

OAA Admission Course - 2014

### Legal Aspects: Contract Law and Professional Liability

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### Judicial Process

- 1) Generally by independent courts
- 2) Other entities exercising judicial functions
  - Workers' Compensation Board
  - Ontario Municipal Board
  - Discipline Committees (OAA)
- 3) All of the above are subject to review by courts



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### Court System



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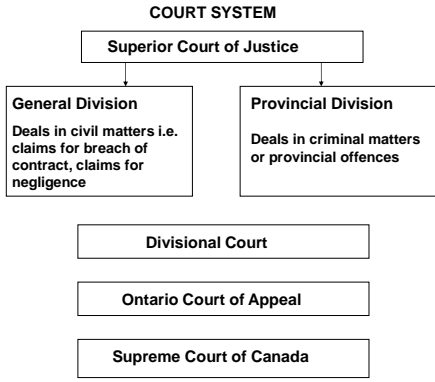
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### Alternate Dispute Resolution

- Most common forms are:**
- arbitration  
(Arbitrations Act; Arbitration Agreements )
  - mediation



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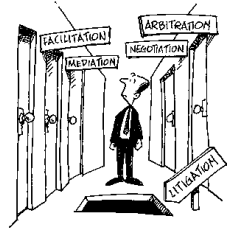
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### Dispute Resolution Spectrum



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### Dispute Resolution Spectrum

<b>Negotiation</b> Party to party	<b>Mediation</b> Third party intermediary facilitates negotiation	<b>Arbitration</b>	<b>Litigation in Court</b> Parties are adversaries presenting evidence before a judge
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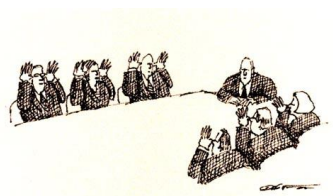
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### Mediation



The mediator sensed that the negotiations were in trouble.



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### Mediation

- Mandatory now for court proceedings commenced in Toronto and Ottawa
- Before a neutral third party
- Mediator does not decide merits
- Mediator utilizes “shuttle diplomacy” in an attempt to broker a settlement.



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### Mediation

- Parties must agree that they would both like to mediate their dispute
- Agree on a mediator, should be lawyer experienced in design and construction - Good ones a challenge to find.
- Prepare and exchange briefs setting out their positions and the facts
- Mediation itself is an informal process




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### Mediation

- Everything that is said is “off the record”
- Opening statement
- Opportunity to ask questions
- “Break out” into separate rooms
- Exchange settlement offers
- If there is a resolution, the parties record the settlement in written form




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### Mediation

- Low risk exercise
- Number of advantages
- Empowers the principals to take control of the settlement process
- Private process
- Cathartic opportunity
- Opportunity to reach a compromise solution and end legal proceedings




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### Mediation

- Permits the parties to emerge from their dispute without a clear-cut “winner” and “loser”
- Relatively expeditious
- Can also remain confidential




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### Mediation

- Situations when it is not appropriate to conduct a mediation
  - Not currently “ripe” for mediation
  - The parties do not yet have sufficient information – Discoveries may be required
  - Experts’ reports on critical issues are necessary
  - Emotional anger and pain too fresh




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### Mediation




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### Mediation

- Mediation can fail because:
  - one party or the other is so unrealistic and inflexible in their position
    - E.g. recent case: sole purpose building vacated by fitness club tenant. Architect blamed for \$5mm financial failure on basis that mold appeared in wet areas. The owner did its own interior finishes, badly.
  - Relief sought in the dispute, for example an injunction, is only available in court




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### Mediation

- Mediation can fail because:
  - One party wants a court decision to use as a precedent
  - One party has no interest in speeding up the resolution




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### Arbitration

- Closely resembles court process although less formal
- Arbitration can be as expensive as going to court but can also be a quicker process
- Arbitration is private whereas courts are public




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### Arbitration

- Trial out of court
- Parties select their own adjudicator
- A consensual process
- Often agree to arbitrate their disputes in advance
- Process generally more streamlined than a court case




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### Arbitration

- Like a courtroom trial with live witnesses, cross-examinations and legal submissions from lawyers
- Generally arbitrator's award is binding on the parties
- Arbitration agreement may provide for rights of appeal to court




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### Arbitration

- Advantages
  - Parties determine the process to be followed
  - Parties can choose their adjudicator
  - Allows parties to set their own schedule
  - Process is private
  - A less formal process




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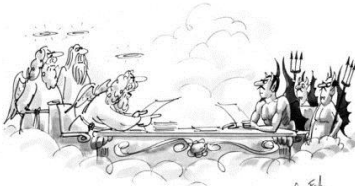
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### Arbitration



"Then it's agreed. Watson, Smith, Talles, and Wilson go to Heaven; Jones, Daniels, and Horner go to Hell; and Foster and Miller go to arbitration."



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### Arbitration

- Number of potential drawbacks
  - Arbitration does not create a legal precedent
  - Not well suited to cases where there are a large number of parties
  - Not appropriate where one party is seeking to delay



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### Arbitration

- A party may believe that it can exert more pressure on the other party through a public court proceeding



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# CONTRACT LAW



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## Elements of a Contract

- An agreement between parties
- “Consideration” from both parties
- Intention to create legal obligation
- Consensus ad idem (a meeting of the minds)
- Essential terms – eg. Scope of services, price, time, etc.
- What if the parties do not agree on minor issues?
- What if the contract is verbal?



