

# LSI

## Construction Law

**Holding the Architect Responsible for Design Liability: Responding to cutting edge excuses for avoiding liability; design and engineering liability; issues faced by architects daily**

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## A. Liability of Architects for Design

Design professionals, including architects, have a responsibility to their clients for the design of a project.

The extent of this responsibility is governed by the architect's contract. In Illinois, the leading case is Ferentchak v. Village of Frankfort, 105 Ill.2d 474, 475 N.E.2d 822, 86 Ill.Dec. 443 (1985). "The first question to be addressed, therefore, is whether [the defendant] had a legal duty to" do that which the plaintiff alleges should have been done. Id. at 480, 475 N.E.2d at 825, 86 Ill.Dec. at 446. In Ferentchak, the plaintiff homeowners brought suit against a municipality and the engineer for the developer, alleging that improper foundation grade levels caused water damage to their home. The Illinois Supreme Court held that the engineer's contract did not create a duty to do the acts that were allegedly done negligently. Id. at 480-483, 475 N.E.2d at 825-826, 86 Ill.Dec. at 446-447.

Thus, it is most important to have a contract between the architect and the architect's client that accurately reflects the duties and obligations of the respective parties. Particularly in construction contracts, it is also important that the contract accurately allows for the identification of what the architect is not doing. For instance, AIA contracts go to great lengths to specify that the architect is not responsible for the means and methods of construction – that is the contractor's job. Here is one example:

**2.6.2.1** The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 2.8, (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

Note that this provision not only states that it is the contractor and not the architect who is in charge of the construction, it also qualifies the architect's duties with respect to observation of the construction work and responsibility for detection of any errors committed by the contractor.

Without this sort of qualifying language, a court may hold the architect responsible for injuries to workers that result from improper construction methods.

### To whom is the architect liable?

In Illinois, an architect is only liable to the party who hired the architect, so long as the damages are solely economic. Moorman Mfg. Co. v. Nat'l Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982); Redarowicz v. Ohlendorf, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982); Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp., 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983); 2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990). The Moorman court defined economic loss as “[d]amages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits . . . .” Moorman, 91 Ill.2d 69, 82, 435 N.E.2d 443, 449, 61 Ill.Dec. 746, 752,(1982) (quoting Note, Economic Loss in Products Liability Jurisprudence, 66 Colum.L.Rev. 917, 918 (1966)). This principle does not apply if there is any personal injury or significant damage to other property. In other words, an injured worker can sue the architect, but a subcontractor who is not paid cannot.

Other states may not follow the Moorman (Economic Loss) Doctrine. For instance, Wisconsin permits an action by a subcontractor directly against an architect, even though there is lack of privity. A.E. Investment Corp v. Link Builders, Inc., 62 Wis.2d 479 (1974) (“under Wisconsin negligence law, architects may be liable to third parties with whom they are not in privity of contract. The lack of privity does not constitute a policy reason for not imposing liability where negligence is shown to be a substantial factor in

occasioning the harm.”)

### Warranty of Plans

It should be noted that, under the Spearin Doctrine, United States v. Spearin, 248 U.S. 132 (1918), an owner warrants the accuracy of the plans to the contractor. If the contractor builds the project in conformance with the plans and specs, the contractor will not be responsible for the consequences of defects in the plans and specifications. However, the architect makes no such warranty to the owner. Thus, if the plans and specs contain defects, that does not automatically make the architect liable to the owner. Rather, the architect’s liability to the owner is more of a negligence standard – if other similarly qualified architects would have made the same error, the architect will not be liable for the error.

Owners will sometimes try to get around this problem by having architects warrant the accuracy of the plans and specifications. The problem for the owner is that such a warranty may negate the architect’s errors and omissions coverage. Such a provision in the owner-architect agreement may cause the owner more harm than good and needs to be carefully analyzed.

In most situations, an error in the plans will result in liability. Architects most often try to limit their liability contractually (see below).

### Limitations of Liability

One increasingly common approach by architects to limit their liability is a provision in the contract to limit liability to a maximum amount and/or to limit who will be liable. Once commonly used provision would limit the owner’s maximum recovery to the fees paid to the architect, or to the available insurance. Here is one such provision:

**LIMITATION OF LIABILITY.** The Owner agrees, to the fullest extent permitted by law, to limit the liability of the Architect to the Owner for any and all claims, losses, costs, expenses, or damages of any nature whatsoever, including attorney's and expert-witness fees and costs, from any cause or causes, so that the total aggregate liability of the Architect to the Owner shall not exceed the Architect's total fee received for services rendered on this project, or the available amount of the Architect's professional liability insurance policy, whichever is greater. It is intended that this limitation apply to any and all liability or causes of action however alleged or arising, unless otherwise specifically prohibited by law.

