

# ProNetwork News

## Risk Management Tools for the Design Professional



Michael Welbel Vice President  
mwelbel@risk-strategies.com  
[www.mgwelbel.com](http://www.mgwelbel.com)



### Eric O. Pempus

Expertise in architecture, law and professional liability insurance, with a unique and well-rounded background in the construction industry, Eric has been a risk manager for the last 12 years. Prior to serving as a risk manager, he has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses 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 presented numerous programs in various venues across the US and Canada. Eric serves as the risk manager for DesignPro Insurance Group, a member of a/e ProNet.

### “Complying with all laws” during design and construction

*Eric O. Pempus, FAIA, Esq., NCARB, LEED GA*

Consider this situation: You have been awarded a commission to design a building for a new client. You propose using the AIA’s Standard Form of Agreement B101 as your owner-architect contract, but the client insists you sign a version of the B101 “with just a few minor changes.” You notice that one of those changes requires you to “comply with all laws, rules, and regulations,” rather than, as the B101 states, to “review laws, codes, and regulations applicable to the Architect’s services.” That changed language should be setting off alarm bells for you.

One of the most overlooked yet dangerous pitfalls for an architect is a provision in a legal document requiring a design professional to “comply with all laws, rules, and regulations” or similar language. However, such a provision can create a trap for an unsuspecting architect.

### The problems with “complying with all codes”

A large number of laws apply to the design and construction of buildings. These laws govern:

- life safety (national model building codes as well as local variations)
- fire protection
- accessibility (ADA as well as local requirements)
- zoning
- occupant safety (e.g., OSHA)
- sustainable design
- wetlands preservation
- public health
- historic preservation and
- employment (federal, state, and local).

*This information is provided as a service of a/e ProNet, an international association of independent insurance brokers dedicated to serving the design profession since 1988. We are dedicated to representing the best interests of our design clients as a trusted and impartial source of information on professional liability insurance, risk management, loss prevention and continuing education. Please visit our website [www.aepro.net](http://www.aepro.net) for additional information*

# ProNetwork News

## Risk Management Tools for the Design Professional

It may in fact be impossible to comply with all laws that apply to a particular project because those laws may have contradictory provisions. To illustrate this point, the Advisory Legal Opinion – AGO 93-40 from the Florida Office of the Attorney General, on the subject of “conflict between building code & firesafety code,” states that

*when the provisions of the applicable minimum building code and the applicable minimum firesafety code conflict ... the local building code enforcement official and the local fire code enforcement official [shall] resolve the conflict by agreement in favor of the requirement of the code which provides the greatest degree of lifesafety or alternatives which would provide an equivalent degree of lifesafety and an equivalent method of construction.*

Similarly, the General Services Administration’s (GSA) Codes and Standards states that

*[s]hould a conflict exist between GSA requirements and the GSA adopted nationally recognized codes, the GSA requirement shall prevail. All code conflicts shall be brought to the attention of the GSA project manager for resolution.*

Similarly, the Department of Public Safety, Bureau of Building Codes & Standards, State of Maine, states that when conflicts between codes arise the Bureau will make changes. But until such changes are made, an architect may not be able to comply with all laws.

Even national model codes can conflict with each other:

*Since the creation of the Technical Standards and Codes Board in 2009, the Board has reviewed several conflicts between the ICC Codes adopted and the NFPA Code. They have also made several amendments to the Code that was originally adopted. All of these changes should be reflected in the latest set of Chapters 1-6 that were done through Rule-making in the 126th Legislature...*

Furthermore, when architects agree to “comply with all laws, rules, and regulations” in either a modified B101 or a client’s customized contract, they may be agreeing to perform services beyond their expertise and normal responsibility. If “all laws, rules, and regulations” is construed to mean, for example, job-site safety, then OSHA regulations could apply, making architects responsible for work that is not covered under their professional liability insurance.

And finally, what does “comply with” actually mean? To receive a building permit, it is commonplace for an architect’s drawings and specifications to be reviewed by the agencies having jurisdiction over building code compliance. Normally, the plan review process generates corrections, with the agency citing code sections that were not met in the submitted plans, thus not “complying with all laws, rules and regulations.” Especially for large or complex projects, rarely is a plan review

# ProNetwork News

## Risk Management Tools for the Design Professional

returned with no corrections needing to be made. Is the architect in breach of contract if the initial plan review identifies areas of noncompliance?

