
design services?**

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### Causes of Professional Liability Claims

- **Chance events:** Arbitrary developments that result in loss.
- **Changed conditions:** Financial problems, site issues, or surprises causing cost recovery efforts.
- **Technical errors:** Design problems that have to be corrected.
- **Managerial deficiencies:** Communication, documentation and actions not meeting project requirements, fee disputes, unmet expectations.

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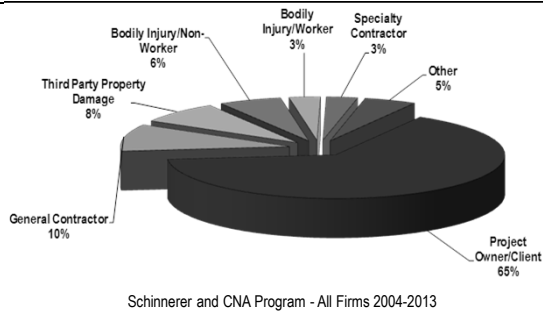
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### Frequency of Claims by Claimant



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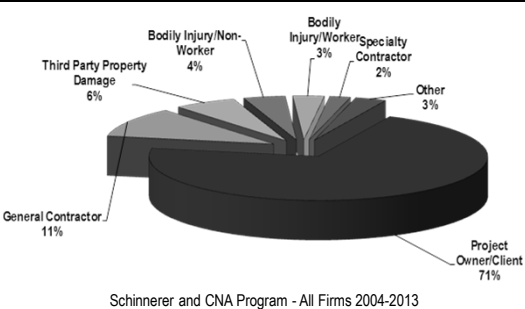
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### Severity of Claims by Claimant



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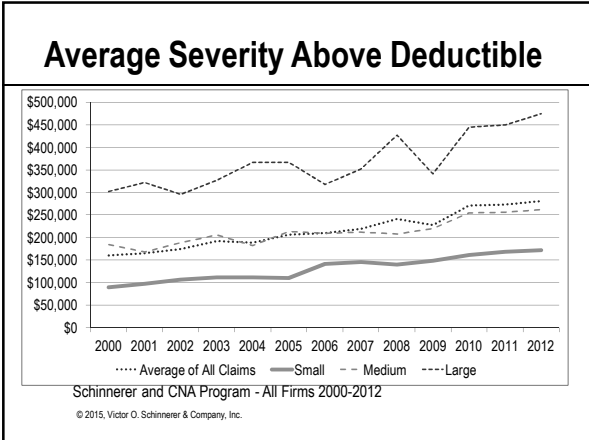
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### The Necessity of Managing Risk

Risk management is more than mitigating risk – it is preventing situations that lead to disputes.

- Protecting a firm’s reputation
- Meeting registration law requirements
- Enabling the firm to innovate
- Satisfying client and public expectations
- Remaining profitable and rewarding

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### The Necessity of Managing Risk

Managing client expectations is essential to a profitable, risk-controlled culture.

- Under-promise and over-deliver
- Set common goals and expectations
- Define roles and responsibilities clearly
- Identify potential barriers to success
- Jointly establish measures of success

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**Risk Management  
Procedures**

**We have  
procedures?**

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**Risks Exist in All Projects**

- Identify Risks
- Assess and Manage Those Risks
  - Balance Compensation with Risk
  - Modify Practice Management Techniques
  - Focus on Communication and Documentation
  - Increase Capability if Unique Risk
- Prepare for Unanticipated Risks

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**Risk Management Basics**

- Retention
- Avoidance
- Allocation
- Transfer
- Mitigation

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<b>Transfer of Risk</b>
<ul style="list-style-type: none"><li>• Insurance<ul style="list-style-type: none"><li>• Practice Policy</li><li>• Project Policy</li></ul></li><li>• Contract<ul style="list-style-type: none"><li>• Indemnity</li><li>• Limitation of Liability</li></ul></li></ul>
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<b>Risk Mitigation</b>
<ol style="list-style-type: none"><li>1. Written Contracts with Clients and Consultants<ul style="list-style-type: none"><li>• Payment Terms</li><li>• Interprofessional Insurance Verification</li></ul></li><li>2. Method of Enforcing Fee Arrangement with Client</li></ol>
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<b>Risk Mitigation</b>
<ol style="list-style-type: none"><li>3. Pre-Project Planning and Project Definition Document</li><li>4. Internal or External Project Peer Review</li><li>5. Constructability Review</li><li>6. Submittal Management as Required in the Contract</li></ol>
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**Risk Mitigation**

Creating the Record

- Establish and enforce communication and documentation rules.
- Be objective: state facts only

Preserving the Record

- Written or Other Preserved Formats
  - Notes/tapes/transcripts/emails/calls/texts/photos
  - Project correspondence
- Preservation and Destruction Policy
  - Costs and Benefits
  - Statutes of Repose, Regulations, and Contract Obligations

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**Contractual Obligations**

**What do you mean this project isn't like all the others?**

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**Oral Agreements**

- Unclear Scope of Services
- Time Constraints not Documented
- No Evidence of Terms and Conditions
- No Contract Change or Dispute Resolution Systems
- Difficulty in Relying on Memories

