One of the most significant issues facing architects and engineers involved in construction projects is how to limit exposure to claims by construction workers for personal injuries that occur on site. Design professionals are often sued along with the premises owner, general contractor and others in third-party personal injury lawsuits alleging that the defendants negligently breached their duties to maintain a safe jobsite and to monitor the work performed by various subcontractors for safe conditions. These types of cases are very frustrating for design professionals because they almost always have no role in safety on the construction site or in overseeing the means and methods used in work performed on site, yet they must endure costly and time consuming litigation despite their lack of involvement in these matters, and risk adverse jury verdicts as happened in the Dorris case discussed in the Special Alert.

This article analyzes Illinois case law regarding the elements of liability for design professionals, and offers a road map designed to avoid being sued, and steps that can be taken before, during and after the Project to be best prepared for such an unfortunate circumstance. The guidelines are to ensure (1) that your contract is properly drafted consistent with your intended scope of work and containing appropriate limitations; (2) that you do not deviate from your contractual responsibilities; and (3) that in the event that you feel compelled to address an extra-contractual matter for ethical reasons, such as a safety issue, that it is handled properly and the project file is documented accordingly.

Illinois Case Law
The majority of Illinois cases addressing the requirements for creating a duty on behalf of architects and engineers toward construction workers arose under the Structural Work Act. The Structural Work Act was an Illinois statute that held any entity found to be “in charge of the work” subject to a form of strict liability for jobsite safety. The Structural Work Act was enacted in 1907, before the adoption of the Workers’ Compensation Act, and was repealed on February 14, 1995. Since the repeal, an injured worker/plaintiff (“plaintiff”) is required to prove that entities such as design professionals had a duty to provide jobsite safety and were negligent under a common law negligence standard.

Under Illinois common law, a plaintiff who seeks compensation for negligence against an architect or engineer must show not only that the design professional owed him a duty, but also that the duty was breached, and that the breach resulted in his injury. Wartenberg v. Dubin, Dubin & Moutoussamy, 259 Ill.App.3d 89 (1st Dist. 1994). The existence of a duty is a question of law to be decided by the court, and no recovery can be made if there is no duty. Joyce v. Matri, 371 Ill.App.3d 64, 72 (1st Dist. 2007). In order to prove the architect or engineer owes a duty under common law, a court will look to both the language of the contract and the factual record to

1 The AIA 2007 Code of Ethics & Professional Conduct does not address an ethical obligation of an architect to report an unsafe condition. Likewise, the National Society of Professional Engineers’ Code of Ethics for Engineers does not specifically address an engineer’s obligation to report an unsafe condition outside of contractual requirements; however, the NSPE Code in several places references the requirement that engineer’s services and duties shall hold paramount the safety, health and welfare of the public.

2 Plaintiffs may assert liability under Sections 343 and 414 of the Restatement (Second) of Torts. Section 343 imposes liability upon a “possessor” of property for damages from a “dangerous condition.” Section 414 imposes liability on a defendant who retained sufficient control over the “operative details” or incidental aspects of the injured person’s work.
see if the design professional did in fact contract to, or assumed a duty to, oversee construction site work and safety.

The contract between the owner and design professional will always be scrutinized to determine whether the architect or engineer had or assumed a contractual duty to maintain safety on the jobsite. See Tolan & Sons v. KKLM Architects, Inc., 308 Ill.App.3d 18, 26 (1st Dist. 1999). As stated by another Illinois court, where a defendant is charged with negligence for his failure to perform an act allegedly required by contract, the question of whether the defendant had a duty to perform under the contract must be determined from the terms of the contract. Holubek v. City of Chicago, 146 Ill.App.3d 815, 817 (1st Dist. 1986).

Illinois Courts have strictly enforced a design professional’s obligation to maintain jobsite safety when the language of the contract gives them a duty to ensure a safe jobsite and/or safe construction practices. For example, in Miller v. DeWitt, the Illinois Supreme Court found an architect had a duty to insist upon safe construction shoring methods because the contact terms provided that the architect had the right to interfere and even stop work if the said shoring was done in an unsafe or hazardous manner in violation of its contract with the owner. Miller v. DeWitt, 37 Ill.2nd 273, 284 (1967). The Miller Court specifically held that “if the architects knew or in the exercise of reasonable care should have known that the shoring was unsafe, they had the contractual right and corresponding duty to stop work until the unsafe condition was remedied.”

Illinois courts have held design professionals accountable even in the absence of contract language where an architect or engineer assumed a duty to maintain a safe jobsite. Typical circumstances involve the design professional becoming involved with controlling safety on the construction site or with controlling the operative details of the means or methods of the construction work on the construction site. Stopping the work for safety concerns, inspecting the work for safety issues or getting involved in jobsite safety may create an ongoing duty for the design professional to ensure a safe jobsite as is exemplified in the case of Emberton v. State Farm, 71 Ill.2d 111 (1978). In Emberton, the Illinois Supreme Court upheld a jury verdict against a premises owner and architect finding that the architect had a duty to maintain a safe jobsite because the architect effectively controlled work on the site as a representative of the premises owner. The Emberton Court specifically cited to the facts of record to reach its determination, including that the architect was on-site inspecting the work performed continuously for over three years; attended all weekly progress and coordination meetings; issued stop work orders at the direction of the premises owner; had given directions as to how to perform work and had reported unsafe conditions to the general contractor.

Illinois courts have acknowledged that design professionals can contract to, and provide services for, inspecting the construction work for compliance with specifications, and to require the contractor to remove or replace rejected work, without assuming a duty to ensure a safe work site. See Fruzyna v. Walter C. Carlson & Associates, 78 Ill.App.3d 1050, 1058 (1st Dist. 1979). Additionally, design professionals will not be held liable under Illinois law where the architect’s or engineer’s function is limited to general oversight activities. See McGovern v. Standish, 65 Ill.2d 54 (1976).

