Agreement Basics

Prepared by

The Committee on Claims Reduction and Management

of

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ASCE's Committee on Claim Reduction and Management (CCRM) developed this document containing basic information about engineering professional service agreements. This document is intended for the engineer who wants to become more familiar with this topic. CCRM is developing additional documents and resources. If you would like additional information or would like to participate please contact Jim Rossberg at 703-295-6196 (jrossberg@asce.org).

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Agreement Basics

1. Introduction

One of the tasks of the American Society of Civil Engineers (ASCE), Committee on Claims Reduction and Management (CCRM) is to provide ASCE members with information about how to reduce the chance of a civil engineering claim. Providing information about contracts between the engineer and the client is one of many parts of this effort.

This document is an introduction to contracting for professional engineering services. It is intended for the mid-level engineer engaged in client relationships and perhaps negotiating the contract for engineering services. While the title "Agreement Basics" implies information about business practice, this document, unlike many others, attempts to focus on professional practice. *Business* practice requires the use of the skills of management and finance, involving processes and procedures focused on the success of your firm. *Professional* practice requires the use of the special skills and knowledge of engineers, involving processes and procedures focused on the success of the project. Business and professional practice are not bifurcated. They overlap, but the emphasis in this document is on professional practice.

While a contract for engineering services is normally and appropriately completed prior to the start of engineering services, the provisions within the contract will affect everyday professional practice decisions during the course of the project.

The words *contract* and *agreement* are interchangeable. From this point on, we will use the term *agreement* instead of the term *contract* to avoid confusion with the term *contract documents*, which are the instruments of service - meaning the plans, specifications and other documents developed by engineers and architects.

This document is divided into 8 Sections. Section 2 through 6 address the development of agreements for projects where the client and/or owner enter into agreements for the design separate from the agreements for construction (commonly known as design-bid-build). Sections 2, 3 and 4 address basic agreement concepts that will assist in lowering the chance of a claim. Section 5 provides information about standard forms of agreements available from various entities. Section 6 addresses the typical provisions of client written agreement that may affect your liability and insurance coverage. Section 7 will briefly describe the added issues when the owner issues a single agreement that includes both the design team and the construction contractor (Design-Build, Construction Manager at Risk, Progressive Design-Build, Design-Build Operate, etc.). Section 8 is a glossary of common legal terms that occur in engineering written agreements and negligence claims.

2. Agreements - General

An agreement does not have to be written, it can be oral or even implied by the conduct of the parties. This can be particularly important when you're on-site performing construction services

where documentation of decisions is critical to avoiding disputes. Be careful about what you say and who you say it to, what you email and even what you communicate on social media.

A written agreement between parties can be amended by your actions without amending the written agreement.

> Example: You may inadvertently take on new responsibilities by attempting to be helpful to the contractor. While at the job site you see an opening in the floor that does not have fall protection. You suggest the foreman correct it. While it needed to be done, you are now possibly exposed to responsibilities for safety on the job site; responsibilities that are likely specifically excluded from your scope of services and are not part of the customary standard of care.

> Example: You may inadvertently take on new responsibilities by not following agreement required lines of communication. The contractor calls and asks if they can move a pipe 5 feet to the north. Being helpful, but without following the agreement required lines of communication, you tell the contractor it is acceptable to move the pipe. Then, to the surprise of the owner, the contractor sends the owner a bill for the change. Because you did not follow the appropriate lines of communication for the change, the owner was excluded from the decision and may look to you for reimbursement.

In our industry, it is best practice to have written agreements for all projects, signed by both parties, before performing services and amended only with a signed amendment. An unsigned written agreement may still be valid. If you provide service on a project without a signed agreement, your actions could constitute an acceptance of the agreement.

It is important to understand that an agreement needs to stand on its own. While you and the person you are negotiating with understand the intent, that person or you may not be there in the future when issues arise and/or enforcement of provisions occurs. People move on to other positions and other organizations. It is critical that all understandings be documented in the written agreement.

With or without an agreement, an engineer is still responsible to meet the professional standard of care, also known as the common law standard of care, which is generally defined as: *the ordinary and reasonable care usually exercised by one in that profession, on the same type of project, at the same time and in the same place, under similar circumstances and conditions.*

Written agreements cannot lower your responsibility below the ordinary standard of care. You are responsible to meet the ordinary standard of care no matter what is provided in the agreement. But, agreements can, by accepting their provisions that do so, increase your responsibility and liability beyond the ordinary standard of care.

> Example: In a written agreement it is not unusual for a client to include provision seeking a level of quality higher than the ordinary standard of care. An agreement phrase that states that the engineering shall perform to the “highest standard of professional care” is common. However, should a claim occur where the client alleges that you did not meet this higher standard, you may not be covered by your Professional Liability insurance policy. Most policies do not provide coverage for the violation of a written agreement. This is generally true unless the engineer would have been liable even in the absence of the written agreement. At a minimum, it is advisable to consult with a competent

attorney, seasoned principal and/or your insurance agent/broker before accepting a higher than ordinary standard of care provision in your agreement.

To prevent taking on unexpected responsibilities, written agreements should include a well-defined scope of services and favorable dispute resolution provisions. They may also include a Limitation of Liability provision, and a Claims Validation provision.

2.1. Elements of an agreement

There are four elements required for an agreement.

1. There must be a mutual promise (offer and acceptance) between parties to the agreement
2. There must be mutual consideration or exchange of value between the parties, usually fees for services.
3. The agreement cannot be for an illegal purpose or activity.
4. The parties to the agreement are competent to enter into it. Competent generally means that the parties have the authority to enter into the agreement.

2.2. Typical Parts of a professional services agreement

Most professional services agreements contain the following sections:

1. Initial Information

   The characteristics and intent of the project are described possibly including the following: project type, functional/technical program, location, project and design budget, project delivery method, project team (engineer's and client's consultants), sustainable design goal.

2. Scope of services

   The scope of services defines what you are going to do and what you are not going to do, what you are responsible for, the level of design quality and the expected deliverables.

3. Schedule

   When services will commence, design milestones, design completion date and agreement end date.

4. Professional fees and reimbursables

   Fees and payments may be lump sum or based on hourly rates, either actual or negotiated. The fees should generally correlate to the scope of services. The agreement should identify costs that are reimbursable and not reimbursable.

5. General terms and conditions

General terms and conditions identify owner responsibilities, payment terms, insurance requirements, a changes clause, indemnification requirements, copyright/license limitations, jurisdiction identity, dispute resolution methods and other provisions depending on the nature of the project and services to be performed.

6. Signatures from representatives of each party to the agreement and date of signatures. The signatures and/or printed names of those signing need to be legible and from people authorized to sign on behalf of the organizations.

2.3. Consult with Competent Advisors

It is recommended that legal counsel be consulted before accepting a written agreement. The fine print, including general conditions, indemnification and hold harmless clauses, is often written in language that requires interpretation beyond the expertise of most engineers. Additionally, the interpretation of these clauses will vary from state to state.