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**Purchase Orders**

- Product liability not the professional standard of care
- Express warranties and guarantees
  - Absolute timely delivery
  - Fitness and merchantability
- Broad-form defense/indemnity terms

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**Vicarious Liability**

- Responsibility and control over subconsultants
- Subconsultant insurance or able to indemnify the prime from its assets
- Only rational waivers or limitations on risk
- Prime compensation for unusual risks of the subconsultant's services

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**Limitation of Liability Provisions**

- Reperformance of services
- Amount of compensation
- Specific dollar amount
- Insurance proceeds
- Exclusion of consequential damages
- For a specific risk
- On a comparative basis
- Anticipated change orders

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**Accepting Exposures**

- Indemnification provisions beyond negligence or other normal legal standard
- Certifications beyond the scope of services or available knowledge
- Guarantee and warranty language
- Product liability language

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**Indemnification of a Client**

You are assuming a business risk if your contractual indemnification obligation for your professional services exceeds your responsibility for damage caused by your negligence.

***Architect shall indemnify and hold owner harmless from all damages to the extent they are caused by architect's negligence in performing professional services.***

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**Ownership and Use of Documents**

- Copyright protection
- License to use documents
- Risk and liability
- Compensation and leverage
- Provisions for transfer
  - Compensation
  - Disclaimer
  - Indemnification

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### **Time Limitations**

- Time limits should include time needed by consultants and for client and governmental review
- Limits should not be stated as absolutes
- Events beyond control should lead to adjustments
- Beware of liquidated damages or penalty provisions

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### **Construction Phase Services**

- Contract administration is valuable
  - Documents not intended to be "complete"
  - Design professional interprets documents
  - Presence can mitigate problems
- Risk increases if not providing service
  - Release from risk of client's administration of contract for construction
  - Indemnification of claims caused by changes

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### **Construction Activities**

- Construction contract administration is not construction administration
- The contractor is responsible for:
  - Construction means, methods, techniques, sequences, and procedures
  - Safety precautions and programs
- The architect's risk is increased if:
  - Architect has responsibility without control of contractor and site
  - Architect assumes duty through actions

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### **Submittals and Shop Drawings**

- Require schedule for timely review
- Enforce submittal and review schedule
- Require checking and approval by contractor
- Reject shop drawings not required
- Have someone qualified and familiar with the project or schedule requirements provide the review
- Document the process

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### **Construction Site Visits**

- Visits should be determined on rational basis, specified as to procedure and limited in scope
- The purpose and number of visits should be negotiated; architects should be able to explain why and when they should be on site
- “Periodic” visits are not in the client's interest
- “As necessary” visits are a target for litigation and loss

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### **Evaluation of the Work**

- Clearly describe level of evaluation
- State in terms of value to client
- No “supervision or direction of work”
- Negotiate and define any other level of service
  - Reviewing project status
  - Observing the work
  - Monitoring the effort
  - Inspecting the result

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### **Payment Certification**

- Base on level of evaluation of the work and contractor's data
- Include qualification of certification tied to architect's knowledge and available information
- Preserve owner's right to recover money from contractor upon re-evaluation

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### **Duty To Reject Work**

- Authority means duty
  - Reject observed non-conforming work and refer to owner for decision.
  - Be authorized by owner to accept non-conforming work.
- Rejection must not include correction advice
  - Contractor decides on correction methods to meet requirements of contract documents
  - Architect focuses on result

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### **Certifications**

- Be based on scope of services
  - Be within the expertise of architect
  - Relate a fact known by and within the control of the architect
  - Be set as to place and time
- OR
- Clearly express a professional opinion
  - Be qualified as limited in use

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### **Record Drawings**

- The architect
  - Records contractor-reported changes
  - Documents observations
  - Does not verify changes
  - Does not certify the accuracy of information
- The architect should be protected from misuse of record documents

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### **Practice Management Issues**

**There is even more to worry about?**

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### **Proposals and Advertising**

- Advertising
  - Promotional material
  - Website information
- "Pre-contracts"
  - Proposals
  - Letters of intent
  - Studies and reports

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### Confidentiality

- Ethical duty of client information confidentiality
  - Informed consent to disclosure
  - Implied authorization
- Areas of risk include:
  - Inadvertent production of client confidences
  - E-mails/texting/camera phones
  - Award programs
  - Media coverage

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### Product Selection

- Product selection and specification
  - Recognize of danger of substitutions.
  - Caution owner on product availability.
- Documenting a rational selection process
  - Request technical data not promotional material. (Ask for bad results.)
  - Research manufacturer's reputation, stability, and production capacity.
  - Establish client's "informed consent" and keep client informed of risks discovered.

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### Resources

- Check The AIA Trust website. ([www.TheAIATrust.com](http://www.TheAIATrust.com))
- Look for information from the AIA including free information from the Contract Documents program (B503).
- Refer to insurance carrier information
- Schinnerer and CNA Policyholders:
  - [www.Schinnerer.com/AERiskManagement](http://www.Schinnerer.com/AERiskManagement)
  - *Managing Risk Through Contract Language* Guide
  - *Tips for Reviewing a Contract* Checklist
  - Schinnerer's *Voluntary Education Program* Course
  - *Guidelines for Improving Practice* Newsletter
  - Blog on Topical Risk Management Issues

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