

# BUILDING BLOCKS

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

## DESIGN PROFESSIONAL PERSONAL LIABILITY

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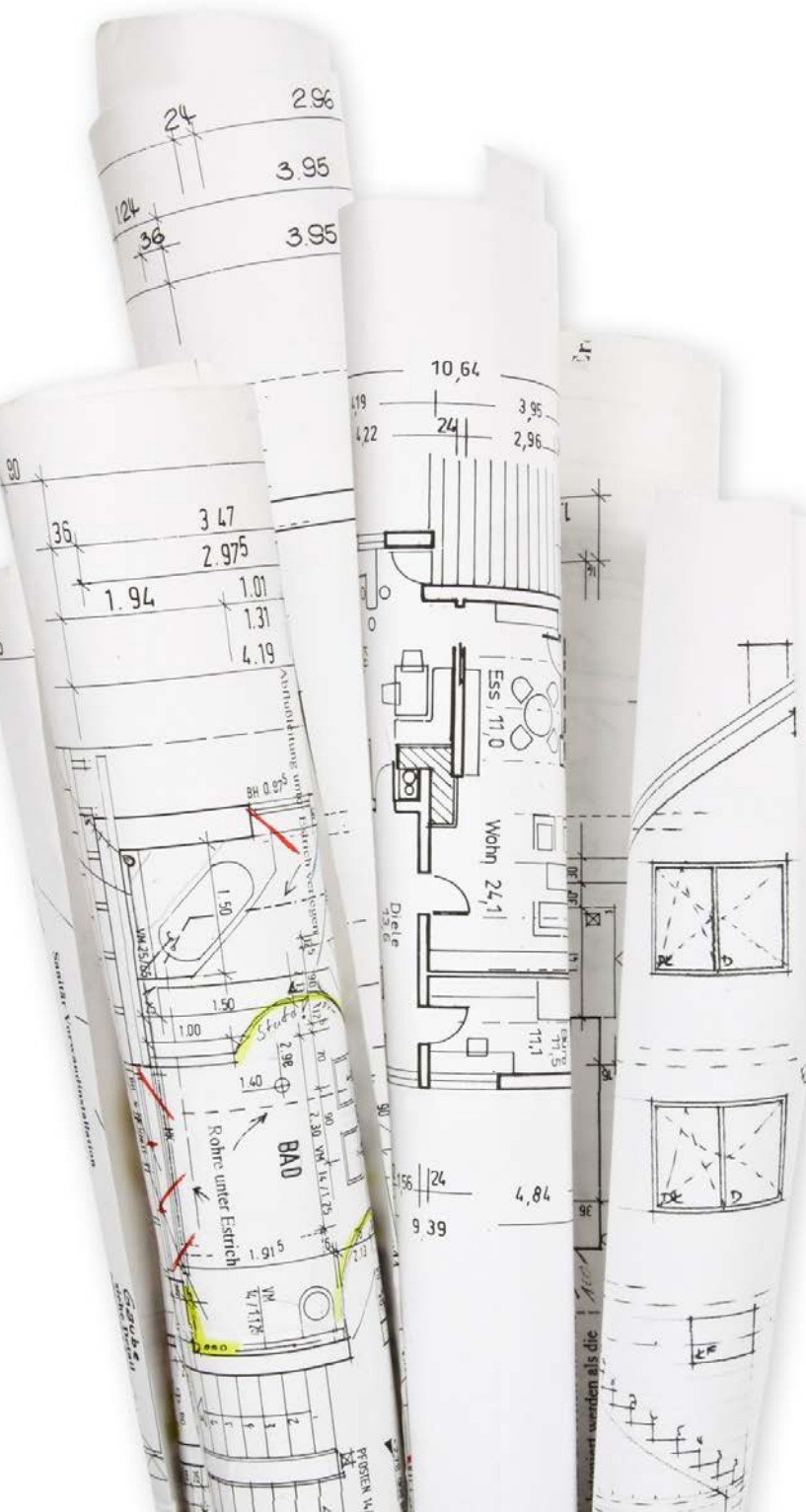
Possibly one of the most common misunderstandings for architects and engineers relates to personal liability in their professional practices. As licensed professionals, architects and engineers are always personally liable for their own negligent acts, errors and omissions. The same holds true for doctors and lawyers—they too cannot hide from claims for their negligence, regardless of the form of business their firms are structured (such as limited liability corporations, partnerships, professional corporations, etc.). Therefore, there is no real benefit in the form of a legal entity, for professional personal exposure.

