
PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 05/2005: "Negotiating Insurance Requirements with Your Clients"

May, 2005



Negotiating Insurance Requirements with Your Clients

*Article courtesy of Professional Liability Agents Network (PLAN)
with special thanks to XL Insurance for contributing to the article*

Contracts drafted by your clients often have detailed and many times confusing insurance requirements. Specifications regarding types and limits of coverage, as well as special endorsements, can be mind-boggling.



To make sense of and meet these requirements, you'll need a basic understanding of the various types of policies and coverages clients ask for. You'll also need to know what your standard policy covers and what extra coverages can be added by endorsement.

Design professionals must be prepared to negotiate impossible or ambiguous insurance requirements in client-

written contracts. Often, clients will ask a design firm to provide the types of coverages they routinely get from their contractors.

These coverages can be difficult or impossible for you to obtain and may not provide the results your client is looking for. An experienced insurance broker who specializes in the design profession

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INSURANCE BROKERS

License No. OA99520

450 B Street, Suite 1800

San Diego, CA 92101-8005

Phone: 619-234-6848 ♦ Facsimile: 619-234-8601

Web Site: <http://www.cavnac.com>

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- **Sexual Harassment Training (AB 1825 Compliant)**
Thursday, May 12th, 11:30 AM—1:30 PM
- **Fleet Safety**
Friday, May 13th, 9:00—11:00 AM
- **Sexual Harassment Training (AB 1825 Compliant)**
Tuesday, June 7th, 9:30—11:30 AM
- **Fall Protection Program & Personal Protective Equipment**
Friday, July 22nd, 9:00—11:00 AM
- **Sexual Harassment Training (AB 1825 Compliant)**
Friday, August 5th, 9:00—11:00AM
- **Workers Compensation Claims Management**
Friday, September 16th, 9:00—11:00AM
- **IIPP: How to Set Up an Effective Training Program**
Friday, November 4th, 9:00—11:00AM

**All training sessions available to our clients
Seating is limited!**

Contact **EILEEN JOLLY** by e-mail ejolly@cavnac.com or by phone at **619-744-0551** for information about upcoming training sessions. ✨

Insurance Requirements (Continued from page 1)

can assist you in educating your clients regarding appropriate insurance coverages for design firms and negotiating reasonable coverages and rates on your behalf.

It is also important that your consultants meet either your specific insurance requirements or the requirements imposed on you in the prime agreement. It is not uncommon to see provisions in the prime agreement that require you to "flow down" the terms and conditions of that agreement to your subconsultants.

Design firms also need to consider the types of insurance coverages they should demand from their clients. Again, we can help you identify the types of insurance coverages you should require of your clients before accepting a new project.

Contractual Insurance Requirements

Take the initiative when dealing with insurance requirements for a new client or project. Offer your client an insurance agreement in simple, straight-

forward language that says you will attempt to maintain appropriate insurance with reasonable limits of coverage. Then list current coverages on an addendum attached to your contract. For starters, XL Insurance suggests the following language:

Insurance

During the term of this Agreement, the Design Professional agrees to provide evidence of insurance coverage as shown on Addendum _____ attached hereto.

The addendum should include a qualifying statement such as: *"In accordance with the terms of this Agreement, the Consultant shall attempt to obtain and maintain the following insurance policies with coverages and limits as indicated."* Then list the coverages and limits for the types of insurance required, including the following.

Professional Liability Insurance

Most client insurance requirements begin with professional liability coverage. Professional liability insurance protects designers from claims arising from negligent acts, errors or omissions allegedly committed in the performance of their professional services. Professional liability policies have several unique features that both you and your clients should be aware of:

- Policies are written on a **claims-made** or a **claims-made and reported** policy form. Both of these policies cover claims made against a design firm during the policy period and require that the claims be reported to the insurance carrier in accordance with policy terms. To be covered, such claims must have arisen from acts, errors or omissions occurring after the **retroactive date** stated in the policy.
- The **retroactive date** is the date on which you originally obtained your professional liability insurance coverage. To keep its retroactive date in force and have *prior acts* coverage, a design firm normally must maintain continuous coverage. In other words, if you go uninsured for a period of time and then get a new PL policy, you could lose coverage for your acts prior to the new policy's inception date.
- Professional liability policies have annual **aggregate limits**. That means the yearly policy

limit purchased is the **total** amount the insurer will pay for all defense costs and indemnity payments regardless of the number of claims made during the policy period.

