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## GOOD CONTRACTS ARE GOOD BUSINESS

Professional duties must be detailed in a written contract. The contract defines the design professional's duties to the client, and that creates responsibility. That responsibility, in turn, creates exposure. The duties form the basis of any judicial determination of negligence against the design professional. In other words, the courts will look to a contract to determine what the parties expected from one another. In the absence of a contract, the court will make a decision that may not reflect anybody's expectations.

### Good contracts allocate risk fairly

Throughout this guide we talk about 'fairness.' In some circumstances, one party to an agreement might have the economic power to dictate unfair terms to others. Since this creates risks that simply cannot be managed or insured, it is difficult to understand what long-term advantage the more powerful party has achieved. Under the worst circumstances, the weaker party may be forced to default and walk away from all its contractual obligations, leaving the other parties to the agreement to salvage what is left.

Good contracts allocate risks to the appropriate parties. For the design professional, one simple test of a contract clause is to find out whether the potential risk of that clause is within the scope of professional liability insurance coverage. An insurance company stays in business by covering reasonable risks. In today's competitive marketplace, no insurance company will willingly pass up business. If the risk cannot be insured, there is usually a good reason.

Contracts also contain risks that cannot be covered by professional liability or other insurance coverage. These are the business risks that every professional service firm faces in the normal course of practice. A key to a reasonable contract is one with business risks that are clearly identifiable and manageable. If a contract contains onerous terms and conditions that create unmanageable business risks, a firm should carefully consider the exposure. Many firms are unwilling to gamble by accepting unreasonable terms and conditions.