### **Negligent Acts Creating Personal Liability**

In order to establish when a professional is personally liable, an allegation negligence must be made, and proven. Four things all must be established, and even if just one of the four elements are not proven, the claim of negligence fails to establish personal liability.

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- First, the professional must have a duty to be non-negligent. For example, an architect or engineer has a duty to provide their professional services in accordance with their standard of care.
- Secondly, a design professional has to breach their duty to be non-negligent. For example, an architect or engineer has to breach their duty to be non-negligent by falling below their standard of care.
- Thirdly, there must be a causal link between the breach of that duty causing some harm to someone else. For example, an architect's or engineer's services created a significant omission when they prepared their drawings and specifications.
- And lastly, that breach of duty has caused damages (usually not minimis) to satisfy the fourth element to prove a claim for negligence. For example, an architect's or engineer's omission in their drawings and specifications resulted in a collapse of a structure.

Duty, breach of a duty, causation plus damages can result in a finding of negligence, unless there is some reason that at least one of the elements stated above is absent. A classic example is the second element-someone has not be able to prove that a design professional has fallen below their standard of care in a dispute. Another example is a bit more esoteric. An intervening force that causes a break in the causation link (the third element stated above). Suppose an engineer designed a railing on a catwalk that ran between roof trusses in a sports facility, which was improperly anchored to the walkway. A spot light operator leaned on the rail and fell. The engineer's defense is that the catwalk's railing and the walkway were properly designed (proven by expert testimony), but the railing installation was faulty. Furthermore, a spotlight operator had damaged the same railing when removing a piece of equipment a month ago, and it was proven that it was never repaired. That improper installation and damage to the railing (proven by expert testimony) could break the causation link, and nullify the allegation of the engineer's negligence. (These facts are from a real case.)

Exposure to general liability, as opposed to personal liability, is a different matter. For example, say a visitor trips and falls while entering your office. They then sue you for the medical costs associated with their injury. Your general liability insurance can help cover these costs. In another example, say you work as a contractor and you accidentally damage a customer's valuable china while working in their home. Your general liability insurance can help cover the costs associated.

### Protection from Personal Liability

Transferring one's assets to a spouse may not be effective as another approach to provide protection, called professional liability insurance. Transferring assets to avoid personal liability would certainly cause a legal battle that may be lost. It would be especially troublesome if the design professional decides to transfer their assets after that they have been alleged to have been negligent, which could be considered a fraudulent conveyance. Claimants have their own process to convince courts that your assets should be within their reach. Consult with your legal counsel when considering this approach for personal protection.



**Insurance Policy**  
An insurance policy is  
A contract between the ins  
the insured known as the  
the insurer promises to  
change for an init  
- loss

<http://www.thebluediamondgallery.com/highlighted//insurance-policy.html>

For architects and engineers, the principal means of protection from personal liability is professional liability insurance for negligent acts, which covers the firm and all of its employees. That protection is limited to the limits of insurance that a design professional purchases and maintains. Thus, an architect or engineer may purchase professional liability insurance which transfers the risk of personal liability to their insurance carrier, except for their policy's deductible, and up to the amount of their coverage. If a lawsuit is filed against the firm, the attorney representing the client may also name the design professional in addition to their firm. However, the professional liability insurance carrier would defend both the individual and the firm, and the carrier would compensate both defendants after the deductible is paid up to the limits of the policy.

