

When a Client Changes their OAA Member General | Changes at Different Stages | Exposure to Liability

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Summary

There are a number of issues to consider when the services of an OAA Memberⁱ and associated Certificate of Practice are terminated and another practice has been engaged to complete the project—there are regulatory and contractual matters, as well as legal issues, professional courtesy, and common sense.

Background

General

This Regulatory Notice addresses questions that frequently arise when, during the course of a project, a client changes the practice they have contracted for services. Whether you are having your services terminated, or are contemplating a commission to complete a project started by another practice, a number of issues need to be considered. Among them:

- Termination status;
- Regulatory requirements under the [Architects Act](#);
- Use of documents;
 - Copyright (documents and designⁱⁱ)
 - Credit for authorship
 - Payment to previous OAA member
- Liability; and
- Different client on project – see [Practice Tip – PT.01](#).

When the services of a practice are terminated and the client elects to proceed with the completion of the project engaging a different practice, the [Regulation](#) under the *Architects Act* requires a certain procedure be followed. The procedure entails a written notice from the client to the subsequent “Practice Bⁱⁱⁱ” that the services of the previous “Practice A^{iv}” have been terminated. The subsequent Practice B is required to send a letter to Practice A, stating that Practice B “*has been engaged on the same building project for the same purpose by the same client.*”

Termination may occur one year from the date of substantial performance or total completion of the work^v as stipulated in the client/member contract or at any time during a project and can be for any number of reasons such as:

- Termination of the agreement by either party;
- The death of either party;
- Bankruptcy of either party;
- Failure of either party to fulfil contractual obligation;
- Client suspending or abandoning the project; or
- Change in ownership of the project.

In some cases, the termination might be a breach of contract, in which case the offended party may wish to consider legal proceedings for recovery of damages.

The Regulation does not require Practice B to ensure that Practice A's accounts with the client have been discharged in full. Practice B cannot be expected to be the arbiter between Practice A and the client, nor is Practice B necessarily privy to Practice A's contract, the extent of services performed, etc.

In the event a client does not give assurance that Practice A's services have been appropriately paid, or agrees there is a dispute over fees, then Practice B must advise the client that documents/design relative to the dispute cannot be used until the dispute is resolved and disposition of the documents in question agreed to.

Changes at Different Stages

In general, where Practice B has been engaged to continue with a project for the same purpose by the same client as Practice A whose services were terminated, and Practice B has complied with the relevant sections of the Regulation under the *Architects Act* and is satisfied that the documents of Practice A may be used for the purpose intended, a number of issues relative to liability need to be considered.

1. If termination of services occurred at completion of site plan approval, but prior to completion of schematic design, the conceptual design to the point of termination can be expanded upon to schematic design and subsequent stages by Practice B. Credit should be given to the originator of the conceptual design. Site plan agreement should be complied with or, in the alternative, a new site plan agreement should be applied for with amendments requested by the client. This latter course, and its inherent consequences, should be discussed with the client before proceeding.
2. If termination of services occurred at Practice A's completion of schematic design but prior to design development, Practice B may continue into design development and subsequent stages provided that the regulatory requirements have been met. New drawings should be prepared by Practice B incorporating changes (if any) that the client agrees to or initiates. Appropriate credit should appear on documents, site signs and subsequent publications for schematic design by previous Practice A.
3. If termination occurred at completion of design development, working drawings and specifications can be proceeded with on new drawings under Practice B's title block. Appropriate credit to Practice A should be given.
4. If termination occurred part way through working drawings, a judgement has to be made as to the extent to which Practice A's documents can be used in application for building permit or for construction. If nearly complete and sealed, they may form part of application for building permit and contract documents supplemented by Practice B's documents with appropriate cross referencing and credit. If a relatively small percentage is complete, it may be more effective to start over with all documents prepared by Practice B.

Unless given specific authorization in writing to do so by Practice A, Practice B must not draw on or alter Practice A's drawings or documents.

5. If the working drawings have been completed but were not issued for building permit or construction, they may be issued with supplemental documentation prepared by Practice B. Ordinarily, Practice B must neither alter nor apply seal and signature to Practice A's documents.

If the municipality requires the documents of Practice A to be sealed, there are two options:

- a) Arrange with Practice A to seal the documents (on the rare case where the termination was due to death or disability of Member A, it may be possible to have someone in Practice A's office seal the documents, attesting to the fact that the documents were prepared under the personal supervision and direction of a member.)

OR

- b) Create the documents under Practice B's title block and seal, giving appropriate credit to Practice A.
6. If termination occurred after application for building permit but before construction, the municipality will want to know who will be the OAA member and practice responsible for general review during construction. Usually, both practices will separately communicate to the municipality—Practice A to advise they are no longer engaged and Practice B to execute the commitment form. Adjustments required by the municipality before issuance of permit

and subsequent additional details, change orders, etc., will be prepared separately by Practice B, cross referencing where necessary to Practice A's documents. Changes to Practice A's permit application documents by Practice B are not permitted.

