

# The Worst-Case Scenario Survival Handbook for Design Professionals

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RLI Design Professionals  
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# Course Description



For most design professionals, the “worst-case scenario” is a substantial professional liability claim. Evaluating past claims allows us to evaluate what went wrong and how public health, safety and welfare may have been compromised—almost always inadvertently.

Errors originate in proposed contracts; in interpretation of laws, codes, and regulations; in lender-requested documents; or in other ways. This course will address how these issues can be identified, assessed, and mitigated—for the protection of all.

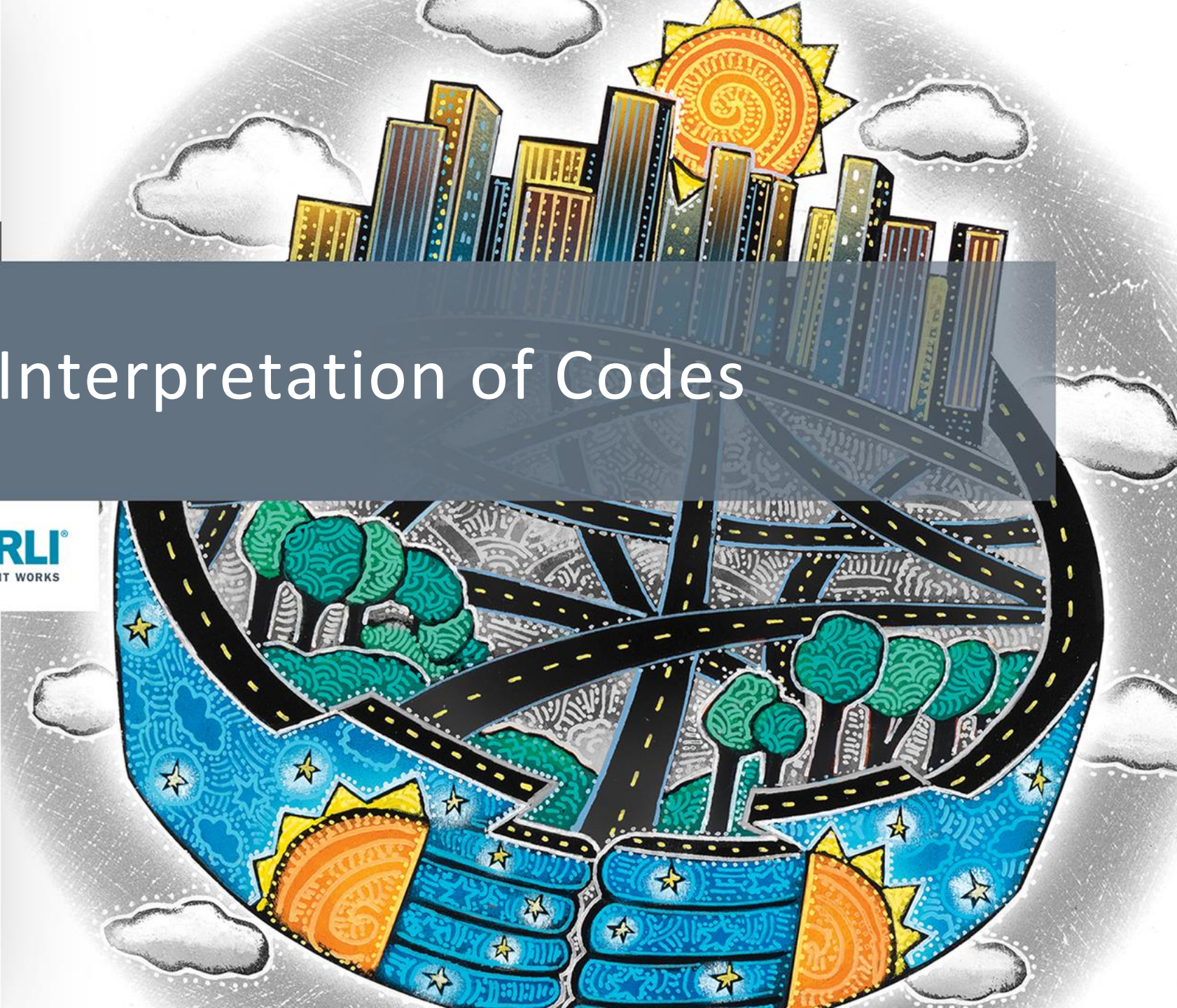
# Learning Objectives

## Participants will learn how:

- 1** Interpretation of codes can result in significant exposures for design professionals and their clients;
- 2** The legal process works and what rights each party has in it;
- 3** Contracts and other communications can more clearly address these concerns to protect the parties as well as the public; and
- 4** Owners, lenders, and other parties may need explanations from their design professionals about the risks and uncertainties of the design process.

# Interpretation of Codes

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# Interpretation of Codes

## Issues include:

### **CONTRACT FOR PROFESSIONAL SERVICES**

...

Consultant shall comply with all laws, codes, ordinances, rules, regulations, orders and other legal requirements....