Not all attorneys will be competent to understand engineering agreements. Just as engineers specialize in an area of practice, attorneys specialize in areas of practice including defending civil engineers for negligence. Your selected attorney needs to be familiar with engineering agreements, the professional services laws in the jurisdiction of the project and professional negligence claims. Attorneys specializing in construction claims are generally not acceptable. Their expertise is often limited to contractual issues involving construction, which is much different than professional negligence issues involving engineers. Selection of an experienced attorney to help in the review and/or the preparation of your engineering agreement is a prudent part of reducing the chance of a claim.

Your insurance agent/broker is another source of advice. They should be consulted on matters of insurance coverage. Additionally, most agent/brokers have knowledge about written engineering agreements, current trends and onerous agreement provisions in the applicable jurisdiction. It is important to make sure that a written agreement does not leave you exposed to claims that are not covered by your professional liability insurance policy, which is one of the risks with a written agreement.

> Example: If you agree to indemnify the client for any non-negligence-based issue, your insurer may decline coverage. This is generally true unless the engineer would be liable even if the agreement did not exist.

It is also recommended that you consult with a seasoned engineering principal, someone who is experienced in the drafting and negotiation of professional services agreements and defending claims. A seasoned principal will be helpful with defining an appropriate scope of services and with other parts of the agreement related to professional practice. An attorney or insurance agent/broker does not have the expertise to advise you on the engineering and professional practice issues. The seasoned principal will also know when legal and/or insurance advice is needed.

3. When Do I Need a Written agreement?

The short answer is whenever you plan to provide services to another party and want to receive compensation or not (pro bono services) - in other words, always! The agreement should define the mutual promise between parties, provide clear definition of duties and responsibilities, and provide avenues for resolving disputes between parties. When properly done, an agreement will reduce the chance of a claim. The agreement should be executed before any professional services are preformed on the project.

4. Why have a Written agreement?

It is important to note that your professional liability insurance may not cover you if you violate provisions of a written agreement that increased your liability above the common law standard of care. Most claims against engineers are for negligence or failure to meet the standard of care, which exists without an agreement. The standard of care is the level of performance that your professional liability insurance covers. If written agreements may increase your liability above the standard of care and the professional liability policy does not cover you for breach of your written agreement, then why should you have one? There are several important reasons.

The number one reason is that the process of negotiating the agreement gives you insight into your client's expectations and the nature of the project. This process provides information for you to decide whether or not to take the project.

The second reason is to fully understand your roles and responsibilities and the roles and responsibilities of others.

The third reason is to assure that you and your client agree on what you plan to do and not do.

And finally, a written agreement provides you with the opportunity to include a Limitation of Liability and/or Claim Validation provision, both of which are useful in the event of a claim.

These reasons are explained in more detail below.

4.1. The Number One Reason - Understand Client's Expectations and the Project

The most important reason for having a written agreement is that the negotiation process for the written agreement is an opportunity for you to assess your client, the nature of and expectations for the project, and the potential risks associated with the project and the client. It also is an opportunity to teach the client your role as the engineer, especially the limitations of that role, and to create manageable expectations. It is an opportunity to decide if the project is one you should take or decline.

When assessing risks and whether to move forward with a client and project, there are a number of questions/issues to consider.

1. Why did the client select you? Qualifications, fees, reputation or other factors?

2. What are the client's attitudes and motivation with respect to the terms of the agreement, including the desire to shift liability to you?
3. Does the client respect your abilities or is the client attempting to dictate your scope of services?
4. What are the client's expectations about the level of quality of the services to be provided (i.e. standard of care)?
5. Is the client offering a reasonable fee for the work?
6. Does the client lack experience with the type of project? If yes, how is the client addressing the lack of experience? Are you filling their experience gap or will they bring on a consultant to fill that gap?
7. Is the client's requested scope of services clear and detailed enough such that you can prepare a written scope of services with assumptions and limitations that will become part of the written agreement?
8. Is the client willing to fairly negotiate written agreement terms and conditions?
9. Does the agreement the client wants to use contain onerous provisions such as a overly broad indemnification, liquidated damages for not meeting schedule, liability for consequential damages, and the absence of language giving the engineer the ability to suspend services on a cost reimbursable agreement when available funding has been exhausted? If you sense any onerous provisions, contact your attorney and/or seasoned principal for interpretation and understanding.
10. Was there another engineer involved with the project that is no longer working for the client? If so, then why are they no longer engaged? Ask permission to contact the previous engineer. Doing so is good professional practice. If permission is not granted the project is a good candidate to be declined.
11. Does the client have a history of litigation with contractors and/or engineers? Ask the client directly, use Google, ask your attorney, or ask other members of the profession.
12. What is the client's payment history?
13. What is the funding source and are there adequate funds for the project or at least for the design phase?
14. Is the schedule realistic and adequate to achieve the client's goals?
15. How will the construction contractor be selected for the project?
16. When will the contractor be selected? Will the contractor be working with the engineer during any part of the design phase?
17. Will construction observation services be included?
18. Are there any political issues involved in the selection?
19. Has the project been part of a political tussle between groups?

20. If you are offered a sub-agreement, have you reviewed the prime agreement? Can you live with provisions from the prime agreement or are they too onerous?
21. Will the project be peer reviewed? If it is then at what stage in the design process is the design reviewed? What is the peer reviewer's scope? Is it required by the client, jurisdiction or other entity.

If the response to these questions/issues raises enough concerns so that you question whether it's a good business decision to enter into an agreement with this client for this project, you might want to seriously consider walking away from the project. A project that does not fit your capacity to meet the client's needs, or you feel you cannot establish a mutual understanding of expectations, or you are not confident that you can manage and mitigate the project and client risk, is a project and/or client from which you should walk away. The process of negotiating a written agreement will likely provide clarity and aid you in making a final go-no-go decision on whether to move forward with the project and client.

History tells us that on projects with claims, after the claim is settled, one of the most frequent comments made by the defending engineer is:

"I knew I should not have taken that job."

4.2. The Number 2 Reason - Know Your Role and Responsibilities

Project development and execution is a complex process. The primary function of a written agreement is to clearly define your roles and responsibilities, your client's roles and responsibilities, and any third parties' roles and responsibilities in the process. Without clear definition, others in the construction process [contractors, subcontractors, material suppliers, fabricators, architects, other consultants, construction managers, attorneys, risk managers and others] may assume and assign to you unexpected and inappropriate responsibilities. A mutual understanding between you and your client of your expected services, fees, deliverables, schedule and most importantly, the expected level of quality on the project is just good professional practice and reduces the likelihood of a claim.

> Example: The level of quality identified may include the amount and detailing of dimensions (watch out for the word "all"), level of detail on the drawings (how many "typicals" are permitted?), the amount of design innovation acceptable, etc.

Remember that the ordinary standard of care requires compliance with the jurisdiction's applicable codes and standards. Additionally, you are expected to have knowledge of and comply with professional practice standards applicable to your region and area of practice, which will help to reduce claims.

