

# BUILDING BLOCKS

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## ADVISING A CLIENT (BEFORE COMPLETION) THAT THE PROJECT WILL NOT BE SUCCESSFUL

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A professional/ethical dilemma—before the project's completion, should an engineer or architect advise their client that, despite their best efforts, their design and/or construction will not be as intended?

### A SENARIO COULD GO SOMETHING LIKE THIS:

The A/E (architectural/engineering firm) agreed in their professional services agreement that their

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project will achieve a certain level of LEED (Leadership in Energy & Environmental Design) certification. Their client required that the project achieve a “Platinum” certification.

*LEED certification is a globally recognized symbol of sustainability achievement and leadership. LEED is for all building types and all building phases including new construction, interior fit outs, operations and maintenance and core and shell.*



In the middle of the construction phase, the project manager was advised by its mechanical engineer that its HVAC system performance requirements will not achieve the Platinum certification. At best, the engineer believes that the system may achieve a Silver certification.

*Each rating system has four (4) levels of certification that attest to a building or neighborhood's quantity of robust, high performance green features. The four LEED certification level designations are **Platinum, Gold, Silver and Certified**, Platinum being the highest level of certification. (Emphasis added.)*

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## THIS UNSUCCESSFUL PROJECT HAS MORE THAN ONE DILEMMA

Ethically, the National Society of Professional Engineers (NSPE) states that:

### **III. Professional Obligations**

**1. Engineers shall be guided in all their relations by the highest standards of honesty and integrity. a.) Engineers shall acknowledge their errors and shall not distort or alter the facts. b.) Engineers shall advise their clients or employers when they believe a project will not be successful. (Emphasis added.)**

The American Institute of Architect's 2020 Code of Ethics & Professional Conduct, Rule of Conduct 3.301, states that:

**Members shall not intentionally or recklessly mislead existing or prospective clients about the results that can be achieved through the use of the Members' services, nor shall the Members state that they can achieve results by means that violate applicable law or this Code. (Emphasis added.)**

*AIA's Code Commentary: This rule is meant to preclude dishonest, reckless, or illegal representations by a Member either in the course of soliciting a client or during performance.*

In the scenario above (this is an actual project dilemma—not fiction), it was very poor risk management on the A/E's part to agree to achieve a certain level of LEED certification. The A/E should have insisted in its professional services agreement that the project's **goal** was that the project would **endeavor** to achieve a “Platinum” certification. A LEED project's design and construction has numerous variables, many of which are

outside of the control of an A/E. Notably, these include the performance of other project participants, availability of materials and labor, quality of construction, approvals by governing bodies, unknown conditions, etc.

Like a doctor or lawyer, they should never agree to achieve a certain result in their medical procedures or legal outcomes. And that is why professionals should not give a warranty or guarantee of the outcome of their services, expressly or impliedly (all design professional liability insurance policies exclude warranties and guarantees).

Lastly, legally, the concept of “anticipatory breach” would allow the client (project owner) to invoke this common law theory, and if the professional services agreement contained a termination clause, the project owner could void the contract as well. Then, the client could engage another A/E to try to resurrect the project’s requirement that the project would achieve a “Platinum” certification.

The American Institute of Architect’s Standard Form of Agreement Between Owner & Architect, Document B101 (2017) states that:

*§ 9.4 Either party may terminate this Agreement upon not less than seven days' written notice should the other party fail **substantially** to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination. (Emphasis added.)*

*§ 9.5 The Owner may terminate this Agreement upon not less than seven days' written notice to the Architect for the Owner's **convenience and without cause**. (Emphasis added.)*



<https://pixabay.com/photos/termination-cease-and-desist-letter-2473879/>

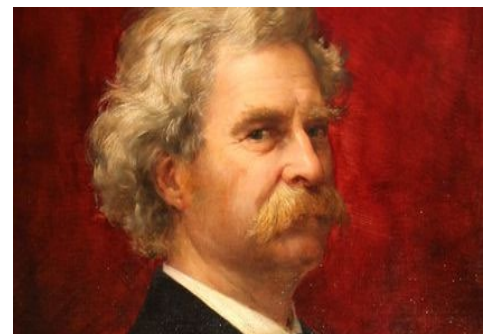
But, a prospective new A/E should follow the wisdom and risk management advice, to not agree to achieve a certain level of LEED certification. A level of certification can be a goal.

## IN CONCLUSION

Achieving a certain level of LEED certification is just one example of such of an A/E responsibility to inform their clients of results that are professionally achievable. At the same time, every A/E has ethical obligations towards their clients as well.

*“Always do right. This will gratify some people, and astonish the rest.”*

*Mark Twain, writer, humorist, publisher, lecturer, 1835 – 1910*



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## **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 15 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 34 years. As a Fellow of the American Institute of Architects and Chair/Hearing Officer 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.*

# A Fond Farewell and a Warm Welcome!

It is with mixed emotions that we are announcing Ken Windle's retirement at the end of August. Ken's friendly demeanor, dedication to his clients, and vast knowledge of the insurance business will be missed. We wish Ken all the best in his new ventures!

And that brings us to introducing you to our newest addition to the DesignPro Insurance team, Chuck Petretti! Chuck is excited to be serving the Cincinnati, Northern Kentucky, and Southern Indiana areas. Chuck's contact information:

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### ***“The Public’s Need for Energy—an Architect’s Understanding of Access to Energy”***

AIA Cleveland Webinar, 1 Hour HSW

September 24, 2021 – 12:00 pm – 1:00 pm



### ***“Client Contract Terms that an Architect is Asked to Agree that Negatively Impacts the Public HSW”***

AIA Cincinnati 2021 Education Summit

Webinar, 1 Hour HSW

November 19, 2021 – 12:00 pm – 1:00 pm

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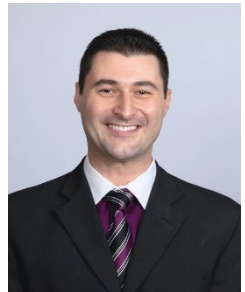
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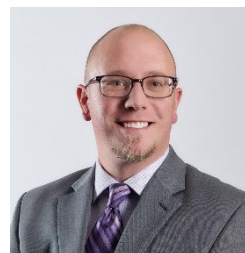
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