Note that the architect's errors and omissions insurance typically is a declining balance policy and covers more than one project (unless project insurance is purchased). Thus, a claim from another project may exhaust the architect's insurance coverage so that little or nothing is left for this project.

Another technique is to limit liability to the architect's firm with a provision such as this:

The Owner acknowledges that the Architect and its consultants are corporations and agrees that any claim made by Owner or its assigns arising out of any act or omission of any shareholder, director, officer or employee of the Architect or its consultants, in the execution or performance of this Agreement, shall be made against the entity and not against any of their individual shareholders, directors, officers or employees.

Owners negotiating with an architect over this issue need to consider whether they really get anything if the architect has unlimited liability. In most situations, the owner will be able to recover from the architect's insurance carrier, but little or nothing from the architect. This is a practical consideration, since only the largest architectural firms will have significant assets. The owner's only real option to protect itself is to have the architect purchase additional insurance, or to obtain a project insurance policy. Both of these may involve a significant additional expense for the owner. The owner should also inquire whether the architect's consultants, such as the structural and mechanical engineers, have insurance and what those limits are. In states where the Economic Loss Doctrine is in effect (such as Illinois), the owner will probably not be able to sue these consultants directly, but they would likely be brought in as third party defendants in a large case, and those insurance policies may contribute towards the end result.

## B. Contractual Issues in the Owner-Architect

### Waiver of Consequential Damages

AIA contracts contain a waiver of consequential damages. The following is taken from the B141-1997, at Par. 1.3.6:

The Architect and the Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Paragraph 1.3.8.

Consequential damages are defined generally in AIA Document A201, and include “soft” costs, such as lost profits, loss of use, etc. The potential damages for consequential damages are typically much greater for owners than architects, so owners often strike this provision. One way to compromise this issue is with a limitations of liability provision (see above).

### Accrual of Statute of Limitations

AIA agreements set the start of the statute of limitations to accrue at substantial completion. Currently, in Illinois, the statute of limitations for construction is four years. By having the accrual date on the date of substantial completion, an owner will have four years after that date within which to bring either a lawsuit or an arbitration against the architect, otherwise the claim is lost. In Illinois, parties can contractually set a time limit within which a suit must be filed. Lake in the Hills v. Illinois Emcasco Insurance Co., 153 Ill.App.3d 815 (1987); Canada Life Assurance Co v. Salwan, 353 Ill.App.3d 74 (2004). Other states agree. Gustine Uniontown Associates Ltd., 892 A.2d at 836 (Pa.Super. 2006); Keiting v. Skauge, 198 Wis.2d 887 (1995).

Note that the discovery period and the statute of repose have no role in this scenario. Those concepts operate to set the start of the statute of limitations as some time in the

future, once the owner has discovered that a cause of action exists. Here, with this contractual provision, the statute of limitations begins to run whether or not there is any knowledge of any defect. For this reason, owners often strike these provisions from both the owner-architect agreement as well as the owner-contractor agreement.

### The Owner's Budget

The cost of the project is normally of primary importance to the owner. If the architect's design cannot be built within the owner's budget, trouble usually results. Architects argue that they cannot guarantee that construction costs will remain stable or that they can reasonably design a project with any certainty of the final cost. There are simply too many variables: labor and material shortages (Hurricane Katrina causing massive national material shortages is one example); strikes; Mideast wars affecting oil prices that, in turn, drive up the costs of many materials; and so forth.

Sophisticated owners will budget contingency amounts to cover such variables. What these owners expect is that the architect will at least come within five or ten percent of the final number. Many architects find this expectation to be too burdensome. The two leading AIA owner-architect agreements approach this problem in two different ways: B151-1997 uses the traditional approach. It states that there is no fixed limit of construction costs unless agreed to in writing. This means that, if the lowest bona fide bid exceeds the budget by 50%, the owner will have to pay the architect to redraw the project to reduce costs, or to accept the higher cost. B141-1997, on the other hand, requires the architect to design the project to the cost stated in the agreement. If the bids come in too high, even if only by a few percent, the architect is required to redraw the project at the *architect's* cost.

## Standard of Care

Owners sometimes try to impose a higher standard of care in the owner-architect agreement. Needless to say, architects oppose such an effort and the architect's insurance may not cover a heightened standard. Anything that sounds like a guarantee of the architect's work may not be covered by insurance, including language that attempts to set the standard of care at the "highest" or "utmost" or the like.

