

# ProNetwork News

Risk Management Tools for the Design Professional

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## Terrence M. McShane, Esq.

Terrence M. McShane, Esq., President of MCSHANE PC, concentrates his practice in commercial litigation involving construction, employment, insurance, real estate and contract matters. His litigation practice is focused upon the representation of architecture and engineering firms, many of which are in the ENR top 100.

For over 20 years, Mr. McShane has presented seminars to thousands of architects and engineers for continuing education credits. He has appeared in association with professional organizations, including the American Institute of Architects, the American Council of Engineering Companies, the District of Columbia Bar Association, and others in speaking to architects, engineers and lawyers on various legal topics and risk management issues.

Mr. McShane received his Juris Doctor degree from Georgetown University School of Law and Bachelor of Administration Science Business degree from Georgetown University.

Mr. McShane is a Vietnam era veteran of the U.S. Navy UDT/SEAL Teams.

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## Why A/E Firms Should Opt to Litigate Instead of Arbitrate and Consider a Trial by Jury

By Terrence M. McShane, Esq.

### Among the critical clauses in design professional contracts are the Dispute Resolution Clauses.

For over twenty years, we have advised our clients to opt for Litigation rather than Arbitration as a means of ultimate dispute resolution in their contracts for a host of reasons. Some of those reasons include:

- 1) A Judge and Jury in Litigation as opposed to no Jury in Arbitration;
- 2) Discovery and depositions in litigation vs. limited and uncertain discovery in arbitration;
- 3) Mediation is typically required by the Courts in litigation, but that requirement doesn't exist in arbitration;
- 4) Dispositive motions can be made in litigation, however, that is not a right in arbitration;
- 5) You have a chance to obtain a complete defense verdict in litigation, whereas in arbitration, the arbitrator often "splits the baby";
- 6) You have the right to file post-trial motions in litigation, no such right exists in arbitration; and
- 7) You have the right to appeal the trial court verdict in Litigation – in contrast, there is essentially no right to appeal in Arbitration.

Over the years, the conventional wisdom among counsel representing Architects and Engineers was to opt for a bench trial in litigation and waive your constitutional right to a trial by jury, because the facts might be "too technical" for the average lay juror. Accordingly, we routinely included a standard waiver of a trial by jury clause in our agreements. However, our litigation experience in recent years has caused us to change our prior thinking, and we now advise our A/E clients to seriously consider not waiving a trial by jury in their contracts on a project by project basis. Some recent cases are briefly outlined below:

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## BROKER'S NOTES

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## PRONETWORK BLOG

*Veni, Vidi, Vici, Lis Pendens: I Came, I Saw, I Got Sued - Part 1 of 2*, by Eric Singer. 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. [Read More](#)

## GUEST ESSAYS

*Perfect Storm for Litigation: How Does Your PL Carrier Measure Up?*, by Tim Corbett. Architect and Engineering (A/E) firms are in the mist of a very litigious periods, a slow economy combined with a credit crisis. Industry surveys have shown that in a down economy, claims and litigation increase. A recent Los Angeles Times headline read "Economic Crisis, Boom Time for Law Firms". With the slow economy, many A/E firm's are struggling to obtain work and stay afloat. [Read More](#)

## PRONETWORK NEWS

*Private Arbitration: A better way to resolve construction disputes?*, by Melissa Dewey Brumback. Architects and Engineers are very familiar with the concept of arbitration of construction disputes. The three main standard sets of form documents - AIA, EJCDC, and ConsensusDOCS, - all contemplate resolving disputes outside of a courtroom. In the past, the default tribunal was arbitration, and, in the case of AIA documents, arbitration through the American Arbitration Association (AAA). [Read More](#)



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In recent years, I successfully litigated a three-week jury trial in Baltimore City Circuit Court where I represented an architectural firm who was getting sued by a sympathetic religious non-profit who provided housing for seniors. The damages alleged were over \$3 million. The case involved allegations of design errors and omissions causing water leaks and major water damage to the structure. Two successful motions in limine excluded potentially prejudicial evidence from ever getting to the jury. During a trial involving numerous technical issues and lengthy expert testimony, the jury was attentive and took voluminous notes. At the end of the trial, the jury rendered a complete defense verdict for our design client. No appeal was taken.

More recently, I successfully defended an Architect and his Firm in arbitration. The claimant was a wealthy residential homeowner who alleged claims of water damage to the home's structure due to the Architect's negligent failure to detect construction deviations by the General Contractor resulting in over \$700,000.00 in damages. Construction was completed in 2001. The Demand for Arbitration was filed in late 2013. Although this was an arbitration matter, it provides an example of why design professionals are generally better off in litigation for ultimate dispute resolution. While we successfully achieved a decision in the Architect's favor after the hearings, it took significant time and legal fees to prepare for and defend the client at the arbitration hearings. In a litigation forum, the Architect would have had a straightforward Statute of Limitations/Statute of Repose winning defense. The Architect could have won the case prior to trial on a Motion for Summary Judgment. Instead, the Architect had to endure three intense and stressful weeks of preparation and hearings. Finally, the Architect incurred significant legal fees which he probably would not have incurred if we were in litigation.

In addition to the examples above, I could cite several other cases where our professional design clients opted for a trial by jury and we successfully obtained a complete defense verdict in their favor. These cases demonstrate some of the reasons why we advise our clients to consider opting for a jury trial on a **project by project basis** by striking the jury trial waiver from their standard form agreements in future contracts.

Some additional reasons for striking the jury trial waiver from your contracts are as follows:

- 1) You get to pick the jury in a jury trial, but you do not get to pick the judge in any trial;
- 2) You can have your attorney make motions in limine to exclude potentially prejudicial evidence from the jury (see senior housing case above) – in a bench trial the judge hears everything;
- 3) You can make a post-trial motion to set aside the jury's verdict (if they get it wrong), whereas a judge is far less likely to revisit his/her own verdict;
- 4) Juries are not perfect but they usually "get it right"; and
- 5) Design professionals generally have "jury appeal" and present well at a jury trial.

We are well aware that some project Owners will never agree to a jury trial. However, you can still use this as a bargaining chip in your contract negotiations. For example, seek to achieve a more favorable limitation of liability clause rather than "giving it away" by conceding a jury trial waiver from the outset.

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## A/E PRONET ONLINE

*Are Your Liability Limits Adequate?* It's an age-old question that defies an answer. The best answer - but not one that makes anyone feel better - is that you'll know if your professional liability insurance limits are adequate when the worst case scenario claim happens. At first blush, many design firms find this answer extremely frustrating. Professional liability insurance has been available for 60 years. Why has no one been able to create a formula to determine appropriate limits? [Read More](#)

Finally, if you preserve your constitutional right to a trial by jury by demanding a jury trial in your answer to a complaint, you can always waive it at a later date if circumstances or facts change. Conversely, if you don't demand a jury trial at the outset, in many jurisdictions, you will have waived your right to a jury trial forever.

We advise clients who have standard form agreements previously drafted by us to consider striking the jury trial waiver clause from their standard form contracts. For all others, we strongly urge you to consider striking the jury trial waiver from your future contracts on a **project-by-project basis**. You may benefit from considering this change as some of your colleagues have.



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