4.3. The Number 3 - A Written Well-Defined Scope of Services

Recent claims reveal that some engineers are not documenting their scope of services with sufficient written detail. The best way to document your scope of services is in a clearly written agreement. The scope of services can be either in the written agreement or as an attachment to the written agreement. If it is attached, the attachment must be identified in the

agreement. It is necessary to date and name the scope of services attachment in the written agreement.

Every project is unique and requires a customized definition of the scope of services. The agreement should have a detailed explanation of the service that you intend to perform, and the services that you do not intend to perform.

> Example: If you do not intend to include the design of site retaining walls or the structural design of the exterior wall bracing, it is important to exclude these items in your scope of services.

By including a detailed scope, and then following it, you will lower the chance of a claim.

Providing a specific scope of services in the written agreement also helps you establish an appropriate fee for your services. Make sure you document your assumptions in developing the scope, including such things as the right to receive and rely upon client-provided information, reporting requirements for each phase of the project, and access to the project site.

Document elements of your service that could affect project schedule and cost, such as timely client decision-making, timely client reviews, travel and meeting requirements. Include the number of meetings and estimated time to attend the meetings. Don't assume travel time will be compensated if that is not included in the agreement.

The frequency and timing of project observation during construction can be a source of contention. The timing and frequency of observation will require engineering judgment depending on the quality of the construction, the contractors' understanding of the project complexity, and the requests of the client. These factors typically are unknown while negotiating the original written agreement. Sometimes it is possible to defer the negotiation of construction phase services until after the contractor is selected and construction schedule confirmed. Be careful about including a number of site visits in the written scope of services. Instead, place an estimated number of hours or lump sum in the agreement or include language identifying a maximum number of visits by using the phrase "we will conduct up to x site visits to observe the construction". This way you are not dictating a minimum number of visits in case you visit the site less often.

The standard of care for construction observation is to assure general compliance with the design concept, not to inspect for quality control. Adding frequency and timing of observations to your scope appears more like inspection. Note that most building codes require observation of specific parts of the construction to assure compliance with the design concept.

> Example: The International Building Code, 2018 defines structural observation as "*the visual observation of the structural system by a registered design professional for general conformance to the approved construction documents.*" and Section 1704 identifies when structural observation is required.

When negotiating an agreement, you have a lot of control over defining the scope of services. If the client proposes a scope that is unacceptable to you, for any number of reasons, then modify the scope or walk away from the project.

Many claims against an engineer have been traced to a nickel and dime attitude by the engineer for extra services. If as the project progresses, there are additional required services, you have control as to how they are addressed. A fundamental psychology in dealing with scope creep is to “accumulate the negative and segregate the positive”, meaning a good approach to extra services might be to accumulate them and address them at some opportune time.

However, do not wait until the end of the project to informing the client of extra services. Clients are not fond of engineers waiting to the end of the project to let them know that there were added scope items. Giving the client a bill for added scope at the end of a project, without prior notification, will often result in a claim against you and you will learn of all the previously unknown things you did wrong,

Finally, the written agreement between you and your client will not necessarily protect you from third-party claims, (that is, those who are not signatory to your written agreement). However, a well-defined scope of services and a disclaimer of third-party responsibility can provide protection if the claim involves services that do not fall within your scope.

Here are some additional considerations while preparing a written scope of services:

4.3.1 Statements and Words to Avoid

Avoid absolute or open-ended statements such as “perform **all** necessary services to -----”; “will provide **normal** services for design of ------”; “will **complete all** services necessary for the project”; and/or “will obtain **all** permits and approvals required for the project”. Avoid superlatives words such as *all*, *any*, *ensure*, *determine*, *insure*, *highest*, *most, best* and *every*. These are broad words that can require you to perform services you a) never intended to provide, b) did not include in your budget and fee, c) might not be insurable, d) might commit you to exceed the standard of care.

4.3.2 Services Included and Excluded

Include services and deliverables that you think should be performed as part of your professional responsibilities in meeting the standard of care. Include key definitions of those services as well as related services to be provided by others (and when they are expected to be delivered). If the client does not agree to include the services you believe are critical for the success of the project, you should consider walking away from the project.

It is recommended that the agreement include a statement that the contractor is responsible for safety on the construction site. If for some reason, the services include any responsibilities for construction safety then they must be fully understood and resolved or rejected. You may want to consult your seasoned principal and/or attorney.

If the client compromises the quality of the project by limiting the scope of services (such as by requiring that you specify less expensive or inferior products or by rejecting necessary elements of the scope of services) and you nonetheless choose to accept the scope, be sure to document in writing that the decision was the client’s and against your

recommendation. Write the client a letter explaining your recommendation. In no event, should you accept such an assignment if it would violate the ASCE Code of Ethics.

4.3.3 Opinion of Cost

When asked by a client to provide construction cost estimates for your project, avoid framing it as a "cost estimate" and instead offer to prepare "an engineer's opinion of probable construction costs." By referring to your work product as an opinion of probable construction cost, it reduces confusion between the information you are providing as a design engineer at the design stage of a project from cost estimates provided by contractors and estimators experienced in preparing detailed construction cost estimates.

The engineer's opinion of probable construction cost should define the sources and methodology used to develop that opinion, including when and where those sources were derived. The agreement should state that when providing a client with an engineer's opinion of probable construction costs, there is no guarantee that the construction bids will come in at those costs. Provide a statement with the opinion that contractors base their bids on their in-house experience, price quotes from selected subcontractors and prevailing market conditions, all of which can change over time. Prevailing market conditions can include the number of bidders, fluctuations in the pricing and cost of materials and systems, contractor's previous bid experience and whether bidders are already busy (or not).

Contingencies should be included in the opinion of probable construction cost. Organizations such as the American Association of Cost Engineers International provide guidelines for how much contingency to include at various phases of the project. If the client needs construction cost estimates they can rely upon, recommend the engagement of a professional construction cost estimator or a contractor.

Do not appear or take on the role of a financial advisor unless you are so qualified and in compliance with local, state, and federal regulations including the Dodd-Frank Act and have checked coverage with your agent/broker.

4.3.4 Information Supplied by Others

Define information that will need to be supplied by others in order to complete your services. This is particularly critical when you are relying on information from outside sources, including the client. If you are relying on information from outside sources, you should state in the written agreement that it is not your responsibility to verify the accuracy or relevance of the information supplied. However, this language does not necessarily protect you from liability as you do have certain basic responsibilities to review information supplied by others. If the information is inaccurate or inadequate, or critical information is missing, you can still be found to be negligent for not recognizing these deficiencies. This is called the "*you should have known syndrome.*" Consult with a seasoned principal and/or your attorney if this is a concern.

Your scope of services should clearly state in the assumptions that you are relying on the accuracy, completeness and appropriateness of client-provided information. If you believe the provided information is inadequate, or the client wants you to verify the suitability of the provided information for use on the project, your scope of services should include adequate budget and schedule to accomplish these tasks. This is particularly critical if you are a subconsultant relying on information from the prime consultant and/or another subconsultant.