- Professional liability policies are **expense within the limits** policies (except in the state of Vermont). This means that after you meet your deductible, any additional defense costs paid by your insurer will decrease the policy limits available for payment of that claim or other claims.

Be aware that clients often confuse professional liability insurance with general liability insurance. Thus, they may try to insist that you have the same coverage and stipulations they require of their contractors. For example a client may demand that they be included as an "additional insured" on your professional liability policy. This cannot be done for a number of reasons, including the fact that the client is not a licensed design professional.

Also, clients may insist that you guarantee to maintain a certain level of professional liability coverage for an extended time. Because of the volatility of the insurance market, it is best not to provide such guarantees. Instead consider offering a contractual clause similar to this example provided by XL Insurance:

Professional Liability Insurance

The Consultant agrees to attempt to maintain professional liability coverage for the period of design and construction of the Project, and for a period of _____ years following substantial completion, if such coverage is reasonably available at commercially affordable premiums. For the purposes of this Agreement, "reasonably available" and "commercially affordable" shall mean that more than half the consultants practicing the same professional discipline in the state where the project is located purchase such coverage.

Commercial General Liability

Another frequently required type of insurance is commercial general liability (also called comprehensive general liability, CGL, or public liability). This coverage insures your firm against liability claims for bodily injury and property damage aris-

ing out of your nonprofessional activities and business operations. For example, this policy provides coverage should a visitor slip and fall while visiting your offices.

Many coverage amendments, or endorsements, that cannot be added to your professional liability policy can be provided under your general liability policy. You might be able to provide your clients with endorsements they believe will give them additional protection under your policies, such as Waiver of Subrogation or being named an Additional Insured.

General liability insurance is sometimes combined with property insurance (covering furniture, fixtures and real property) in what is called an "office package policy." Such packages often include additional coverage for other exposures common to a professional practice. An office package policy often represents an economical form of coverage for smaller firms with standard insurance needs.

Workers Compensation

Workers compensation is a no-fault insurance that protects employers and employees when workers are injured, become ill or are killed on the job as a direct result of their employment. Workers compensation insurance is paid for by the employer and provides benefits for medical costs and lost wages. Although workers compensation insurance is required by statute in every state, client contracts often require proof that the design firm carries such coverage.

Clients may ask that endorsements they typically require of their contractors be added to your workers compensation policy. Availability of endorsements such as Waiver of Subrogation and Additional Insureds varies from state to state and insurance carrier to carrier. We can help you educate your client regarding such endorsements and negotiate contract language that provides appropriate coverages that are available from your insurer.

Automobile Liability

Clients often require evidence of automobile liability insurance, whether or not you are likely to use vehicles on the project. If you have a business automobile insurance policy, this requirement can be met by providing certificates of insurance. How-

ever, if employees drive and insure their personal automobiles, you may face a problem. Private passenger auto insurance companies will not likely issue certificates of insurance or name a client as an additional insured.

Non-Owned and Hired Automobile Liability

A client may impose a contract requirement to provide evidence of *non-owned and hired auto coverage*. This is insurance you would carry for automobiles your firm does not own – such as employees' cars used on company business. This type of insurance provides liability coverage for your firm above and beyond the primary limits carried by the car owner. This coverage often is attached to a firm's owned automobile policy or its office package policy.

Hired auto liability provides liability coverage for automobiles you rent in the name of the firm for company business.

Foreign Projects Coverage

Many insurance policies provide coverage only in the United States (and perhaps U.S. territories and Canada). If a project is in a foreign country where coverage is not provided under your existing policies, separate foreign coverage insurance may be needed for workers compensation, general liability and/or automobile liability.

