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ProNetwork News

Risk Management Tools for the Design Professional

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David A. Ericksen is a principal shareholder in and past President of the law firm of Severson & Werson in San Francisco, California, and leads the firm's Construction and Environmental Practices. For over twenty years, Mr. Ericksen has specialized in the representation of architects, engineers, construction managers, design-builders, and other construction professionals. Mr. Ericksen's expertise covers all aspects of such professional practice as lead litigation and trial counsel, as well as being an active resource for risk management, strategic planning, and transactional matters.

He is a trusted and valued resource to design and construction professionals and their insurance carriers across the United States and beyond. He has been repeatedly recognized as an industry leader, including being named a Construction "SuperLawyer" for the last fifteen years. He is a graduate of University of California, Berkeley, School of Law, a former law clerk to the Washington State Supreme Court, and a member of and resource to numerous construction and environmentally related professional organizations. Mr. Ericksen is a frequent speaker before construction professional organizations such as the AIA, SEA, ACEC, CSI and others, as well as providing in-house training seminars for firms.

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Strategic Solutions for Construction Site Visits An A/E Guide

By David A. Ericksen

As a result of the pandemic of 2020, construction site activities have changed or even stopped. In reality, "normal" is still a long way off and may never actually be the same again. As design and construction professionals grapple with "shelter in place" orders, partial activities, "essential" services, phased re-openings, social distancing, and elevated health and travel concerns, on-site construction activities and obligations present a constantly changing challenge. In fact that could be said about all phases of practice and not just the elevated challenges of the construction site. The following six steps are very much focused on specific construction site obligations and demands, but similar algorithms are readily transferrable to all phases of the design and construction process. Six steps to a strategic and structured approach to on-site construction participation are as follows:

1. Evaluate Legality.

Local, regional, state, and federal standards may limit what construction activities may actually proceed. Unfortunately, those standards do not always agree and are frequently changing. Accordingly, before considering participation or support of any construction activities, the first step is to conduct an internal investigation to confirm whether or not construction is actually permitted and to what extent. If you cannot confirm that the activities are permitted, do not proceed. If construction is officially sanctioned and such services proceed, those regulations should be regularly monitored for changes.

2. Client/Owner Authorization and Direction.

Even if an independent evaluation of the permissibility of continued construction has been completed, it remains the client's project and the consultant should request written confirmation from client/owner that the project is deemed essential and exempt from "shelter in place" orders and that they wish to proceed with construction. Do not go to site without this. If they will not do so in writing, but make such determinations and directions orally, confirm it in writing. A template for such confirmation could be:

<Client> has evaluated local and state COVID-19/Coronavirus related orders and has determined that the _____ project is exempt or

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BLOG

Project Certification and Closeout in a Virtual COVID World and After. As we experience and emerge from "the great shutdown" of 2020, things have and will change in all aspects of life – including the design and construction process. [Read More](#)

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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. [Read More](#)



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otherwise may proceed because_____ . Accordingly, <client> has elected to proceed with construction. Owner and Contractor are in control of the project site and site safety and will implement reasonable procedures consistent with appropriate hygiene and social distancing and will provide Consultant with those procedures in advance and at the site.

In addition to the COVID-19/Coronavirus concerns, also consider the financial impacts on the project. The economy and financial markets have been hit hard. Where there is any concern, consider confirming the financial viability of the client, project, and lenders where any of those could adversely impact collection of fees and ongoing viability of the project.

3. Evaluate Necessity vs. Alternatives.

Technology and pragmatic reality have introduced options to the traditional site visit. In fact, those tools may even offer greater efficiency and record enhancements. Accordingly, evaluate what construction administration services genuinely need to be done at the site versus "virtual" alternatives such as video conferencing tools, digital photographs, and drones. Where the latter are options, consider the limitations and vulnerabilities as well as selective and strategic incorporation of the related advantages. For example, video conferencing may be a great tool to overcome social distance, but recording of such sessions may come with its own set of issues as referenced below.

4. Present & Confirm Alternatives with Client.

If remote technology alternatives are available and viable for remote construction site services, present them to the client as an option with a corresponding discussion of the pros and cons. If acceptable to the client, confirm the revised plan of action in writing. Such confirmation may be as follows:

In light of the current COVID-19/Coronavirus travel and social contact concerns and restrictions, we have agreed that portions of the construction phase services will be modified to be by remote technology as follows:

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Such construction site related services require good faith and collaboration and teamwork with those on the site to provide accurate and representative information and to identify and highlight any issues of potential concern. Consultant's services shall rely on that information consistent with appropriate professional standards and obligations under the circumstances.

If tools such as videoconferencing, drone flyovers with voiceover, or conference calls will be recorded, do so selectively and intentionally and only with full disclosure to all participants. Unauthorized or undisclosed recordings may create poor or incomplete project records and may be subject to criminal sanctions. By the same token, strategic

and focused use of recording may be an excellent tool to establish a good project record.

5. Site Safety Policies.

For services which must be or are requested to be on site, request a copy of the on-site COVID- 19/Coronavirus protocols in advance. Recognize and acknowledge that others are in control of and responsible for the site. Representative issues which should be covered by those protocols would be:

- Job-site access controls with no visitors or unnecessary personnel allowed on the jobsite and access subject to confirmation of asymptomatic conditions.
- Job site trailer capacity should be maxed at 50%
- All individuals on the job site must be separated by more than 6 feet; if a task requires individuals to be closer than 6 feet, that task should be delayed.
- Gloves and masks should be worn at all times
- All sites should have hand wash/sanitizer stations throughout site
- Safety information should be prominently posted in appropriate languages
- Medical Professional inspection/spot checking protocols may be implemented

6. Internal Policy & Procedures.

No consultant personnel should be compelled to go to a site. For those who do, they should be given appropriate guidelines and equipment which would include the following:

- Do not go to a site if you have any symptoms consistent with COVID-19/Coronavirus. In particular, this would be if you have a fever.
- Dress in layers such that exterior layers may be removed and bagged for laundry immediately upon leaving site.
- At all times on site wear gloves, mask, and eye protection.
- Maintain distances from all others of at least six feet throughout the activity.
- If anyone presents a concern to you by presenting symptoms or not observing appropriate procedures, state that you are leaving the site and why and promptly document that by an e-mail to the client and the Consultant Principal for the project.
- Wherever possible, use technology such as a phone for notes and photos as opposed to paper records.
- Wash and sanitize hands and face upon leaving site and at appropriate opportunities while on site.

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