## Copyright Issues

Copyright issues in construction cases have seen a dramatic rise in the past decade. Federal litigation has likewise seen substantial growth, with no abatement in sight. Beginning with the 1997 documents, the AIA has addressed these issues in their contracts. See the outline below for some of the issues involved in these matters.

## Architect's Fees

In the end, if an owner wants better service or a better set of construction documents, the owner will have to pay more. Architects are not fungible goods. Some architects are better than others at design, while some architects are meticulous in the preparation of the construction documents. The effort that any architect can put into the preparation of the plans or site visits is proportional to the fees that the owner pays. Owners must recognize that, by cutting the architect's fees to the bone, the architect's services will be diminished to the point that many things will be missed and the project will be in jeopardy far out of proportion to the fees saved.

If an owner wants a successful project, the contract must be reasonable and the result of meaningful negotiations between the parties. It does an owner little good to go after the architect's insurance after the project has failed. It is far more prudent to hire the best

possible architect for that project and to adequately compensate the architect for the services that the owner wants and needs.

### C. Copyrights in Construction

The issue of copyright protection of a design professional's drawings and specifications is complicated, and requires knowledge of not only construction law, but intellectual property law as well. The following outline is intended to give only a very brief overview of some of the issues involved:

- Copyrights are governed by Federal Law
  - a) 17 U.S.C. §101, *et.seq.* The "Act." (References are to sections of the Act)
- Architects are deemed the authors of the plans and specs and have a copyright in those works from the moment of creation.
- Clients almost never have a copyright interest in the plans and specs unless the contract conveys some right.
- Under the Act, § 106, the author has the exclusive right to reproduce the work:
  - a) Make copies of the drawings
  - b) Make copies of the specifications
  - c) Construct buildings based on the plans and specs (see Architectural Works, below)
    - i) Architectural Works apply only since 1990
- Under the Act, § 106, the author has the exclusive right to prepare derivative works:
  - a) Authorize the construction of additional buildings based on the original plans and specs
  - b) Prepare new drawings that reuse the architect's protected details
    - i) Not all details are protected: only original works are protected
- Under the Act, § 106, the author has the exclusive right to distribute copies:
  - a) Transfer ownership interests of drawings to owners, lenders and others
- Some things are not protected by copyright:
  - a) Ideas, procedures, methods, concepts, principles or devices
  - b) Non-original materials
    - i) Manufacturer's standard details
    - ii) Details from standard reference works

- iii) Specifications not original to the architect
- Copyright Notice (§ 401)
  - a) Not required, but recommended
  - b) Form of notice: Copyright, 2006, Wright Architects
    - i) Copyright (word or symbol)
    - ii) Year
    - iii) Name of author
- Copyright Registration (§ 408)
  - a) Not required for protection
    - i) Copyright is effective as of the moment of creation
  - b) Required to file infringement lawsuit
  - c) If registration precedes infringement, then additional remedies are available:
    - i) Statutory damages (you don't need actual damages)
    - ii) Attorneys fees
  - d) Use form VA for plans, specs and Architectural Works
  - e) Current cost is only \$45 per registration
    - i) Architects usually want 2 registrations:
      - (1) Architectural Work
      - (2) Technical drawings
    - ii) If the architect only has one registration, damages may be limited.
  - f) Registration is effective on date of receipt by Copyright Office, but certificate can take many months. Consider expediting for additional fee.
  - g) A copyright certificate is *prima facie* evidence of a valid copyright ownership and the author's originality. Important!
    - i) You can have a situation where you have dueling copyright certificates.
    - ii) A defendant may want to register his drawings as a defensive measure.
- Architectural Works
  - a) Architectural Works Protection Act of 1990 (effective Dec. 1, 1990)
    - i) Before the AWP, you could build a building without the architect's permission as long as you didn't physically copy the plans. You could measure an existing building and construct an exact duplicate.
    - ii) After the AWP, buildings are protected
  - b) Definition: "the design of a building embodied in any tangible means of expression"
    - i) This could mean plans and specs; the actual building; models; or photos
  - c) Only "Buildings" are protected. This includes any structure habitable by humans and intended to be both permanent and stationary
    - i) Houses
    - ii) Office buildings
    - iii) Churches
    - iv) Museums
  - d) Excluded: non-habitable buildings, moveable structures, temporary structures

