

# BUILDING BLOCKS

**DESIGNPRO**  
**INSURANCE GROUP**  
*A Wichert Insurance Agency*

## TOP 10 NEW YEARS' RESOLUTIONS FOR DESIGN PROFESSIONALS

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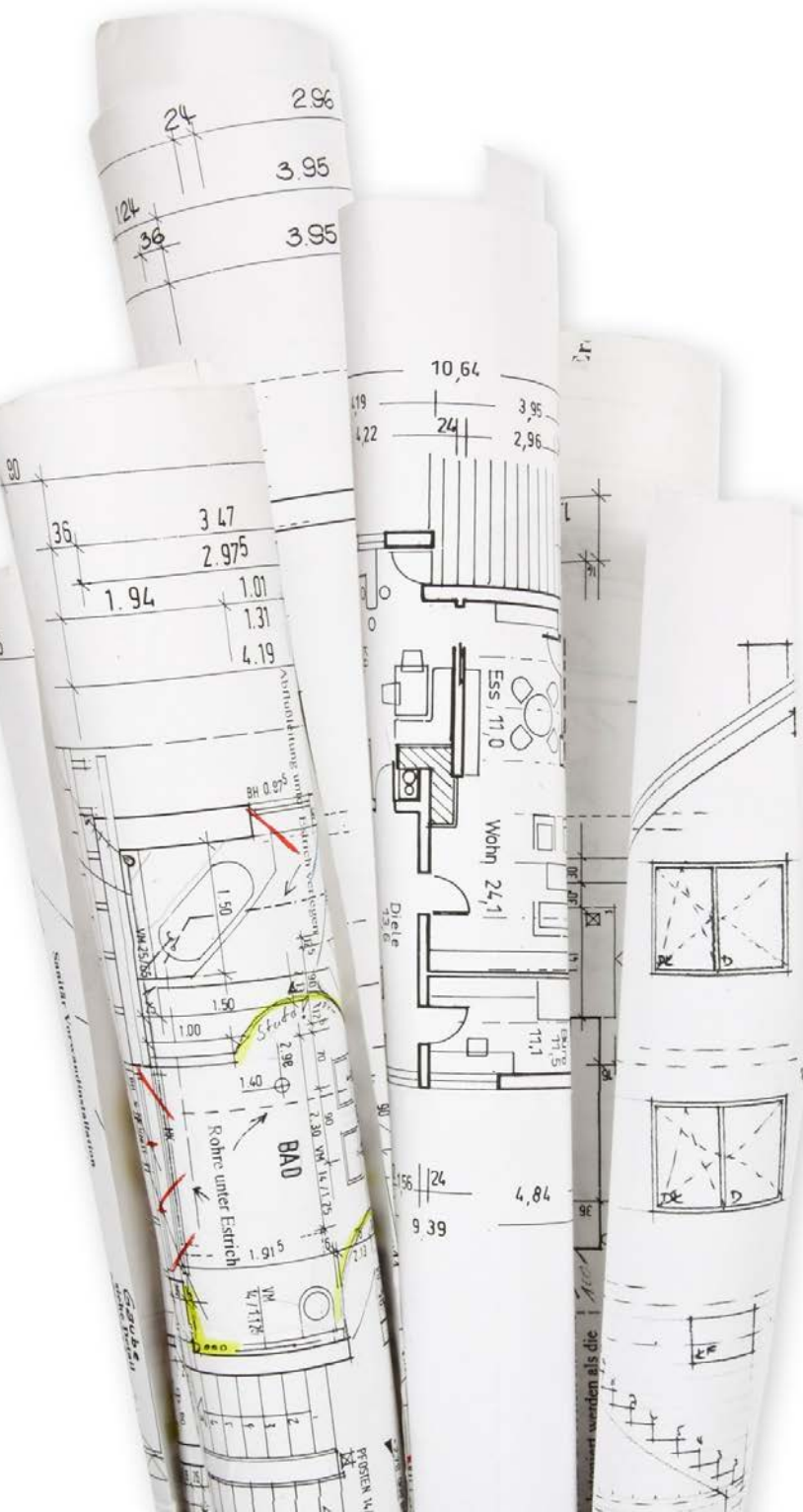
### Resolve to Accomplish these “Best Practices”

It is that time of the year when many of us make new years' resolutions. Consider these top 10 design professional “best practice pointers” when you are preparing your short list of resolutions. There is no real order of importance in the list below, but it is organized from client and project selection, contract formation and negotiation, office and practice management, through project closeout and professional liability insurance concerns.