When defining information that will be supplied by others, also indicate in the written agreement the date by which you need to receive it. Indicate further that failure to receive the information on schedule may delay the completion of your scope of services and there will be no penalty to you for such delays.

Underground utility information supplied by others requires special attention. The accuracy of such information is often poor and the consequences of assuming the information is complete and accurate can expose the engineer to significant liability. Do not accept the risk of identifying the location of underground improvements unless you are qualified. Instead, use a sub-consultant experienced with ASCE 38, “Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data”.

4.3.5 Engineering by Others

Do not agree to seal plans prepared by others not under your direct control. This action would likely be in violation of your state licensing laws and not covered by your professional liability insurance.

4.3.6 Quality Control and Construction Observation

Avoid agreeing to a quality control standard for design or construction that is not prepared by you, that you are not intimately familiar or are not typically performed on similar projects. You will most likely be changing the standard of care for your performance.

Do not accept a project scope unless it includes the ability to periodically observe construction for general conformance to the design concepts expressed in the contract documents.

4.3.7 Repeat Designs

Beware of preparing designs that will be repeated many times.

> Example: Retail chains like to take a design developed for one location to other locations. Each location may have unique characteristics that require different design solutions and expose you to unknown risk.
>
> Example: A single-family house in a subdivision may be repeated many times. Designing a single beam to support the second floor, which is repeated many

times, is accepting significant responsibility usually without adequate compensation. It is a lot of effort to observe each installation.

Consult a seasoned principal and/or your legal counsel and your insurance agent/broker before committing to perform such services. You need to protect yourself from your design being used without your direct knowledge and involvement, as you are the one who knows what engineering judgment is embedded in your design.

4.3.8 Other Considerations

Don't take on responsibility for other consultants' professional services on the project unless they are your sub-consultant. In this case you must recognize that you will be responsible for their work, known as vicarious liability. Just as it is important for you to have a carefully prepared written agreement between you and your client, it is also important for you to have a carefully prepared written agreement between you and your sub-consultants including aligning the terms and conditions of your prime written agreement.

Don't agree to review non-required submittals during construction phase services. These types of submittals must be returned to the sender within the agreed upon turnaround time, marked "NOT REVIEWED: OUTSIDE SCOPE"

Don't accept coordination responsibilities for project participants that are not under your direct control. It is acceptable to coordinate with another project participant but do not assume actual coordination responsibilities unless you have control.

Avoid requirements for inspection unless it is part of your scope of services and you are qualified to perform such services. The proper term is observation not inspection. Inspection services usually require skills beyond those of the average design engineer, such as inspection of welding. Observation is a more global assessment of the construction quality and the evaluation of contractors understanding of the design. Observation needs to be performed in accordance with the jurisdiction's code even if not included in the written agreement because a violation of the code, by definition, is a violation of the ordinary standard of care.

Designing elements for a project that includes pre-engineered systems or buildings can result in unintentionally taking responsibility for the pre-engineered part of the design, which can imply product liability, not covered by your professional liability policy. Carefully include exclusionary language in the scope. Consult with a seasoned principal and/or your attorney.

4.4. Other Reasons to Have a Written agreement

You can limit some of your liability by using proven provisions in the general terms and conditions part of the written agreement.

Here are some agreement provisions that can help you manage the risks:

4.4.1 Limitation of Liability

On many projects a Limitation of Liability (LoL) provision can successfully limit your financial liability and produce a reasonable allocation of risks between you and your client. A clear and unambiguous limitation of liability provision needs to be negotiated between you and your client. Do not attempt to sneak it into the written agreement in the fine print. In general, it will not be held valid if it is not negotiated with the client. It is recommended that you have your client initial the clause to show that it has been read.

Limitations of liability can be based on a fixed dollar amount or percentage of the fee for services. It can also be tied to your available liability insurance limits. The amount of $50,000 has been accepted by many jurisdictions and using lower amounts could result in the limitation of liability provision being rejected by the courts in the jurisdiction of your project for being unreasonably low. The limitation amount should bear some relationship to the size of the project and the extent of the engineer's role in the project. Check with your attorney to make sure your limitation of liability clause is drafted in a way that is enforceable in the applicable jurisdiction of the project.

Typical wording for a limitation of liability provision is:

Limitation of Liability

> *To the greatest extent allowed by law, the aggregate liability of ________ for any and all injuries, claims, demands, losses, expenses or damages, of whatever kind, arising out of or in any way related to this agreement or the services provided by ___________ on this project, shall be limited to $50,000 or the total fee received by ______________ pursuant to this agreement, whichever is greater. Further, no officer, director, shareholder or employee of ______________ shall bear any personal liability to Client for any and all injuries, claims, demands, losses, expenses or damages, of whatever kind or character, arising out of or in any way related to this agreement or the services provided by _____________ on this proje*ct.

4.4.2 Claim Validation Provision

Many states have Certificate of Merit legislation that requires a plaintiff to submit to the defendant a statement from another professional, in the same professional area of practice, justifying the reason for the claim. These legislative Certificates of Merit vary significantly from state to state and generally have not proven to be very effective in avoiding frivolous claims.

Nonetheless, many engineering firms are now including a provision in their agreements that are similar to the Certificates of Merit concept. This provision requires a potential plaintiff to validate the reason for the claim prior to filing the claim.

The following is suggested wording:

> The (Client)_ shall make no claim either directly or in a third party claim, against the Engineer unless the (Client)_ has first provided the Engineer with a written

certification executed by an independent professional currently practicing in the same discipline as the Engineer and licensed in the state of the subject project. This certification shall a) contain the name and license number of the certifier; b) specify each and every act or omission that the certifier contends is a violation of the standard of care expected of a professional performing professional services under similar circumstances; and c) state in complete detail the basis for the certifier's opinion that each such act or omission constitutes such a violation. This certificate shall be provided to the Engineer not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any arbitration or judicial proceeding. *Source: CASE Contract Documents*

4.4.3 Non-Binding Mediation

The most successful dispute resolution method, and the most commonly used method is non-binding mediation. *Non-binding* means that if either party does not agree with the decision or recommendation, they are free to pursue other courses of resolution. Because the mediation process does not necessarily need to follow the common law rules of evidence, the information presented and discussions, which occur during the mediation usually, cannot be used in any future arbitration or litigation.

A provision requiring non-binding mediation is recommended in the agreement for engineering services because it can provide the opportunity to quickly and efficiently resolve a dispute with your client. If an agreement does not contain a dispute resolution provision such as a non-binding mediation requirement, then disputes are resolved with litigation in the civil justice system, which is expensive and time consuming.

Typical mediation agreement language is as follows:

> Any claim or dispute between the Client and _________ shall be submitted to non-binding mediation, subject to the parties agreeing to a mediator(s). This agreement shall be governed by the laws of the State of ______________.

5. What Agreement Should I Use?

Many public and private project owners have developed their own written agreements while others use standard written agreement forms prepared by industry organizations such as the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC). ASCE participates in the development of the EJCDC family of documents.