- i) Bridges, roads
  - ii) Boats
- Copyright Infringement (§ 501)
  - a) Making copies of plans or specifications, or derivatives, without permission of the copyright owner
  - b) Building a copy of a protected Architectural Work (usually a building) without proper permission
  - c) Constructing a building using copyrighted plans and specs without proper permission
  - d) Distributing copies of copyrighted plans or specs without proper permission
- Test for Infringement
  - a) There has to be a valid copyright that is infringed
  - b) Copying without proper permission (such as a license)
- Copyright ownership
  - a) Plaintiff must have copyright certificate issued by Copyright Office.
    - i) Alternatively, proof that the Copyright Office considered the matter and refused to issue a certificate (very rare)
- Copying
  - a) Direct evidence of copying is often difficult to prove. If possible, obtain “smoking gun”
  - b) If you can’t obtain direct evidence of copying, there is an accepted, alternative method of proof:
    - i) Show that the infringer had access to the work (plans, specs, building)
      - (1) Often there are common links: the owner who has contact with the plaintiff and the defendant; common contractors; plans on file with the building department viewed by the infringer; an owner obtains brochures from a developer and passes them on to the infringer.
      - (2) Best to do extensive pre-litigation discovery. In construction, there are many players to interview: subcontractors, consultants, etc.
      - (3) Formal discovery: look for parties that may have copies of infringing works: lenders, title company, contractors, architects, engineers, etc.
    - ii) Substantial similarity
      - (1) Expert testimony is often used, but the test is usually whether an ordinary person would find the two works similar enough to conclude that there was copying.
- Defenses
  - a) The most important defense is independent creation.
    - i) Defendant shows that he created his work independently – without reference to the plaintiff’s work
    - ii) Theoretically, this defense works even if the works are identical.

- iii) In real life, this works better if the two works are dissimilar.
  - b) License. A license is an ownership interest in a copyright. A copyright owner can grant someone a license to use the copyright. A complete stranger is unlikely to have any license. E.g., a developer infringes by copying another developer's plans.
    - i) Exclusive license. This type of license gives the licensee the exclusive right to use the protected work. This could be limited geographically or by time. An example is a franchise with an exclusive area. There is no competition with this type of license. Must be in writing: "§ 204(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."
    - ii) Nonexclusive license. Other people also have a similar license and they may compete with the licensee. Must be in writing.
    - iii) Implied license (nonexclusive). See *IAE v. Shaver*, 74 F.3d 768 (7<sup>th</sup> Cir.1996). Not in writing. Only applies in situations between an owner and the architect for that particular project. This defense often doesn't work outside the 7<sup>th</sup> Circuit. See, e.g., *Johnson v. Jones*, 149 F.3d. 494 (6<sup>th</sup> Cir., 1998).
  - c) Innocence is usually not a defense. E.g., the contractor claiming he had no knowledge he might be infringing does not constitute a defense. However, in the case of statutory damages, this defense may mitigate damages (the "innocent infringer" defense). Such a claim is defeated by a copyright notice.
- Remedies for Infringement (§ 504)
  - a) One or the other of the following two options (if both are applicable, plaintiff can wait until trial to choose one):
  - b) Statutory damages (§ 504C)
    - i) Up to \$150,000 per infringement. Amount up to court to determine.
    - ii) For construction, there is probably only one infringement for each different building constructed. In other words, if the infringer copies several sets of plans for a single project, there will be only one infringement. If, however, the infringer then builds 50 homes from one set of plans, there will be 50 infringements.
    - iii) The copyright owner must have registered the copyright prior to the infringement.
    - iv) Typically, in construction cases, there will have been no prior registration, so you are limited to actual damages. (§ 412)
  - c) Attorneys fees available.
- Actual damages (quoted from § 504B):
  - (b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are

not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

- Author gets his loss plus profits of infringer. See *Van Brouck v. Darmik, Inc.*,
- i) 2004 WL 1799769 (E.D. Mich., 2004) Example: Architect's drawings are stolen. He gets his lost fee, plus the profits of the owner and those of the contractor.
  - ii) Note the burden of proof (Important!) – plaintiff needs only to show the gross revenue. Burden then shifts to defendant to offset this with costs. Example: defendant is general contractor. Plaintiff need only show how much the general was paid by owner or title company. The general then needs to present evidence to show all of his costs. This can be a real problem for smaller contractors who may have “side deals” or pay in cash. *Van Brouck, supra*.
    - (1) What about the owner of the property? How do you show what his “profit” is if he has not sold the property? The answer is to have the property appraised. This appraisal is all the proof the plaintiff needs. Burden then shifts to owner to account for offsets.
  - iii) Hypothetical situation: Architect's drawings are copied to construct a house. Architect sues second architect, owner and general contractor. Assume Architect's normal fee for such a project is \$50,000. He is entitled to that amount as the first part of his damages (it is possible the court may reduce this by theoretical expenses that would have been incurred, but likely not). In addition, he is entitled to the profit of the infringing architect. Assume a gross fee of \$40,000 for the second architect. The burden shifts to the infringing architect to present evidence of costs. Depending on what is left and what weight the court gives to such evidence, the damages will be up to \$40,000 for this item. Assume the construction cost was \$1,000,000. This is the amount claimed against the general contractor. If the general is able to prove only \$800,000 in expenses (costs like general conditions, home office overhead, and so forth are unlikely to fly), then this element of damages will be \$200,000. Plaintiff gets an appraiser to testify that the property is now worth \$2,000,000. The burden then shifts to the owner to prove offsets: cost of land, cost of construction, etc. It is likely that a substantial profit will remain. This is the final element of damages. Note that the architect could have sued the major subcontractors as well. This is a judgment call, balancing the amount that may be recovered versus the effort and corresponding expense required.
- b) Injunctive relief (§ 502). This is in addition to statutory/actual damages.
- i) Impoundment of all plans and specs. This is likely.
  - ii) Stop construction
  - iii) Destruction of infringing works (§ 503(b)). Possible, but unlikely.

