

ProNetwork News

Risk Management Tools for the Design Professional

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info@aepronet.org | www.aepronet.org

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Patrick St. Pierre

Patrick St. Pierre is an associate of Benjamin, Vana, Martinez & Biggs, LLP. He is a graduate of the University of Texas at Austin and the Washington University School of Law. The opinions expressed herein are solely those of the author and do not necessarily represent the views of Benjamin, Vana, Martinez & Biggs, LLP or its clients.

Phone: (512) 732-1880
pstpierre@benlawsa.com

BROKER'S NOTES

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GUEST ESSAYS

Sitting Ducks: A/E Liability Arising From Payment Certifications During Construction. The construction phase pay certification process can be a minefield even with flawless and perfectly coordinated plans and specifications. As an A/E you are often at the center of a complex set of relationships. Your primary responsibility is to your client, usually the owner, but your role has an impact on others. [Read More](#)



a/e ProNet
Dave Johnston, Executive Director
info@aepronet.org

Avoiding the Nonpayment Quagmire

By Patrick St. Pierre

There are two types of design professionals: those who have been stiffed by clients and those who will be. This pithy truism leads to another: obtaining payment for your work is your professional responsibility. Suing for unpaid fees is not equivalent to securing payment in the first place as the mire of litigation will assuredly squander the project's original profitability. For the discerning design professional, the following is a best-practices guide for ensuring full and timely payment.

- First, include a contract provision conditioning the owner's license to the instruments of service on full payment. Such language should unambiguously and expressly foreclose the possibility that the owner can default on his obligation to pay you and nevertheless utilize your design plans as he moves forward with construction.
- Second, be clear about the ownership rights of your design plans such that you own the plans in the contractual interim until and unless the owner makes full payment. No matter how pedantic and redundant it may feel to contract to such an intuitive measure, it feels a good deal worse to argue to a judge or jury what the contract implicitly intended regarding ownership rights.
- Third, insist on a contract clause curtailing the owner's right to withhold your compensation as a penalty or a fee offset until and unless an adjudication has determined your liability. This provision is found at Section 11.10.2.2 of the AIA B101-2017 and is one of the first items owners seek to eliminate.
- Fourth, in the event that you must covenant that your potential liens, rights, and interests be subordinated to those of a lender, use that opportunity to make owner's full payment a condition to the execution of such subordination agreement.
- Fifth, make full payment a condition precedent to obtaining building permits.
- Sixth, be a good steward of your fees. Just as you sign off on next phases of construction, so should an owner sign off on their next phases of payment obligations. Don't let an owner's rush to see a project finished relax your attitude toward accounts receivable; be diligent about obtaining timely periodic payments.

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PRONETWORK BLOG

Getting Paid For Design Services, by Tim Corbett. The last few years have been challenging for many design firms. Adding fuel to this fire, many firms are having difficulty obtaining payment for their services. In a recent and ongoing SmartRisk Survey: 81% indicated trouble with getting paid. Successful account receivable programs do not have to be time consuming or daunting. By implementing some straightforward practices, a firm can implement an effective program that gets invoices paid on time along with maintaining a positive client relationship. [Read More](#)

How To Get a Design Professional To Work For Free, by Brian K. Stewart, Esq. and Christie Bodnar Swiss, Esq. Now that we have grabbed your undivided attention, the purpose of this article is to alert Design Professionals to an alarming trend. This trend involves the inclusion of contract provisions in agreements prepared by Owners/Developers and their attorneys that force a Design Professional to work for free in the event that the Owner/Developer unilaterally determines that there is a "dispute." [Read More](#)

- Seventh, notify lenders when the owner becomes delinquent on his obligations to you. A notification requirement is generally included in subordination provisions but it's far more prudent to effect this notice on your own than to wait for the owner to do so. This pressures owners even further when they have an upcoming financing event.
- Finally, seek the guidance of legal counsel to evaluate these steps. While none of your options may seem particularly pleasant, certain avenues will, nonetheless, be more fruitful than others and a knowledgeable attorney can help you navigate your way to payment.



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Dave Johnston, Executive Director

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