7. If termination occurred during construction, the same principles as outlined above under item 6 would apply. The municipality is to be notified, and new documentation is to be separate from previous practice's work.

Exposure to Liability

Contractually, an architectural practice is liable for the services it performs. If a problem occurs due to negligence of either practice, it is likely both practices and affiliated members will be called upon to address the situation. At issue may be whether Practice B knew or ought to have known of the deficiency in Practice A's documents. Practice A may claim that there was no opportunity to correct the deficiency in a timely fashion, not having been advised of the problem until a later time.

Although the contractual relationships of Practice A to client, and Practice B to client, may address the issues of liability, neither A nor B can limit exposure to third-party liability through contract with their client. In some third-party liability situations, Practices A or B may be able to claim over to the other member for compensation.

Procedures

Changes at Different Stages

The following procedures are a generalization and may differ to your specific circumstances. Read the noted reference and, if appropriate, discuss with your legal counsel.

1. If you are approached by a client to provide services for a project and you have reason to believe that another OAA practice has been engaged for the same project for the same purpose by the same client, you are required by the Regulation to neither solicit nor accept the engagement until the other practice's services have been terminated and you have been so advised in writing by the client.

It is always good convention to ask your client whether another practice has been engaged on the project prior to accepting a commission.

2. Send a letter to Practice A stating that you are advised in writing by the client that Practice A's services have been terminated and that you have *"been engaged on the same building project for the same purpose by the same client."*
3. Although not mandatory, it is a desirable professional courtesy for Practice B to communicate with Practice A and explain the essence of the regulatory letter being sent to them. Practice A may understandably be upset (or, in some cases, relieved), and Practice B may learn from the experience. Practice B should notify Practice A that appropriate credit for the work performed by Practice A will be noted on Practice B's documents, construction signs, and future publications in brochures and articles.
4. In some cases, Practice A might take the position that this credit is not appreciated, in which case it would be prudent to record, in writing, the agreed position of both practices on the matter of credit for authorship both during and after the project.
5. If the terminated practice prohibits you from using their documents/design, promptly notify the client and request clarification. The client may give you a written statement to the effect that they have paid the previous member for the services represented by the documents/design that you intend to use. You are ordinarily entitled to rely on the client's statement to permit you to proceed. You are not required to seek the other practice's permission if you have the client's statement.

If the client does not issue such a statement to you, or agrees the terminated practice has not been paid for the service represented by the documents you propose to use, you may still proceed with the project but must not use the other practice's documents/design. You should inform the client that you cannot use the documents/design and if it is essential that you do use them, advise the client to resolve the matter before you can continue with that part of your services which will require the documents/design.

6. Ensure that your client/member contract has articles concerning termination.
7. Review your subconsultant agreements and ensure they provide for extension of your obligations (under your agreement with the client) to your subconsultants.

Exposure to Liability

If your services have been terminated, you may, depending on the stage of development, seek indemnification from the client for your work—expressing that it may be unreasonable to expect you to be held liable for misinterpretation of your documents.

If you are continuing a project started by another practice, you must consider the ramifications relative to the stage of development. Discuss with your client the work that has to be completed, set out in your agreement the extent of contractual liability you and your consultants can be reasonably expected to assume.

Review the attached appendices and, if applicable to your situation, reduce your exposure to liability by writing an appropriate letter to and obtaining indemnification from your client.

Remember that you cannot contract out of third-party liability, and that whatever indemnity you obtain is only as good as the client's ability to fulfil the obligation.

ⁱ **OAA Member:** Every person licensed by the Ontario Association of Architects is a member of the Association, subject to any term, condition, or limitation to which the licence is subject. R.S.O. 1990, c. A.26, s. 5 (1).

ⁱⁱ **Design** means a plan, sketch, drawing, graphic representation or specification intended to govern the construction, enlargement or alteration of a building or part of a building as defined under the *Architects Act*.

ⁱⁱⁱ **Practice B:** The OAA Certificate of Practice that is being subsequently engaged for the same building project for the same purpose by the same client.

^{iv} **Practice A:** The OAA Certificate of Practice whose services have been terminated.

^v **Work** for the purpose of this Regulatory Notice, work means “artistic work” and “architectural work” as defined by the *Copyright Act*, any instrument of service provided by a practice including design and other documents.

References

Architects Act, R.S.O. 1990, c. A. 26

Regulation 27, R.R.O. 1990, O. Reg 27

OAA Standard Form of Contract 600

“The Canadian Law of Architecture and Engineering” second edition, by McLachlin, Wallace, and Grant – published by Butterworths

Copyright Act

The OAA does not provide legal, insurance, or accounting advice. Readers are advised to consult their own legal, accounting, or insurance representatives to obtain suitable professional advice in those regards.