# Interpretation of Codes

## The Explanation

**PROBLEMS** include:

- **Elevating** the standard of care—maybe to an unattainable level.
- **Insuring** an elevated standard of care.
- **Conflicting** laws, codes, ordinances, rules, regulations, orders, and requirements.
- **Changing** laws, codes, ordinances, rules, regulations, orders and requirements.
- **Applying** the laws, codes, ordinances, rules, regulations, orders, and requirements to the specific services being provided.

# Interpretation of Codes

## Example: ADA Standards

- Many **state** codes are based on **national** models, but there can be **significant variations** among the **state** and **local** code requirements.
- Design and construction **under state and local codes** **comply with the ADA** only when the codes provide accessibility that **equals** or **exceeds** the **ADA** requirements.
- When these laws are **inconsistent**, the burden falls on owners and design professionals to determine compliance with both federal and state laws.

# Enforcement of Codes

## Different Authorities

- The enforcement of state codes is the responsibility of state or local officials – usually through plan reviews and inspections.
- The ADA relies on civil rights enforcement through litigation in federal courts.
- Local officials do not have the authority to enforce the ADA on behalf of the federal government.

# Compliance with Codes

## Efforts to Facilitate

The ADA authorizes the Department of Justice, upon request of state or local officials, to certify that state or local accessibility laws meet or exceed the requirements of the ADA.

### This does NOT:

- Delegate ADA enforcement authority to the states.
- Eliminate an individual's right to seek relief through the federal courts.

### BUT:

- Effective enforcement of a certified code can mitigate the need for federal enforcement if new or altered facilities are accessible.
- If a lawsuit is filed, compliance with a certified code may be offered as rebuttable evidence of compliance with the ADA.

# Resources and Tips

## Contract Considerations

§3.2.1 The Architect shall review the program and other information furnished by the Owner, and shall [review laws, codes, and regulations applicable to the Architect's services](#).

§4.2.1 Upon recognizing the need to perform the following [Additional Services](#), the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner's written authorization:

...

.2 Services necessitated by the [enactment or revision of codes, laws, or regulations](#), including changing or editing previously prepared Instruments of Service.

.3 [Changing or editing previously prepared Instruments of Service necessitated by official interpretations of applicable codes, laws or regulations](#) that are either (a) contrary to specific interpretations by the applicable authorities having jurisdiction made prior to the issuance of the building permit, or (b) contrary to requirements of the Instruments of Service when those Instruments of Service were prepared in accordance with the applicable standard of care....

# The Legal Process and Rights

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# ACEC/AIA/NSPE Professional Liability Survey

## The Issues

	Liberty Mutual	The Hartford Global Specialty (formerly Navigators)	RLI	Victor O. Schinnerer & Company, Inc.	Berkley Design Professional	AXIS Insurance	Aspen Insurance	Professional Underwriters Agency (PUA), A Division of NSM Insurance Group	TMHCC	AXA-XL Design Professional	Travelers	Allied World Insurance Company	The Hanover Insurance Group	Beazley	Lexington-AIG
<b>10. Do you have coverage exclusions and/or underwriting restrictions for:</b>															
Residential and Condos	Yes	Yes	No	No	No	Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
Schools	Yes	No	No	No	No	No	No	No	No	No	No	No	No	No	
Geotechnical Services	Yes	Yes	No	No	No	No	Yes	Yes	Yes	No	Yes	No	Yes	Yes	
Structural Engineering Services	Yes	No	No	No	No	No	No	No	No	No	No	No	No	Yes	

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**11. Are there particular exposures for A/E professionals that may lead to higher rate increases than in recent years?**

	Yes	No	Yes		Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
<b>If yes, please explain:</b>	Traffic signaling		Accounts are underwritten on an individual basis. Heightened exposures, including claim trends, could lead to an increase in rates.		Yes, for firms engaged in higher risk project types like con or who have shown higher than average claims frequency or severity.			Residential project types and in particular, residential subdivisions		Because rate increases are determined by many variables including exposure. Any exposure that experiences a significant increase in severity and/or frequency would heighten the potential for rate increases. We continue to keep a close watch on exposures with potential for volatility such as residential, universities and sustainable design (client expectations vs. actual performance). Also a change in practice by the insured to more volatile areas of design or areas in which they have little or no experience could lead to higher rate increases. The economy as well as other market conditions and variables also impact rates, i.e. capacity.	Adverse claims experience or adverse project types	Habitational risk for sale to 3rd parties	Traffic engineering has largely been underpriced in the market despite the rise of severity claims in the past few years. I see this discipline being more debited in the coming years.	Yes, residential, claims history, structural and geotechnical firms. However, it is best to contact your Beazley underwriter for further information.	Traffic planning/control; Pipeline design/inspection



# Summary Observations on Claims

## Underwriters are seeing concerns with:

Condos, Residential Subdivisions,  
and other Habitational Projects

Geotechnical Services

Structural Engineering Services

Traffic Planning, Control, Signaling,  
and Engineering

Pipeline Design and Inspection

School and University Projects

Sustainable Design

# Legal Process and Rights: Dispute Resolution

## EJCDC E-500-2020—§6.07 Dispute Resolution (summarized)

- 1 **Negotiate** all disputes in good faith—30 days.
- 2 **Mediate** unsettled disputes—120 days.
- 3 If still unsettled, either:
  - **Arbitrate**
  - **Litigate**