1. Have a “go/no go” policy when evaluating new projects and clients, and use it. If the project looks risky, or the client is someone that you have reason to believe will be difficult to deal with, let one of your competitors have it.

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2. When you are proposing your services for the next project, include construction administration in your basic services. The wisdom is that when providing full services (design through finished project) you can resolve construction issues as they occur. If you don't provide construction administration and some other person, such as another design professional or even your client, administers the construction phase of your project, they may not understand your design intent. And if errors or omissions are discovered in your documents during construction, the blame will fall back to you - that otherwise could have been resolved in the field. Thus, include construction administration services in your proposals to your client, and if they don't want it, make them decline it. That way you at least can take the position that the client had written notice that you could have provided a better and problem-free project if a problem does occur.
3. In contract negotiations with your clients, if you are giving up ownership of your documents that you prepare for your client's project, consider using the following contract clause:

*The standard and non-standard portions of the Project-specific construction documents prepared or furnished by the A/E and the A/E's consultants related to this Project, pursuant to this Agreement, are instruments of the A/E's and the A/E's consultants' professional services (the "Construction Documents"). The A/E's and A/E's Consultant's standard details, specifications and designs shall remain the property of the A/E. However, the Construction Documents shall become the property of the Owner upon payment in full of all fees and expenses incurred by the A/E under this Agreement, and any modifications to this Agreement.*

*Furthermore, the Owner may use the Construction Documents only for construction, occupying, maintenance or additions to this Project only, and the Owner may not make any modifications to or use the Construction Documents for any other project, and shall be the Owner's sole risk, without the written permission of the A/E. The transfer of ownership of the Construction Documents to the Owner is not to be construed to be a sale by the A/E or the A/E's consultants. Therefore, the A/E and the A/E's consultants make no guarantees, certifications or warranties, either expressed or implied warranty of merchantability and fitness for any particular use of the Construction Documents. This transfer of ownership of the Construction Documents is not a waiver of the A/E's and the A/E's consultant's other rights under law and this Agreement.*

*Lastly, the Owner agrees, to the fullest extent permitted by law, to indemnify, hold harmless and defend the Architect, its officers, directors, employees, representatives, agents and the Architect's consultants from and against any claims, allegations, losses, damages, liabilities or costs, including attorneys' fees, expert witness fees and costs, and any other defense costs, arising from or allegedly arising from in any way related to the unauthorized reuse or modification of the Construction Documents by the Owner, including any other person that uses the Construction Documents from or acting through the Owner.*

4. Include risk management clauses in your agreements, such as a limitation of liability, waiver of consequential damages, and a betterment clause. Or at least try to negotiate them into your agreements with your clients, recognizing what your risk tolerances are for every unique project. And be on guard for onerous terms and conditions in your clients' contracts, such as the "duty to defend" in an indemnification clause. Strike the defend provision, or consider the insurance available if your clients insist to have such a duty to defend obligation. See our DesignPro Insurance Group website blog section for further information:



## Building Blocks - September 2018

Friday, September 14, 2018

The September issue of **BUILDING BLOCKS** is available. Contractual Defense Protection - A New Solution for the Old "Duty to Defend" Problem is the topic this month.

5. With very few exceptions, have a written (and signed) agreement between yourself and your client. The Ohio Administrative Code (OAC) section 4703-3-09 requires a written and executed contract between a registered architect or architectural firm and the client, before commencing work on any project. It is also good practice, even when providing free services, and the same holds true for professional engineers and their clients. See the seven common sense, basic elements of contract formation in the OAC 4703-3-09 code section to form a simple agreement. Since all rules have exceptions, the three exceptions to the code section are as follows:
  - a. Professional services rendered by a registered architect for which no compensation will be paid to the registered architect.
  - b. Professional services rendered by a registered architect as a consultant to a professional engineer registered to practice engineering under Chapter 4733 of the Revised Code or to a landscape architect registered under Chapter 4703 of the Revised Code, when a written contract exists between the registered professional engineer or landscape architect and a client who is not the registered architect.
  - c. When the services are of the same general kind which the registered architect has previously rendered to and received payment from the same client.

