

Duty To Defend – How To Talk With Your Legislator

- The main point is that both public and private owners (our clients) want us to sign contracts that require us to defend the client for the mistakes made by others. But the real concern is that regardless of whether or not we sign, we are still liable, because of two very poor court decisions.
- This transfers the risk from the owner of the project to us and we could end up responsible for paying their legal fees even if it is determined in court that we did nothing wrong!
- This is a personal risk for design professionals, too, because they have to “stamp” the plans, and so they have no corporate veil, the liability goes directly to them, unlike contractors.
- Requiring design professionals (engineers, land surveyors, architects) to defend allegations against our clients made by others – (any third party we may have not even met!) - involved in construction projects may be unfair – but moreover, it is very bad public policy to have a design professional in essence serve as an insurance company!
- There is no insurance coverage available to design professionals for this sort of risk.
- Our (E&O) professional liability insurance only covers our errors and omissions - not others, and will not pay our client’s defense cost, except only to the proportional extent those costs are caused by our negligent acts.
- I have an example of a claim and contract language that illustrates the problem. (The best example is to give one of a real time when one had to pay to settle.)
- It is sound public policy for all persons and entities in construction projects to defend themselves against allegations of negligence or error. We will absolutely be responsible for our part, but it is not good policy for our firms to essentially operate as an insurance company.
- It is our desire that the Legislature revise the Duty To Defend obligation in construction contracts such that design professionals are responsible to reimburse a client for defense costs only to the extent that the design professional is found negligent through adjudication.
- We agree with the legislature as exemplified in previous legislative action (illustrated in the attachment), that entities should be responsible for their own scopes of work and not that of others.
- Requiring a design professional to accept uninsurable risk is bad public policy.