# Dispute Resolution: Issues to Weigh

- No Dispute Resolution Method Selected in Advance
- Arbitration
- Consolidated Proceedings
- Waiver of Jury Trial
- “Home Field” Advantage
- Unfamiliar Venues

- Negotiation or Mediation as First Step
- Clear Rules:
  - AAA
  - JAMS
  - Governing Law

**Advice: Check with your Attorney!**

# Contracts and Communications to Address Concerns

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# Principles of Good Contracts

## Scope Definition: Issues

- Unknown Conditions
  - Hazardous Materials
  - Services by Others
    - Geotechnical Engineering
    - Surveying
  - “Construction Administration”
    - Inspection
    - Means and Methods
    - Safety
    - Undefined Submittal Review
  - Warranties and Guarantees
- Studies
  - Pre-Planning Services
  - Design Phase Services
  - Procurement Phase Services
  - Construction Phase Services
    - Observation
    - Responsibilities of Others
    - Eye on Completed Project
  - Excluded Services
  - Supplemental/Additional Services

# Principles of Good Contracts

## Innovative Design: Issues

- Products Rushed to Market without Adequate Testing for:
  - Environment
  - Longevity
- False Advertising
- Existing Products or Technologies with New Uses

- Objective Information from Manufacturers and Suppliers, including:
  - Warnings of Adverse Effects
  - Case Studies/Examples
  - References
- Pro/Con Analysis
- Contractor Qualifications

# Principles of Good Contracts

## Timing: Issues

- Inadequate Schedules
  - No “Right to Rely” on Existing Information
  - Differences in Conditions
  - Poor Submittal Schedules/  
Schedules Not Followed
  - “Time is of the Essence”
  - One-Sided Suspensions
- Allowances for Circumstances Beyond your Control:
    - Client Review
    - Consultant Coordination
    - AHJ Review
    - Contractor Delays
  - Force Majeure, including **pandemics** and **epidemics**
  - Notice of Contractor Claims

# Principles of Good Contracts

## Limitations of Liability: Issues

- One-Sided in Favor of the Other Party
  - Non-reciprocal bar against going after clients personally
  - Unwillingness to limit liability, even to insurance proceeds
- Mutual Waiver of Consequential Damages
- Limitation of Liability to:
  - Fee
  - Multiple of the Fee
  - Specific Dollar Amount
  - Available Insurance Proceeds



# Complexity of Contractual Issues

## Example: Consequential Damages

- Loss of use
- Lost opportunities
- Lost income
- Lost profit
- Lost financing vehicles
- Damage to business or reputation
- Lost management or employee productivity

# Contracts, Actions, and Documentation

## Contracts

- Clear scope of services
- No responsibility to inspect work for safety concerns or control/authority to direct the means and methods
- No right or duty to stop work

## On Site Actions

- Selectively choose meetings
- Don't direct contractor on how to do their job
- Report safety concerns to party in charge and follow-up with documentation

## Documentation & Records

- Keep and maintain detailed records
- Contract, notes, correspondence, field logs, etc.

# Explanations to Owners, Lenders, and Other Parties

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# Lender Consent Forms

## Issues include:

### ASSIGNMENT OF AGREEMENT AND CONSENT

...

If, following an Event of Default under the Loan Documents, Agent, on behalf of Lenders, any Lender, any purchaser at a foreclosure sale of the Improvements or transferee by deed-in-lieu of foreclosure (each a "Successor"), **shall elect at any time to complete any or all of the Improvements, any Successor may use Plans and the ideas, designs and concepts contained in the Plans in connection with such completion without payment of any additional fees or charges to Design Professional for such use.**

# Explanations

## What Does Your Contract Say About:

Ownership and Reuse of Instruments of Service?

Representations and Warranties?

Notices to the Lender?

# Resources and Tips

## Contract Considerations

§10.3 ...Neither the Owner nor the Architect shall assign this Agreement without the written consent of the other, except that the Owner may assign this Agreement to a lender providing financing for the Project if the lender agrees to assume the Owner's rights and obligations under this Agreement, including any payments due to the Architect by the Owner prior to the Assignment.

§10.4 ...If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with this Agreement, provided that the proposed consent is submitted to the Architect for review at least 14 days prior to execution...

# Other Resources and Tips

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## Circumstance

An event or occurrence from which an Insured reasonably expects that a Claim could be made.

When in doubt, report it!



# A New Resource for RLI Insureds: DPLEs on Demand!

Visit the **RLI Resource**  
+**Learning**  
**Center:**

<http://www.RLIRLC.com>

*(You can “Add to favorites” for easier future access!)*

Accessing your account is simple—

- Find your activation email from:  
[customerservice@enquironensights.com](mailto:customerservice@enquironensights.com)
- Your username is the email address that’s on file with RLI
- Call 877-568-6655 for help with setup or to reset your password

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Thank you for your time!

# Questions?

**This concludes The American Institute of Architects  
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