- Concerns for owners:
  - a) Make sure the owner/architect agreement properly covers copyright issues.
  - b) Make sure the architect is designing from “scratch” or based on his own past designs. If you hire an architect who just left another firm, be careful.
  
- Concerns for architects:
  - a) Always do your own designs
  - b) If an owner comes in with photos, brochures, plans — run, don’t walk.
  - c) Consider an indemnification agreement if the owner gives you anything in the way of plans. Downside: this could be construed as an admission of guilt
  - d) Find out who owns the copyrights to anything the owner gives you. If there was a prior architect, get permission from that architect. An attorney opinion letter from the owner’s attorney that the owner has the proper licenses to use plans might be in order.
  
- Concerns for contractors:
  - a) No real airtight way to protect yourself!
  - b) Consider indemnification language in the contract.
  - c) Look over the plans and specs carefully to identify the author. Who is the architect? If the listed architect is not the one on the job, or is not identified by the owner-contractor agreement, raise the red flag!

- Provisions of AIA Document B141-1997:

**1.3.2 INSTRUMENTS OF SERVICE**

1.3.2.1 Drawings, specifications and other documents, including those in electronic form,

prepared by the Architect and the Architect's consultants are Instruments of Service for use solely with respect to this Project. The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights.

1.3.2.2 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to reproduce the Architect's Instruments of Service solely for purposes of constructing, using and maintaining the Project, provided that the Owner shall comply with all obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. Any termination of this Agreement prior to completion of the Project shall terminate this license. Upon such termination, the Owner shall refrain from making further reproductions of Instruments of Service and shall return to the Architect within seven days of termination all originals and reproductions in the Owner's possession or control. If and upon the date the Architect is adjudged in default of this Agreement, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting the Owner to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the Project.

1.3.2.3 Except for the licenses granted in Subparagraph 1.3.2.2, no other license or right

shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect. However, the Owner shall be permitted to authorize the Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers to reproduce applicable portions of the Instruments of Service appropriate to and for use in their execution of the Work by license granted in Subparagraph 1.3.2.2. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants. The Owner shall not use the Instruments of Service for future additions or alterations to this Project or for other projects, unless the Owner obtains the prior written agreement of the Architect and the Architect's consultants. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's consultants.

1.3.2.4 Prior to the Architect providing to the Owner any Instruments of Service in electronic form or the Owner providing to the Architect any electronic data for incorporation into the Instruments of Service, the Owner and the Architect shall by separate written agreement set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations or licenses not otherwise provided in this Agreement.

Note the scheme here: Architect maintains the copyright. Architect grants owner a nonexclusive license to use the plans and specs for this project only, on the condition that the owner pays the architect. If the owner fails to pay, the license is revoked and the project stops.

Some owners will attempt to have the architect assign the copyright to the owner. This is to prevent the architect from stopping the project in the event of a dispute. The problem with this solution is that the architect no longer has a copyright interest; and the owner could prevent the architect from using his own designs or details on future projects. The owner could even assign the copyright to a competitor of the architect. The solution to this problem is to have the architect keep the copyright and convey an irrevocable, nonexclusive license to the owner for that particular project, thereby protecting all reasonable rights of the owner.

Note that “work for hire” language will not apply in these situations, because the architect is generally not an employee of the owner. *See Copyright Office Circular 9*. In

general, if a person is an employee, the employer owns the copyright in anything the employee creates pursuant to his job. While there are some situations in which an independent contractor will create a work for hire, those situations are probably not applicable to construction situations. Much better is an express license agreement in the contract.