These standard forms typically include families of written agreements to be used between all participants in the design and construction process, e.g., Owner/Engineer, Owner/Contractor, Engineer/Specialty Sub-consultant, etc. One advantage of using these standard forms is that the terms of all the various agreements are coordinated and consistent with one another including the construction contracts and they are routinely reviewed and updated. The updates reflect changes in regulations, laws and practices around the country. Because there is a substantial body of case law involving these

documents and because updates take into account recent court rulings, it is easier to predict how courts will interpret the language within the agreements.

Each set of agreements has its own approach. For example, the EJCDC Standard Form of agreement Between the Owner and Engineer for Professional Service contains the basic business agreement, terms and conditions, and incorporates by reference exhibits to be used as appropriate for the scope of services, fees schedules, etc. AIA uses a modular or building block approach that can be assembled to respond to the project specific circumstances.

Standard agreement forms are a good starting point but will likely not meet all the needs of your particular project. Blanks in the agreement will need to be filled in. Possible additions and considerations include attorney's fees, limitations of liability, claims validation (certificate of merit) and unforeseen hazards or toxic conditions. Standard forms can be changed, so check for any such changes. Work with your attorney to modify the agreement to meet your situation.

Legal counsel familiar with engineering practice, standard forms, and the law within your or the project's jurisdiction should assist the engineer in a review of the modifications of the standard forms.

These forms are available for a fee, in electronic form or hard copy from organizations such as American Society of Civil Engineers (ASCE), the AIA, EJCDC, the Council of American Structural Engineers, the Geoprofessional Business Association (GBA formerly ASFE), and the Design Build Institute of America (DBIA).

The selection of a standard form of agreement depends on the area of practice and the type of project. Generally, structural engineers use the CASE or AIA agreements and civil engineers use the EJCDC agreements particularly when federal or state funding is included.

6. Working with a Client Drafted agreement

Many clients have their own agreements containing terms and conditions different from the standard agreements described above. If you have been asked to sign a client drafted agreement that is not one of the standard forms, you must consult with your seasoned principal, attorney, insurance agent/broker and/or risk manager.

More often than not, client supplied agreements are weighted heavily in favor of the client, including obligations that fall well outside the coverage provided by your insurance. Before you consider submitting a proposal on a project, it is advisable to review the client's agreement template. It may be included in the Request for Proposals (RFP) or posted on the client's website. If available, you should review it in advance for unacceptable provisions, some described herein, and upon review, you may decide not to pursue the project. Often the RFP itself is eventually included in the agreement and therefore an unacceptable provision in the RFP may be sufficient reason not to pursue the project.

Many engineering and architectural firms have standard sub-agreements. If you are proposing to provide services with an engineering or architectural firm, ask to review their "standard" agreements before the proposal is submitted. You do not want to have the firm

submit you on their team and you realize after selection that you can't sign the agreement because of usurious language, terms or conditions.

Often subcontractors who supply elements of a project will need engineering services. They may offer their standard form of agreement to engage your engineering services. These agreements often are written for vendors and other subcontractors and generally include warranties and other provisions that present challenges to engineers and their insurance carriers. It is difficult to modify these agreements to be acceptable for engineering services and they should be avoided.

The following are typical areas of concern with client supplied agreements.

6.1. Words and Terms

If the agreement uses words or terms such as certify, warrant, guarantee, insure, supervise, inspect, every, any and all, without limitation, but not limited to, use best efforts, all necessary, usual and customary, reasonably inferable, etc., then seek advice. These terms significantly shift expectations (and therefore your risk) and, if not removed, can result in significant losses to you and your firm. They may also impair your professional liability insurance coverage for claims arising out of the project leaving you and your firm personally exposed for any claim that may arise.

6.2. Scheduling

Be careful of scheduling provisions. Clauses stating that "time is of the essence" in your agreement may be interpreted as a guarantee of schedule performance and can become a big problem when defending a schedule delay claim.

While these provisions are common in construction agreements, you should avoid delay and liquidated damage provisions (see Glossary). Claims for breach of these provisions or for liquidated damages will likely <u>not</u> be covered by your professional liability insurance.

It is highly desirable to have language in the agreement prohibiting the client from claiming consequential damages resulting from your services (see Glossary). Many policies will not insure you for consequential damages since they are difficult to determine before entering into a design agreement.

6.3. Standard of Care

Avoid a statement in the agreement that you will perform services in a "non-negligent manner." Of course, your professional duty is to perform services in a non-negligent manner, but this provision in the agreement makes a negligent act or omission a breach of the agreement or in some jurisdictions a breach of warranty. This may significantly increase your liability exposure and may not be covered by your insurance. Check with your insurance agent/broker about coverage.

6.4. Information Supplied by Others

Similar to the discussion above, owner supplied agreements may require you to accept the accuracy of information provided by others, particularly a municipality or government agency, on your project. Be careful not to accept the risk of the accuracy or completeness of information supplied by others.

6.5. Construction Phase Services

Avoid a project that has no provision for you to provide ongoing services during project construction. No design is perfect. As things change during construction, you need to be aware and, in some cases, you will be notifying the client of the impact of those changes. Contractors can make changes through shop drawings and selection of equal products or systems from those specified in your design. If you as the engineer are not aware of these changes, the project may not perform as designed and the client may have a big problem when the project is complete.

Be sure you have construction site access for construction services. Do not accept a project scope unless it includes the ability to observe construction unless such services are barred by administrative or legislative rules.

In some cases, it’s not unusual for owners to defer the scope of services and budget for construction phase services until a later date. If they decide at that later date to exclude you from continuing on with the project for budget or other reasons, notify the client in writing that any changes they implement without your review is not your responsibility.

6.6. Binding Arbitration Dispute Resolution

Binding arbitration dispute resolution provisions should be avoided. Binding usually means that the decision cannot be appealed unless there was fraud, partiality, or other misconduct on the part of the arbitrators. It is a very high standard. While opinions among design and construction attorneys vary, many examples exist where the costs to arbitrate a dispute have become as expensive, if not more expensive, than litigation. Additionally, the commonly applied arbitration rules do not favor the design professional. Arbitrators are not necessarily attorneys and are not bound by the rules of evidence. They may either not be familiar with them or they may choose to ignore them during the process. Arbitrators tend to be more familiar with construction disputes (focused on the construction contract) rather than engineering disputes (focused on the appropriate standard of care). This can result in the inappropriate assignment of liability to the engineer.

6.7. Other Dispute Resolution Provisions

In recent years, there have been a number of alternative disputes resolution processes developed, primarily to expedite settlement. Consult your seasoned principal and/or attorney if the agreement has provisions for other forms of dispute resolution. While these may seem to be more “cost effective” and expedite the settlement process, they may not follow rules of

evidence requirements or require the person(s) reviewing the case to follow laws or the agreement.

6.8. Construction Safety

Beware of provisions related to job site safety and contractor means and methods.

> Example: a provision in the agreement that says the engineers shall be responsible for developing a design so that the contractor can construct the work in a safe manner.