Design professionals have been successful in defending construction injury lawsuits when they can establish that they owed no duty to the plaintiff under the contract and that they did not assume any duty on the jobsite. For example, in Wartenberg v. Dubin, Dubin & Moutoussamy, the First District Appellate Court upheld a trial court’s granting of summary judgment finding that an architect had no duty and therefore no corresponding liability to an injured plaintiff based upon the contract language and factual record. The Wartenberg Court noted that it reviewed both the contract
and record and found “absolutely no evidence to support any assertion that [the architect] was in charge of the construction site where Wartenberg was injured or that it controlled any aspect of his work environment” to create a duty to plaintiff.3

Once a duty is established, the design professional’s conduct will be reviewed under a reasonable care standard. “Architects must exercise reasonable care in performance of their duties and may be liable to persons who may foreseeably be injured by their failure to exercise such care, regardless of privity.” See Miller v. DeWitt, above; see also AIA Document B101-2007 Standard Form of Agreement Between Owner and Architect, Article 2, Section 2.2 providing that the Architect “shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances [and the Architect] shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”

Road Map To Claims Avoidance
As demonstrated above, design professionals can avoid and effectively defend against personal injury cases filed by construction workers by following certain guidelines before, during and after a construction project.

1. Contract Language
There are a number of precautions design professionals can take to avoid litigation even before commencement of the construction project. The first and most important precaution is to carefully draft a contract that unambiguously conveys the scope of services being provided. As noted by the American Institute of Architects, letter forms of agreement are discouraged. The Owner-Design Professional Agreement should be clear that the design professional has no responsibility to either inspect the work for safety concerns or to control or direct the means and methods of the work done by the contractors on site. The contract should also explicitly state that the architect/engineer will not be responsible for jobsite safety, that the architect does not have the right to stop work on the site for safety concerns or any reason.4 Additionally, the design professional and consultants should be contractually indemnified by the General Contractor and made additional insureds under the General Contractor’s general liability insurance policy.

2. On Site Actions
Once the construction project begins, design professionals can protect themselves from litigation by following the word of the contract and, of course, exercising reasonable care in the performance of their professional responsibilities. Exercising reasonable care includes documenting the scope of work, including taking field notes and clearly documenting what actions were taken on site during each phase of the project. Also of note, a design professional must be sure to take thorough and consistent notes throughout the project, as a lack of documentation for any period of time may be used to imply or suggest that actions were not taken or that the architect’s or engineer’s role or duties had changed on site. Design professionals must keep complete records, document their project files and pay attention to detail in record keeping.

While on site, design professionals can also avoid creating a duty for on-site safety inspection by not holding or attending jobsite safety meetings, not directing or advising contractors as to how to perform their work and not stopping work for any reason. If an unsafe condition is observed, while there may not be a contractual obligation to report the condition, the most prudent way to both address the concern and to avoid liability is

3 Clausen Miller represented the architect in the Wartenberg case.

4 Many of the AIA Documents contain language providing protection to the Architect, at least in the contract language. In AIA Document B101-2007, Article 3, SCOPE OF ARCHITECT’S BASIC SERVICES, Section 3.6.1.2, for example, in relevant part provides that the “… Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work...."
to report the safety concern to the representative of the party who hired the design professional, who then in turn may address the issue with the General Contractor. The work should not be stopped directly by the design professional and the concern should not be brought directly to the attention of the construction workers to avoid the appearance of control. Any such safety-concern conversation with the representative should also be followed-up with a letter describing the conversation and indicating that the interaction regarding the safety concern does not in any way change the professional’s role on site or the duties of the professional under their contract, specifically referencing the contract language.

3. File Documentation and Records
One of the most important tasks for design professionals to avoid protracted litigation and potential liability for a construction accident is to keep and maintain detailed records even after the job is completed. Design professionals may be informed of a lawsuit well after leaving the jobsite or months or years after a construction project is completed. Once informed of litigation, having a complete and detailed file including all contracts, notes, correspondence, field logs and memoranda of any contact with the representative regarding safety concerns will aid in the defense of any injury claim. The file should include a complete copy of the contract attaching all referenced forms including the general conditions. Producing such materials early in discovery in the injury case can lead a plaintiff to consider dismissing a claim against the professional early in the litigation without participating in costly and lengthy discovery and will assist in preparing a successful motion for summary judgment.

Conclusion
Taking measures to avoid and otherwise be prepared for personal injury lawsuits from construction site accidents should be a part of business planning for design professionals. Adherence to the guidelines stated above will help to reduce the exposure, expenses, time, costs and headaches for architects and engineers. In short, Illinois law only requires that an architect or engineer perform their contracted work with professional skill and care under the circumstances. By expressly avoiding involvement in means and methods of work or safety issues, design professionals can effectively avoid the assumption of a duty and corresponding responsibility for construction site accidents.

Although the record is not yet available, it appears that the Engineer in the Dorris case reported an unsafe condition after-the-fact to the General Contractor. Clausen Miller defended an architectural firm in a case where the General Contractor argued that the General Conditions (A201/CM) were not incorporated by reference into the Owner-Contractor Agreement (A101/CM) because they were not attached as part thereof or referenced in Article 7, and therefore that Contractor did not warrant to Architect that all materials would be free from defect. See Resurgence Properties, Inc. v. W.E. O’Neil Construction Co., et al., Case No. 92 C 6618 (U.S.D.C ND Illinois 1995). Although we prevailed, the court’s opinion referred to other jurisdictions which allowed such an argument.