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## Offer and Acceptance



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### Offer and Acceptance

- Acceptance must be in same terms as offer
- Offers may be withdrawn at any time before acceptance
- Acceptance of offer may be:
  - a) verbal;
  - b) written;
  - c) implied.




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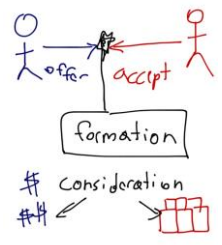
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### Consideration

- Most often money, but can be an act or promise
- May affect who may enforce the contract




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### Types of Contracts

- Written or oral
- "An oral contract isn't worth the paper it is printed on."
- Limited retainer




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### Why you should have a written contract

- 1) Minimize later disagreements
- 2) Precision of terms
- 3) Much easier to enforce




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### Claims for Breach of Contract

- To establish liability, one must prove:
  1. a breach of a term of the contract
  2. loss or damage caused by breach
  3. damage suffered within limits permitted by law




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### Case Illustrations




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### Case Illustrations

- Design Breach  
(building dimensions)
- Field Review Breach  
(Construction deficiencies)




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### NEGLIGENCE




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### Necessary Elements of Negligence

- 1) Duty of care owed by architect
- 2) Failure to meet standard of care
- 3) Damages or injury suffered
- 4) Damages must be caused by breach of standard of care




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### Duty of Care

- **Every person owes a duty of care to take reasonable care not to cause injury to persons whom they might reasonably anticipate would be injured by their act or omission, i.e. owners, inhabitants of buildings, users of buildings**




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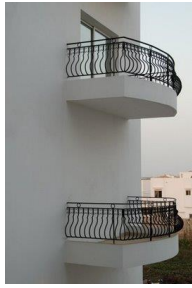
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### Standard of Care




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### Standard of Care

- **All architects must live up to the standard of care of the average, reasonably prudent architect possessing the ordinary skill and knowledge necessary to perform his or her duties**




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### Standard of Care

Standard usually determined through:

- Expert advice
- Rules of professional conduct
- Practice bulletins
- Geographic considerations
- Specialty considerations




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### Case Illustrations

- Personal Injury
- Over - Certification




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### Professional Liability Insurance

- Required to engage in the practice of architecture in Ontario; S. 40 *Architects Act*, s.48 Reg 27
- Minimums enough? – do you need excess insurance?
  - Size of the project
  - Size of staff
- Have you assumed the liabilities of others in your contract? Do they have adequate insurance?




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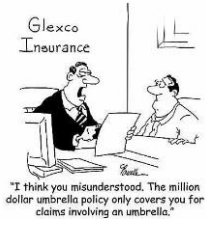
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### Coverage




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### Coverage

- **Indemnifies architects for legal liability arising from errors or omissions in the performance of professional services for others**
- **Covers:**
  - 1) Damages
  - 2) Legal defence costs – lawyers and experts – *[not all insurers]*
  - 3) Interest and costs awarded




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### Types of Claims

- Typical claims may involve
  - School boards
  - Condo corporations
  - Custom homes
  - Hospitals
  - Design/Build projects
  - Envelope issues
  - Delay claims
  - Extras
  - Co-ordination issues




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### How to give notice of a claim

- Notify Pro-Demnity insurance company
- Addressed to:
  - › Pro-Demnity Insurance Company
  - 111 Moatfield Drive
  - Toronto, Ontario
  - M3B-3L6




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### Anatomy of a Lawsuit

- Claim received from client, for example e-mail, demand letter or statement of claim
- Pro-Demnity insurance claim
- Your insurer appoints a defence counsel
- Provide details and relevant documents to insurer




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### Anatomy of a Lawsuit

- Prepare defence
- Prepare Affidavit of documents
- Attend examinations for discovery
- Attend mediation
- Attend Pre-trial
- Prepare for trial and attend trial




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Risk Management

- 1) Clear concise contract
- 2) No oral contract
- 3) Avoid terms which warrant or guarantee result
- 4) New means and methods of construction and new materials = large number of claims. Therefore warn client of risks.




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Risk Management

- 5) Evaluate whether the commission is appropriate. Do you have the capabilities?
- 6) Evaluate the client's resources
- 7) Skimping on general review = lawsuits - if client refuses to pay for general review or suggests skimping, think seriously about declining the contract
- 8) If not retained for review, do not drop in because you are in the neighbourhood




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Risk Management

- 9) Suggest client contract directly with engineers – Document 600
- 10) Sub consultants should be married to client/architect agreement
- 11) Sub consultants should have adequate insurance coverage Owners should agree and limit claims re: E&O of sub consultants




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### Risk Management




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### Risk Management

- 12) Limit liability through clauses in contract
- 13) Carefully consider prospect of a counter claim before sending account to collection, suing for fees or exercising lien rights
- 14) Be evenhanded and fair in dealing with contractor
- 15) Take care in signing standard progress certificates of lenders or surety companies




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### Closing Remarks

- Questions
- Comments
- Discussion




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