An attorney should review these sorts of provisions. The contractor should always have complete responsibility for means and methods and job site safety.

When reviewing RFIs (Requests for Information) and submittals be sure that you are not inadvertently reviewing and approving contractor means and methods and/or safety practices.

6.9. Insurance Requirements

Verify that you can meet your client's insurance requirements for your services. If you do not meet the requirement, you may be self-insured and responsible for amounts over your policy limits.

6.10. Document Ownership

It is not unusual for clients to include a requirement that they own the drawings, specifications and reports that you produced. However, they are not a product in the typical sense of the word. They are your design instruments of service representing the intellectual depiction of your service and you should retain ownership. If the client has good reason for ownership, such as privacy of information, then the client's use needs to be restricted.

> Example: include a provision that the documents cannot be used to construct another project or be modified in any way.

6.11. Termination Provisions

Make sure there is a right to terminate/suspend service provision if you are not being paid or if the owner is otherwise in substantial breach of the agreement.

There are generally two primary types of termination clauses, termination for convenience and termination for cause.

A termination for convenience clause is usually applied when the project is suspended or terminated or the client wants to change the engineer for whatever reason. This clause should allow you to recover all your costs up to the date of termination plus costs to close out the agreement.

A termination for cause is applied when the design team hasn't performed in accordance with the agreement. This clause should also have a warning and remedy period.

> Example: The client needs to inform you in writing that they are not satisfied with your performance. If the warning is not heeded, then the client should state in writing that you have “X” days to correct or you will be terminated.

If you are notified that you will be terminated for cause, you should immediately contact your attorney.

As stated above, the agreement should have a provision for termination for cause if the client fails to make payments in accordance with the agreement or is in breach of the agreement.

6.12. Indemnity and Allocation of Risk

The indemnity provisions in client supplied agreements often include an attempt to shift risk from the client to you. Consult your attorney to delete or modify the language. Do not agree to “defend” the client or someone else, or to pay a third-party’s attorneys’ fees, especially prior to the determination of your liability by a court of competent jurisdiction and only accept indemnity obligations that are proportional to your responsibility.

For some complicated, innovative or inherently risky projects, the allocation of risks between parties can be identified and equitably allocated in the agreement. However, it is not easy to foresee all the risks and difficult to record the intent of the parties in writing.

Indemnity clauses are complicated and need to be reviewed by an attorney. Interpretation will vary from state to state. Allocations of risk clauses are also complicated and need to be written by an attorney.

6.13. Waiver of Subrogation

Waiver of subrogation (see glossary) provisions is complicated. Consult your attorney.

6.14. Additional Insured

It is recommended that the agreement require the owner in its contract with the construction contractor to list the design team as additional insured. There is no added cost to the contractor and this provision will provide protection to the design team.

> Example: If the contractor’s action causes a flood in a basement, that property owner will most likely file suit against everyone involved with the project. If the contractor lists the design team as additional insured, the contractor’s insurance provider will be responsible for repairs and all legal costs, including the design team’s legal costs. Without that provision, you may not have to pay for the damage, however you may have to pay your own legal fees.

6.15. Timing of Claims

Clients may attempt to include provisions that modify the timing of the filing of a claim or change the limits on how long you are exposed to liability on your project. Consult your attorney.

6.16. Lender or Funding Agency Requirements

Carefully consider any provisions or requirements that get added by a lender or funding agency. Ask your client if the lender or funding agency has added requirements. These sorts of provisions generally attempt to shift significant amounts of financial risk to you. Limit any certifications to your scope of services and professional knowledge and avoid requirements to certify quality. You will generally need to modify any language proposed to you by the lender or funding agency through your client. Seek legal advice as necessary.

6.17. Billing and Payment Terms

Carefully consider the billing and payment terms including attorneys' fee provisions for collection of unpaid fees and termination of work provisions.

6.18. Design for Construction Safety (DfCS)

Agreement provisions are beginning to appear requiring the engineer to consider construction safety in the design. If one appears consult your attorney.

6.19. Other Issues

Other common provisions needing careful review are ones that require you to: design to certain costs, design to fit a purpose, specify records retention requirements and limit your ability to assign personnel. Also note, Siri and Alexa are not professional engineers and should not be consulted in making project decisions.

7. Design-Build Agreements

Design-build agreements provide some challenges and opportunities that vary from those where the owner enters into separate agreements with the design team and contractor. There are a number of options in design-build for teaming and contracting. In many cases, the design team contracts with the contractor. In other situations, both the designer and contractor work for the same organization. In these situations, due to bonding and insurance requirements, the construction arm of the organization usually takes the lead.

The design-build organization structure provides opportunities for collaboration between the design and construction teams. The construction team becomes familiar with the design during the design phase and provides recommendations that support their means and methods and cost reductions opportunities. In some instances, the "final" design documents

do not need to be as complete as in the traditional design-bid-build scenario. This can reduce design costs.

In almost cases it is the client that develops the Design-build contract. In most cases, the Design-builder will develop the subcontract agreement with the Engineer/ Design team.

Design-build contracting has a number of unique issues that design engineers need to be aware of and deal within its implementation. The following comments are specific to when the design-builder subcontracts the design responsibility to the engineer:

1. The design-builder has a number of options when contracting for design services. In some cases, the design-builder may put all the design responsibilities onto a single design engineer. In other situations, the design-builder may delegate design for portions of the project to several separate entities. As an example, a design-builder may have separate engineers for the design of a pre-fabricated building, its electrical and control systems, and its life safety systems to mention a few. When the design-builder elects to delegate design components to different entities, the agreements need to clearly define the responsibilities of each entity. The agreements also need to clearly define whether the designers or design-builder are/is responsible for coordination of the design.
2. In some design-build situations, the engineer provides design documents that include quantities that the contractor relies upon to develop the hard dollar bid. In these situations, the agreement should spell out what happens (including no action) should those qualities increase during the design process. In most situations the engineer's betterment defense no longer applies (see glossary).
3. Circumstances happen and things change during the design process. In the design-build situation the builder may be less likely to inform the engineer of changes. The engineering agreement should spell out what and how changes will be addressed with the design-builder and owner.
4. Schedule compression is one of the key reasons for using the design-build approach. The design-builder/engineer agreement needs to spell out milestones for services and deliverables. Before signing the agreement, confirm you have the resources to execute the services. In preparing the agreement, make sure you carefully consider the recommendations in the "Information Supplied by Others" section of this document. Unlike many professional engineering service agreements, the design-build agreement will have liquidated damages (see glossary). These may be passed onto the designer/engineer in the agreement but is not generally insurable under a professional liability policy. Be aware of these sorts of provisions and your responsibilities/liability if the milestone dates are not met.
5. While the contractor may be the lead in design-build, in most situations the designer will still need to obtain and maintain professional liability insurance. The limits of liability should be defined in the agreement.

There is a difference between engineering agreements and construction contracts. Do not enter into a design-build agreement for engineering services without competent legal assistance.