Check with your legal counsel to determine if your client's "letter of intent" in lieu of a written signed agreement may suffice for purposes of the Ohio Architects and Landscape Architects Board. One thing that may help, is that the letter includes at least those seven common sense, basic elements, in the OAC 4703-3-09. Very few states have a written contract requirement between architect or architectural firm and their client, but does include California and Ohio.



6. Implement a written quality control/quality assurance program in your office if you don't already have one, and most importantly, use it. That may include having a different set of eyes to look over your documents before they are issued. It may look even worse if you have a written program and you don't use it, such as in a claim situation.
7. Utilize a "certificate of substantial completion" to document when your projects have reached the point when the project can be occupied for its intended purposes. A good definition of substantial completion is found in AIA A201 (2017) General Conditions of the Contract for Construction § 9.8.1.

*Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.*

The point of time of substantial completion will trigger the statute of repose in your state (such as Ohio Revised Code 2305.131), and also warranties and guarantees on the built work. At least have a document in your project records that has informed your client and the contractor that, in your professional opinion, that the project is substantially complete, even if you do not use the AIA G704 (2017). A "certificate of occupancy" from a city building department is a good indicator that the project has reached substantial completion, but may not necessarily be so in every project.

8. Manage your projects' scope creep by utilizing a "change in services agreement" (even a short form one page document may suffice), and don't start performing those additional services until you have a signed copy. Avoid disputes when your client's memory has faded, or has selective recollection what they have asked you to do, and what you have agreed to do.
9. If you have a circumstance on one of your projects that could lead to a claim for money or services, report it to your insurance agent immediately. Ignoring a problem on a project inevitability will lead to a bigger issue in time, and may jeopardize your professional liability insurance coverage. Insurance carriers require notice of a circumstance or a formal claim, so that they can be involved early as possible to help resolve an issue before it mushrooms into a bigger problem.
10. Before you make a formal claim to recover your unpaid fees and reimbursable expenses on a project, consider that you will likely get a counterclaim from your client, which will have to be reported to your professional liability insurance policy through your agent. Then you have a claim on your hands, which requires a defense.
11. I can't resist adding just one more "best practice pointer" to the list of ten. Be careful not to take credit for the work of another design professional. The codes of ethics and professional conduct for architects and engineers are very clear that it is unethical to do so, and is one of the most common ethical violations (see [www.aia.org/pages/3296-code-of-ethics-and-professional-conduct](http://www.aia.org/pages/3296-code-of-ethics-and-professional-conduct)).

*Have a happy, healthy and prosperous new year from all of us at  
DesignPro Insurance Group!*

*If you already do all of the above on the list,  
you must be one of our clients.*



**About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB, ORSA has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

***Disclaimer:*** *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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# DON'T MISS ONE OF ERIC'S UPCOMING SPEAKING ENGAGEMENTS!

Mark your calendars for Eric's upcoming Continuing Education Programs:

## **Webinars:**

### **"Project Delivery for Engineers"**

Cleveland Engineering Society Webinar  
April 24, 2019 - 11:30 a.m. – 12:30 p.m.

## **Conference Seminars:**

### **"Cybersecurity: Technology, Risk and the Law"**

Half Moon Education Seminars, Middleburg Heights, OH  
March 12, 2019 - 8:30 a.m. – 5:00 p.m.

### **"Empowering your Ethics in a Changing Architectural Culture"**

Quebec City Conference  
Ontario Association of Architects, Quebec, Canada  
May 23 and 24, 2019 - 10:30 a.m. – 12:00 p.m.

### **"Engineering Law & Ethics"**

Half Moon Education Seminars, Middleburg Heights, OH  
May 30, 2019 - 8:30 a.m. – 5:00 p.m.

### **"Owner-Architect Contract Clauses that You Should Really Pay Attention To"**

AIA National Conference on Architecture 2019, Las Vegas, NV  
June 8, 2019 - 10:30 a.m. – 12:00 p.m.

## NEW YEAR

## FUN FACTS:



- On average, about 45% of Americans consistently make a resolution for the New Year.
- The most common resolution made is to increase the amount of exercise that one gets (it is estimated that 37% of resolutions are this one!)
- Unfortunately, about 22% of resolutions fail after about a week, 40% after a month, 50% after 3 months, and 60% after 6 months. Not you – you're in it to win it!



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