### Standard forms of agreement and the architect's standard of care

The AIA Owner-Architect Standard Form of Agreement B101 (2007) recognizes that (1) there is a bewildering number of laws and codes related to design and construction, making it unreasonable to expect an architect to be an expert in all of them; (2) the codes themselves may contradict each other; and (3) not all the design- and construction-related laws and codes concern the architect. Thus, the B101 states, in Section 3.201, that

*[t]he 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.*

This effectively establishes the standard of care for architects relative to code compliance (the standard of care for architects being how other architects under similar circumstances, in the same time frame, and in the same locale, would be expected to perform). Agreeing to a “comply with all”-type clause elevates an architect's professional standard of care beyond what is typically insurable, and should be replaced with words such as “take into account” or “review.” There is considerable authority for this position.

The 2012 AIA Code of Ethics & Professional Conduct addresses this:

*3.101 In performing professional services, members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.*

NCARB's Rules of Conduct are recommended for Member Boards having the authority to promulgate and enforce rules of conduct. NCARB's Rules state that

*[i]n designing a project, an architect shall take into account all applicable state and municipal building laws and regulations. While an architect may rely on the advice of other professionals (e.g., attorneys, engineers, and other qualified persons) as to the intent and meaning of such laws and regulations, once having obtained such advice, an architect shall not knowingly design a project in violation of such laws and regulations.*

Many states follow NCARB's view. For example, the Ohio Administrative Code (OAC) 4703-3-07 (A)(2) requires that architects “take into account” all laws when performing their services. It does not require an architect to be perfect and “comply with all laws.” The lesson to be learned from NCARB and states like Ohio is that architects do not have to agree to such a clause, and that an architect who does could find it difficult or impossible to perform in accordance with the contract.

# ProNetwork News

## Risk Management Tools for the Design Professional

### **Certifications including compliance with all laws**

On some projects, the architect may be presented with the client's lending institution's Certificate of Consent for Assignment. This document may state that in order for the client's loan to be finalized for the project, the architect must certify that the project was designed and built in compliance with all laws, rules, and regulations, so that the architect's agreement can be assigned to the lender if the client defaults on the loan. Unfortunately, sometimes this certificate lists every conceivable law or rule, which may be well beyond the scope of the architect's services.

If you find yourself in the situation where your client is requiring you as an architect to certify that something is true, complete, and correct, and that the design "complies with all laws," push back. Satisfying this requirement exceeds the standard of care for which you are insured, and signing such a document may risk your insurance coverage. Your better option is to advise your client to delete such onerous "comply with all laws" language if they also require you to carry professional liability insurance—they can't have both. If that doesn't work, then at least define what is meant by "certify":

*As used herein, the word certify shall mean an expression of the Architect's professional opinion to the best of its information, knowledge, and belief, and does not constitute a warranty or guarantee by the Architect.*

### **Avoid the "comply with all laws" trap**

In summary, architects should explain to their clients why the "comply with all" language is problematic. First, there are so many laws, rules, and regulations affecting the building industry that they may at times conflict, and it simply is not possible for an architect to know them all. Second, laws are constantly evolving, sometimes even during the course of a project, making it impossible to comply with a moving target. And third, laws are subject to human interpretation. One code official's interpretation of a regulation may be different from another's, and code officials may change during the course of a project.

To a layperson it seems logical that an architect should "comply with all laws, rules, and regulations" for their projects. However, these clauses in legal documents are a pitfall that architects should avoid. The best approach is to negotiate with your client, explaining why it is inappropriate to require an architect to perform above the accepted standard of care.

# ProNetwork News

Risk Management Tools for the Design Professional

## Broker's Notes:

Visit [the a/e ProNet website](#) today for more excellent resources:

### [ProNet Practice Notes](#)

#### The Keys to Keeping a Project On Track



I understood, as the traditional casebooks teach in law school, that appellate decisions in commercial cases tend to focus on determining where something went wrong and deciding who should be blamed. Liability was the proverbial 'hot potato', something to be avoided at all cost. As a result, lawyers teach and are trained to concentrate on anticipating potential liability and finding ways to avoid or transfer it so their clients are not caught in its web.

### [Guest Essays](#)

#### Benefits of a Succession Plan for Your Business



You've worked hard to establish your business and plan to stay actively involved in its future success. So, why would you plan your exit from it now? Because, as the saying goes, if you fail to plan, plan to fail. You won't lead your company forever, and statistics show most businesses don't make it past the second generation of ownership due to the lack of a proper and thorough succession plan.

### [The ProNet Blog](#)

#### Richard Friedman Speaks at a/e ProNet's Fall Meeting



ProNet has held these fall meetings for more than two decades, but the goal and capacity of the meeting continues to evolve to meet the climate of the industry. This year, we're proud to host Richard Friedman, president of consulting firm Friedman & Partners as our guest speaker. [Continue reading...](#)

## Permissions:

This article was originally published as a white paper in 2016 by the American Institute for Architect's Construction Contract Administration knowledge community. Reprinted with permission from Eric Pempus and the AIA.

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.