8. GLOSSARY OF COMMON LEGAL TERMS

The following glossary of terms is intended as a handy reference for engineers to obtain a general knowledge of some of the common legal terms involved in an engineering agreement and claims against engineers. Some of the terms vary by jurisdiction and all should be verified before relying upon the definitions presented herein.

Answer -- In law, a written pleading filed by a defendant to respond to a complaint in a lawsuit filed and served upon that defendant. An answer generally responds to each allegation in the complaint by denying or admitting it, or admitting in part and denying in part. The answer may also comprise "affirmative defenses" including allegations which contradict the complaint or contain legal theories which are intended to derail the claims in the complaint. Although some jurisdictions require that each allegation by plaintiff or cross-complainant be specifically addressed (admitted, denied or a statement of inability to admit or deny) in an answer, other jurisdictions allow a general denial which places all allegations at issue. Answers also set out the basis for a particular defense in the form of new matter or affirmative defenses.

Affirmative Defense -- Part of an answer to a charge or complaint in which a defendant takes the offense and responds to the allegations with his/her own charges, which are called "affirmative defenses." These defenses can contain allegations, take the initiative against statements of facts contrary to those stated in the original complaint against them and include various defenses based on legal principles. Some jurisdictions require you to include affirmative defenses in your answer. These affirmative defenses can range from a limitation of liability provision in your agreement, a statute of limitations defense or other specific contractual defenses you have to plaintiff's claim.

Arbitration -- A process of dispute resolution whereby a neutral third party (the arbitrator or panel of arbitrators) renders a decision after hearing the factual and legal arguments of each party. As with trials, the arbitration practice differs significantly from jurisdiction to jurisdiction with some arbitrators conducting the process with a formality very similar to a "bench trial" and others conducting it in an informal meeting fashion. Arbitrations can be binding or non-binding.

Attorney-Client Privilege -- The requirement that an attorney may not reveal communications, conversations and letters between them and their client, under the theory that a person should be able to speak freely and honestly with their attorney without fear of future revelation. A privilege, which protects confidential communications between an attorney and his client from discovery. The communication must be reasonably necessary to the purpose for which the attorney is consulted and is waived if the client discloses the information to third parties.

It should be noted that if the engineer places written communication between himself and his attorney into the project file, and discloses the project file to the other side under a subpoena, the privilege contained in that attorney-client communication is waived or voided.

Attorney Work Product -- Written materials, charts, notes of conversations and investigations, and other materials directed toward preparation of a case or other legal representation. Their importance is that they cannot be required to be introduced in court or otherwise revealed to the other side. The doctrine which generally makes the notes, writings, memoranda or physical objects (models, graphs, photographs, etc.) prepared by an attorney or consultant retained by an Attorney in anticipation of litigation and/or trial protected from discovery.

Burden of Proof -- An evidentiary doctrine, which requires a party to prove a disputed fact or facts. While the plaintiff is generally required to meet an initial burden of proof to prevail, a defendant may have the burden of proof with respect to "affirmative defenses" or "new matter," and there are several doctrines, which shift the burden of proof in certain circumstances.

Betterment Defense -- An affirmative defense to challenge the amount of damages incurred by the plaintiff when the alleged damages added to the value of the project.

Bench Trial -- This is a non-jury trial where the judge not only conducts the trial, but also renders the decision. Your fate is in the hands of one person as opposed to six or twelve jurors.

Breach -- The failure to perform an obligation in your contract or agreement with your client. In some jurisdictions, third parties may sue for this breach even though your contract or agreement was not with them.

Case Management -- Case management is a means of organizing and controlling a litigation matter. The case management objectives may be set out in an order from the court or stipulation among the parties. The stipulation may establish such things as a limitation on the time and amount of discovery that may be taken, dates by which discovery must be completed, deadlines to file dispositive motions, dates by which mediation or another form of alternative dispute resolution must be completed, and a trial date.

Cause of Action -- These are the legal theories pled against you in the complaint or cross-complaint. Examples are negligence, breach of contract, implied indemnity, etc.

Certificate of Merit -- In many jurisdictions, before an action is commenced against an engineer, a plaintiff's lawyer must consult another engineer. In California, for example, a certificate must be signed and filed by a plaintiff's or cross-complainant's attorney affirming that the attorney has reviewed the facts of the case with an engineer in the relevant field; and that based on the facts and consultation, has concluded that there is reasonable and meritorious cause for filing the action.

Complaint -- The original or initial pleading filed by the plaintiff when a case is initiated or any subsequent pleading after the original complaint.

Compensatory Damages – Provide a plaintiff with the monetary amount necessary to replace what was lost and nothing more.

Consequential Damages -- Damages claimed and/or awarded in a lawsuit which were caused as a direct foreseeable result of wrongdoing. These arise due to special facts and circumstances of a particular case. For example, suppose the client advises the engineer, during formation of the contract or agreement, that the plans must be completed by a certain date and that the client will have to pay a substantial penalty to a governmental agency if they are not on file by that date. In this instance, the engineer's failure to conform with its undertaking in a timely fashion would cause the client to incur consequential damages. Consequential damages can include costs such as lost profits, lost revenues, loss of use, loss of financing, and loss of reputation.

Cross-Complaint -- A complaint filed by a defendant or cross-defendant. A cross-complaint can set forth a cause of action against an existing party or against a non-party who may be liable for any cause of action previously asserted against the defendant.

Cross-Complainant -- A party who has filed a cross-complaint

Cross-Defendant -- A party against whom a cross-complaint has been filed.

Defendant -- A party against whom a Complaint has been filed.

Demurrer -- a written response to a complaint filed in a lawsuit which, in effect, pleads for dismissal on the point that even if the facts alleged in the complaint were true, there is no legal basis for a lawsuit. A hearing before a judge (on the law and motion calendar) will then be held to determine the validity of the demurrer. Some causes of action may be defeated by a demurrer while others may survive. Essentially, this pleading states that even if the allegations in a Complaint or Cross-Complaint are true, there is no legal basis upon which relief can be granted. If granted, the Demurrer terminates all issues regarding the disputed causes of action.

Deposition -- A pretrial discovery device by which attorneys ask questions of another party or a witness under oath. If relevant and otherwise admissible, the deponent's testimony can be used in future court proceedings.

Discovery -- Pretrial devices or actions which are used by parties to obtain facts, documents and other relevant information from other parties to the suit and third parties who are not in the suit. Discovery assists a party in evaluating an opposing party's claims and in preparing its case for trial. Typical discovery methods include depositions, written interrogatories, requests for production of inspection of documents or things, physical and mental examinations, and requests for admissions.

Expert Testimony -- Opinion evidence of a person who possesses special skill, knowledge or experience in a profession relevant to an issue in the action. In contrast to a percipient witness, expert witnesses need not have personal knowledge of the facts giving rise to the action. In some states, the term expert witness is being changed to opinion witness.

Interrogatories -- A set or series of written questions given to another party to the action. Answers to the Interrogatories are given under oath and, if relevant and otherwise admissible, may be admitted into evidence at subsequent judicial proceedings.

