

# ProNetwork News

## Risk Management Tools for the Design Professional

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### Veni, Vidi, Vici, Lis Pendens: I came, I saw, I got sued - Part 1 of 2

By Eric L. Singer, Ice Miller, LLP

What if Caesar had written "I came to the project site, I observed for general conformance with the Contract Documents but not for means or methods or work covered since my last visit" and then wrote a three word report? Caesar was a master of understatement and understatement leads to misunderstandings and, well, understatement. Architects have always faced liability for undiscovered construction defects but current economic times have forced many contractors out of business. With the typical lack of contractor insurance for defective work, A/E's are the only solvent or insured pocket, leaving design professionals more vulnerable to construction defect claims than in the past.

#### Veni – I went to the site

Those preaching risk reduction used to urge that architects and engineers leave construction administration to construction managers and contractors. This approach allowed or even encouraged contractors, CMs, program managers and owner's representatives to take market share for services formerly performed by A/E's. It also missed the point. Design professionals do not seek to eliminate liability, but to manage the reasonable risks of design practice. Reasonable risks are those placed with the party able to control them.

If an owner wants an A/E to ensure perfect construction, the project is doomed to fail for two reasons. First, there hasn't been perfect construction since the Pyramids (and they had different labor and insurance agreements in those days). Second, the A/E does not control all of the variables that go into a construction project. There are elements of construction installed and concealed by the time the A/E arrives for a weekly or monthly meeting and site tour and even the most gifted A/E is powerless to see through walls.

*Architect and consulting M/E/P engineer design a medical office building and, by contract, are required to make only monthly site visits to review the work in progress, corresponding with the monthly draw. Less than one year after substantial completion, the owner notices moisture and mold growth on the underside of soffits in a number of locations. The general contractor is out of business, as is the installing mechanical contractor.*



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*The owner retains a well-known litigation consultant who opens the soffits and determines that there are short runs of insulated pipe as specified but long runs of uninsulated pipe. The litigation consultant theorizes that the short runs of insulated pipe correspond to installation on the one day the architect and engineer visited the site, always on the same day every month.*

Liability arising from construction administration typically comes either from the contract or from the A/E's actions. In this area, the law tends to divide the world into contracts and torts. Torts are not those pastries but non-contract duties running to injured third parties. In tort law, you owe third parties damages in proportion to your degree of fault. If you have a car accident with two other cars, one of the drivers may be more at fault than the other or have caused the whole mess. Tort law apportions liability among the parties so that nobody pays more than his or her fair share. A party 20% responsible owes 20% of the damages. The contract's description of your scope of services and your actions will factor into your percentage. They are not likely to give you 100% or 0% of the liability, but usually something in between.

A contract is different because it is a deal – a legally enforceable promise. If you break the deal – breach -- you owe all of the damages caused by your breach. If the owner has deals with others, who also breach, you are still responsible for all of the damages flowing from your own breach. Like telling the officer that you weren't the only one speeding, a contractor's breach of its own contract does not get the A/E off the hook. You are both responsible for the entirety of your damages. If the damages overlap, the owner only gets to recover the total of its actual damages but can pursue those damages from either or both of you in whatever order it chooses. If the contractor is solvent or insured, you may be in luck. Unless you also have a contract with the contractor, though, in many jurisdictions you may not be able to force the owner to beat up the contractor. More on that below.

For decades, A/E agreements have called for A/E's to visit *periodically*. Owners may insist on "as required" or "as needed" language. The best response to such a request is to explain the increase in fees necessary to provide it. Increased fees usually end the discussion but the decision is not usually reflected in the final version of the contract. It will be lost to a later judge or jury. The best way to reflect the discussion is to address it like a limitation of liability provision:

*A/E has offered to provide more frequent or full time site presence as a part of Basic Services for an increased fee. Owner has declined to engage A/E for more frequent or full time site presence.*

A judge or jury will know from your agreement that this was a term discussed and that it was not part of your deal. The same is true for typical language leaving to the contractor the responsibility for the contractor's performance, now in paragraph 2.6.1.2 of the AIA B201 (2007), for example.

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### Vidi – I observed for general conformance with design intent

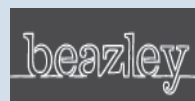
If the owner takes you up on your offer of increased or full time site representation, be careful not to warrant perfection. A/E's know to avoid contract terms connoting detailed examination, like "inspect" or "assure compliance." Is *general* conformity any better? The AIA B201, § 2.6.2.1 uses the phrase "to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents." The terms *generally* and *in general* sometimes become the focus of an A/E's defense in litigation and, ultimately, an analysis of the standard of care. What did you document in your visits and what do others performing your services typically see when they visit a site?

Owners may seek to strike the words *generally* and *in general*, likely leaving a judge or jury to conclude that the parties intended the opposite of general and assume that they intended the opposite -- *specific*. Bad contract language makes it difficult to defend construction defect claims. Nothing in your contracts, the laws of physics or karma, however, are likely to exculpate you for an error, whether in your plans or in your duties on site. And sometimes construction defects are hidden in plain sight.

*Architect designs a 100 unit extended stay hotel, with each unit consisting of a lower level living area, kitchen and bath, with a lofted bedroom at the top of a flight of stairs. An extended stay resident tumbles down the stairs in one of the units and suffers a significant head injury and broken bones. On inspection, the tread depth on the stairs is one-half of an inch short of code compliance. The installing subcontractor is out of business, leaving the owner and the architect to defend a lawsuit. During discovery, the parties' experts scour the entire 100 unit complex and determine that only that unit's stair treads fail to comply with code, while the other 99 were just fine. The plaintiff's expert, however, pointed to other defects having nothing to do with the plaintiff, leading the owner to claim that the Architect failed to conform to the standard of care in performance of its CA services.*

In the example above, the plans were sufficiently detailed to yield code compliant stairs and 99% of them complied. The defense focused both on the overall compliance of the hotel's stairs (*general* conformance with Contract Documents) and on standard of care – architects do not typically measure stair treads and nobody would have caught this. The hotel case was different from concealed conditions cases because the stair treads were out in the open and at least theoretically measurable at any time. In addition, this particular jurisdiction required a signed architect's certification of code compliance prior to issuance of a certificate of occupancy. Those facts combined to yield a denied summary judgment and leaving the architect to defend the case. The case settled for a nominal sum but the settlement was literally on the eve of trial and followed exhaustion of the architect's deductible and expenditure of a great deal of legal, expert witness and the architect's time over the course of several years.

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NEXT MONTH: *Lis Pendens* – I got sued anyway AND *Vici* – I conquered?

NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances and jurisdiction.

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