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Risk Management Tools for the Design Professional

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February 2022 | Vol. XI No. 2



Jonathan C. Shoemaker

Jonathan believes that the best solution to most problems is often the simplest: what does the contract say? Jonathan begins every new engagement seeking to understand how the parties on a construction project elected to allocate risk and responsibility before the project, and then works with his client to develop a plan for bringing the issue to resolution as expeditiously as possible consistent with the client's goals.

Jonathan has tried cases before judges, juries, and arbitrators, and relishes the opportunity to advocate for his clients in court and in arbitration. Jonathan enjoys getting into the weeds of a dispute, deconstructing the issues presented throughout the discovery process, and then presenting the dispute clearly and concisely for the fact finder.

Jonathan's experience includes noteworthy appellate work on behalf of design professionals and the design professional industry, and frequently speaks on risk management issues, best practices for design professionals, different project delivery methods, and legal updates both at in-house seminars for his clients and at programs put on by design professional organizations and insurance carriers.

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Licensed To Design: Complying with Regulations Governing Professional Services - *Part 2*

By Jonathan C. Shoemaker, Lee/Shoemaker PLLC, and Rochanne Keane, Beazley Insurance Services

Consequences of Performing Professional Services without a License

When a design firm performs services without being appropriately licensed, the design firm (and potentially the individual licensees) may face significant consequences, including, but not limited to, the following:

- Complaints to licensure board;
- Contracts being deemed unenforceable; and
- Insurance coverage issues.

Proper registration in each jurisdiction in which a design professional practices is critical to avoiding these risks.

Licensure Board Complaints

When a design firm engages in the practice of architecture or engineering without being qualified to do so, it risks exposure to being sanctioned by the licensure board. Unlike a complaint regarding the quality or adequacy of the services performed by the design firm, a complaint regarding the firm's qualification to provide the services rendered will likely depend on whether the firm engaged in professional practice, as defined by the licensure board, in the jurisdiction.

A licensure board may discover a firm is practicing without a license in a number of different ways, but – anecdotally – this occurs when a competitor “squeals” on an unlicensed firm or when a client becomes dissatisfied with a design firm's services. In the first situation, a competitor for a project may attempt to “limit” competition by reporting an out-of-jurisdiction/unlicensed design firm for submitting a proposal on a project. While the reporting firm may remain “anonymous,” the investigation by the licensure board will proceed against the unlicensed design firm. In the second situation, an unsatisfied client who discovers their design professional is unlicensed may try to leverage reporting the design professional to a licensure board to extract a settlement.

If a design firm has performed services in a jurisdiction in which it is not properly qualified and licensed, there are a variety of potential consequences, including the following:

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Rochanne Keane is the Focus Group leader for the U.S. Architects & Engineers Claims Team and directly manages professional liability claims for design professionals. She has extensive experience handling construction defect litigation nationally and internationally. She serves on the AIACC Task Force and other A&E affiliated advisory boards.

Rochanne has spoken at numerous national and regional forums to discuss construction defect litigation, contract and insurance issues, including risk management for design professionals. Rochanne is licensed to practice law in the states of California, New York and New Jersey.

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- Imposition of a fine associated with the unlicensed practice;
- Suspension or revocation of individual license to engage in professional practice;
- If the complaint is filed after the design firm has registered, then suspension or revocation of the design firm's license to engage in professional practice; or
- Referral to a prosecutor for pursuit of criminal charges against the individual licensee and/or the owners of the design firm.
- Some jurisdictions even enforce jail time as a possible penalty.

While many licensure boards are "compliance oriented" and avoid severe punishment of design professionals seeking to comply with their regulations, other licensure boards are "deterrence oriented" and impose onerous penalties on design professionals who are "caught" engaged in practice without a license.

The consequences of a licensure board complaint may have cascading consequences for a design professional. Many applications (and renewal applications) for both licensure boards may seek to confirm (a) the different jurisdictions in which the design professional is practicing and (b) the absence of any adverse actions taken by a licensure board. If one licensure board finds that a design professional performed professional license without a license, another licensure board may elect to impose a reciprocal penalty on the design professional.

There may also be business consequences to a licensure board's finding that a design professional engaged in unlicensed conduct. A licensure board's finding may impair the design professional's ability to complete on-going projects in the jurisdiction, and expose the design professional to damages incurred by their client having to replace the design professional on the project.

Contract May Be Unenforceable

If a design firm is not properly licensed to engage in professional practice at the time it enters into a contract to perform professional services, its contract may be deemed to be illegal and, therefore, unenforceable. See, e.g., *Food Management, Inc. v. Blue Ribbon Beef Pack, Inc.*, 413 F.2d 716, 724 (8th Cir. 1969)(stating that "[a]rchitectural and professional engineering contracts which violate registration statutes are generally unenforceable"). Moreover, while the law varies from state-to-state, some courts may require disgorgement of fees (i.e., refund of amounts previously paid to the design professional) when performing professional services without being properly qualified and permitted in the jurisdiction. If a design firm's contract is deemed illegal and unenforceable, then this may impair its ability to collect outstanding fees and its ability to enforce risk management provisions.

For example, where a project experiences significant delays which the contractor attributes to the performance of the design professional, the owner may elect to withhold payment of fees from the design team. If the design professional pursues its fee claim against the owner and the owner counterclaims against the design professional for the contractor's delay claims the owner may argue that the unlicensed design professional may not rely on any limitation of liability or waiver of consequential damages provision in the contract.

The investment of time and effort that most design professionals put into obtaining favorable risk management provisions may be a wasted cost if the design professional is not properly licensed to provide professional services in the jurisdiction for the project. The investment of time and effort that most design professionals put into executing a project may be a wasted cost if the design professional may not enforce the contract to collect on the anticipated fee for the services.

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Insurance Coverage Issues

Professional liability policies are intended to cover design professionals for negligent acts, errors or omissions in the rendering or failure to render a professional service. Being an unlicensed professional may negate coverage for a design professional who is not legally licensed to practice in that jurisdiction. Some insurance policies may require licensure as a condition to coverage.

Other potential coverage issues may arise where there is an allegation of improper licensure made in the complaint. For example, an allegation that the design professional acted intentional to defraud the client by holding themselves out as a licensed professional and knowingly entered a contract for services they were not legally licensed to perform in that jurisdiction. Therefore, being unlicensed may negate coverage in its entirety or for part of the claim.

Professional liability policies also do not cover damages that arise from fraudulent, illegal or intentional acts. Therefore, if there is a finding by a trier of fact that being unlicensed results in fines or other sanctions related to fraudulent or illegal activity, a design professional's policy may not provide coverage for any damages resulting from these judgements or findings.

Conclusion

The consequences of practicing architecture or engineering without a license can be significant. Fortunately, the prudent design professional may avoid the risks associated with engaging in professional practice without a license through proactive planning. While the upfront investment of time and money associated with qualifying to transact business in an out-of-state jurisdiction may be frustrating, compliance with the regulatory framework imposed on licensed professionals can help to avoid a relatively simple challenge becoming a more significant issue down the road.



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