Joint and Several Liability -- This provision involves the question of who pays a judgment when there are two or more parties found liable, but only one party can pay. It usually provides that when one or more parties defaults (or cannot pay) a judgment, the remaining parties must pay the defaulting party's share in the same ratio that the remaining parties were found to be responsible. If only one party remains, that party is responsible for the total judgment. The laws governing this potential liability vary widely state to state, seek legal advice.

Liquidated Damages -- A contractual provision wherein the parties to a contract provide for specific damages in the event of a breach. In construction contracts, liquidated damages clauses are most commonly triggered by a breach of contract and establish a given sum of money to be paid on a per diem basis as a result of the breach. This obligation is not insurable under an engineer's PLI policy.

Mediation - mediation is a process used to resolve and issue whereby the parties agree to hire a mediator (or Dispute Resolution Facilitator). The parties typically set a date and all convene with the mediator to resolve the issue. The format of the meeting varies depending on the mediator, but it usually begins with all sides being given the opportunity to state their positions to all. The mediator typically asks questions to clarify the situation and positions. Following the

open presentations, the parties are isolated from each other and the Mediator negotiates with each party separately, looking for a compromise, which is forthcoming

more often than not. In most claims early mediation is the best way to resolve issues. However, at the time of the compromise no one is generally happy with the results. The compromise is simply better than the alternative.

Motion -- a formal request made to a judge for an order or judgment.

Motion in Limine -- A pretrial motion which requests the court to prohibit opposing counsel from offering matters into evidence or making reference during the trial to certain facts or issues. A Motion in Limine prevents the admission of irrelevant, prejudicial or otherwise inadmissible evidence. This is most common in criminal trials where evidence is subject to constitutional limitations, such as statements made without the Miranda warnings (reading the suspect his/her rights)

Motion for Summary Adjudication -- A procedure by which a party can obtain a final determination of a particular issue in the action without the necessity of a trial. Summary Adjudication differs from Summary Judgment, which, if successful, operates as a judgment on the entire action. A perfect application for a motion for summary adjudication would be to test whether or not the limitation of liability clause in your contract or agreement is going to be applied by the court.

Motion for Summary Judgment -- A procedure by which a party can obtain a final determination of the action without the necessity of a trial. Summary Judgment is proper when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. A motion for summary judgment differs from a demurrer because a wide variety of material outside the pleading (affidavits, declarations, admissions, answers to interrogatories, depositions, etc.) is produced to assist the court in its decision, and unlike the demurrer, this motion requires an examination of factual material.

Motion to Quash -- An application for a court order nullifying or modifying compliance with a subpoena.

Percipient Witness -- Any witness who has knowledge of the facts of the case who is not an expert witness.

Plaintiff -- The party who initiates a civil action by filing a Complaint in a court of law.

Pleading -- Every legal document filed in a lawsuit, petition, motion and/or hearing, including complaint, petition, answer, demurrer, motion, declaration and memorandum of points and authorities (written argument citing precedents and statutes) is a pleading. Laypersons should be aware that, except possibly for petitions from prisoners, pleadings are required by state or federal statutes and/or court rules to be of a particular form and format: typed, signed, dated, with the name of the court, title and number of the case, name, address and telephone number of the attorney or person acting for himself/herself (in pro per) included. The act of preparing and presenting legal documents and arguments. Most any document filed with the court is called a pleading.

Preponderance of Evidence -- The general standard of evidence in civil actions. This standard is met when the evidence, taken as a whole, shows that the fact sought to be established is more likely.

Privileged Communications -- Statements made by persons or written documents which are protected by law from forced disclosure. ***See also Attorney-Client Privilege* and *Attorney Work Product***.

Punitive Damages -- Damages ordered by the court as punishment for the willful and wanton acts of the party found guilty by the court.

Request for Admissions -- A set or series of statements submitted to an opposing party. The opposing party is required to admit or deny each statement.

Request for Production of Documents -- A pretrial discovery device where one party asks another party to produce for inspection and copying specified documents or tangible things, or to permit inspection of land or other property of the party.

Sanctions -- A penalty, typically monetary, but often in the form of an order which precludes the admission of certain evidence, prevents a party from calling a certain witness or may, in some instances, strike a pleading. Among other things, Sanctions are imposed on a party or attorney for failing to comply with discovery proceedings and court orders regarding discovery proceedings.

Statute of Limitations -- A law which sets the maximum period which one can wait before filing a lawsuit, depending on the type of case or claim. The periods vary by state. Federal statutes set the limitations for suits filed in federal courts. If the lawsuit or claim is not filed before the statutory deadline, the right to sue or make a claim is forever dead (barred). The law that deals with the passage of time as it relates to the onset of knowledge of a condition (defect) and the time after that date in which a claim can be legally filed.

Statute of Repose -- While a statute of limitations sets a lawsuit-filing time limit based on when the potential plaintiff suffered harm, a *statute of repose* sets a deadline based on the mere passage of time or the occurrence of a certain event that doesn't itself cause harm or give rise to a potential lawsuit. In Construction defect lawsuits and similar kinds of claims over property-related damage, the time period is typically measured starting after completion of the construction project or the sale of the property.

Subpoena -- A court order, typically issued by the court, commanding a person to appear at a specified time and place to give testimony.

Subpoena Duces Tecum -- A subpoena, which compels production of documents or other materials within a person's or entity's possession or control.

***Subrogation* –** The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights and remedies.

Summons -- A court instrument issued by the court clerk and served with the complaint to notify a person or entity that a civil action has been commenced.

Trier of Fact -- Any individual or group responsible for hearing evidence and ruling as to which party (or parties) prevails. Examples of a trier of fact include judge and arbitrators.

Tort -- A civil wrong or wrongful act, (other than under contract) whether intentional or accidental, from which injury occurs to another. Torts include all negligence cases as well as

intentional wrongs which result in harm. Therefore, tort law is one of the major areas of law (along with contract, real property and criminal law) and results in more civil litigation than any other category. A legal theory, usually alleged as negligence, which is not a contract theory.

Vicarious Liability -- ***(Also called Imputed Liability)*** This is a theory of liability, which makes you responsible for the acts of another.

Voir dire -- A preliminary examination of a witness or a juror by a judge or counsel. The general process of interrogating potential jurors at the commencement of a trial.

9.0 CCRM Membership

The membership of the ASCE Committee on Claim Reduction and Management (CCRM) consists of:

Dan Becker, HDR, Chair

John Tawresey, formerly of KPFF, Vice-Chair

Jim Anspach, T2 Utility Engineers

Ron Anthony, Anthony & Associates, Inc.

Paul Bizier, Barge Design Solutions, Inc.

Rudy Bonaparte, Geosyntec Consultants

Dan Harpstead, Kleinfelder

Jim Harris, JR Harris and Company

Steve Lang, Pearl Insurance

Dave Ponte, Nautilus Consulting, LLC

Paul Tremel, Westland Resources