## The Ethics of Professional Liability Insurance

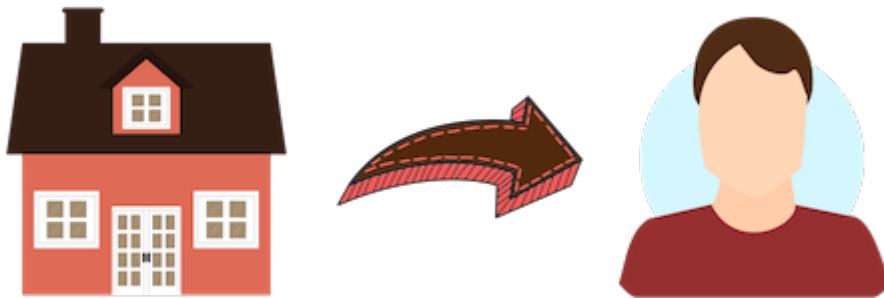
From an ethical perspective, should an architect or engineer be required to purchase and maintain professional liability, and also have an ethical obligation to inform their clients that they have such coverage? Conversely, should a design professional have an ethical obligation to disclose to their clients that they do not have insurance, either professional liability or other types of insurance? Professional codes of ethics and conduct for architects and engineers do not really speak to this issue, except in one instance in Ohio. The Ohio Administrative Code for architects, OAC section 4703-3-08 Professional Responsibility states that:

A registered architect or architectural firm shall, when providing professional design services to a public authority, have and maintain professional liability insurance or other assurance of financial responsibility as may be required by the public authority.

In other professions, and in other states, it may be an ethical obligation to inform their clients regarding the types of insurance that they carry.

## In Conclusion

Architects and engineers as licensed professionals, are always personally liable for their own negligent acts, errors and omissions. But, they may obtain a limited protection by purchasing and maintaining professional liability insurance with amounts of coverage that they determine as a business decision. Transferring assets to avoid personal liability, when you are a licensed professional, carries with it a thorough legal analysis with your attorney and account.



**About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB 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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Mark your calendars for Eric's upcoming Continuing Education Programs:

## **Conference Seminars:**



***“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.*



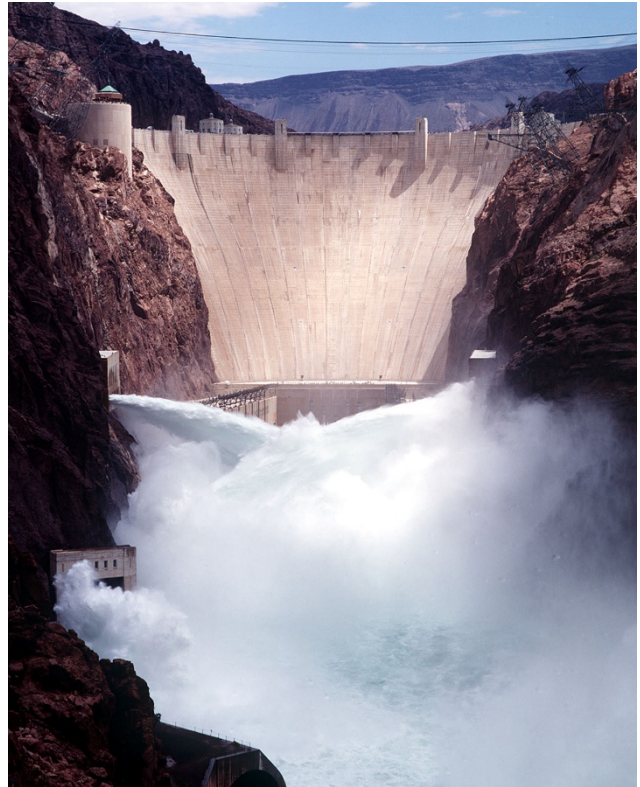
***“Practice Management Case Studies: From Disaster to Resolution”***

*AIA National Conference on Architecture 2019, Las Vegas, NV*

*June 5, 2019 - 1:00 p.m. – 5:00 p.m. Workshop*

FUN  
FACT:

The Hoover Dam was built to last 2,000 years. The concrete in it will not even be fully cured for another 5,000 years.



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