Professional liability policies often provide or can be endorsed to provide international or worldwide coverage. Check with your agent before undertaking any foreign project.

Owner Insurance Provisions to Contracts

Since clients require verification of insurance coverage maintained by design firms, it's only fair that architects and engineers receive similar verification of the insurance their clients are maintaining, as well as the coverage secured by the contractor.

Following is sample terminology regarding client and contractor insurance coverage you can review with your attorney and possibly adapt in your contract. The article references are to an AIA Owner/Architect agreement (1997 B141), and these clauses should be revised as necessary.

2.9 – Owner's Insurance Requirements

2.9.1 – *Owner shall secure and maintain either commercial general liability insurance or owners and contractors professional liability insurance providing coverage for bodily injury, property damage, and personal injury for the owner's liability in the amounts of \$_____ per occurrence and in the aggregate. Such coverage will include contractual liability, personal injury liability, and advertising liability.*

2.9.2 – *Owner shall secure and maintain on behalf of Owner and Owner's Employees Workers Compensation Insurance including Employers Liability coverage. Employers Liability coverage shall be maintained with limits of at least \$_____ per bodily injury, each accident, and \$_____ disease each employee, \$_____ disease policy limit.*

2.9.3 – *Owner shall secure and maintain on behalf of Owner, Architect, and Architect's Consultants and as their interest may appear Builders Risk Insurance on this project with limits in accordance with the project value.*

2.9.4 – *Owner shall require that the Contractors Commercial General Liability Insurance name the Owner, Architect, and Architect's Consultants as additional insureds. Owner shall require the Contractor to forward certificates of insurance and appropriate endorsements confirming this to all parties.*

Conclusion

It is crucial to review and negotiate the insurance terms of any contract entered into with a client. Design firms should not hesitate to specify the coverages they expect the client, contractors and other parties to secure in order to provide proper protection.

Don't hesitate to call on us if you have questions or require assistance in either reviewing or negotiating specific insurance provisions. ✨

***Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

Tips for Screening Prospective Clients

By Michael Strogoff, AIA, *Negotiating Strategies* Publisher
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Most design professionals have had clients whom they wish they had never met. Likely, initial signs warned of a lurking problem. But because early clues often go unheeded, design professionals may suffer months or years of agony placating difficult clients while telling themselves, “*I should have known.*”

When screening and negotiating with prospective clients, observe the following red flags:

- **The client is reluctant to meet.** If a client insists on conducting negotiations via letters, faxes or e-mails rather than face-to-face, they probably place a low value on the relationship or the importance of effective communication. You will likely face an uphill battle throughout your commission.
- **The client is inflexible or unwilling to negotiate.** Statements such as, “*our contract is not changeable*” or “*other architects (or engineers) have signed this*” indicate an unwillingness to collaborate, and this attitude will last well beyond the negotiation.
- **The client doesn’t listen to or respect the design professional’s opinion.** Clients need to trust design professionals as their advocates and valued team members. While it’s their prerogative not to accept a design professional’s recommendations, successful relationships require mutual caring and respect.
- **The client undervalues architects or engineers.** These clients might jokingly say things such as, “*If they let me, I could get this project done without an architect*” or “*Architects make too much money.*” Be warned — they wouldn’t make these statements if they didn’t believe them.
- **The client has unrealistic expectations,** such as that design professionals should deliver an error-free set of documents or reimburse clients for the full cost of change orders.
- **The client assigns a representative who doesn’t have the authority to make decisions.** During a negotiation, you will be at a disadvantage if the representative must seek approval from the client between meetings. (The client can easily reject proposals when you are not physically present.) And if the representative must obtain approvals throughout the project, design professionals can expect untimely decisions, delays and poorly communicated second-hand information.
- **The client is reluctant to disclose available information to the A/E team.** Imagine if architects and engineers, based on what they deemed appropriate, parceled out portions of their construction documents to contractors.
- **The client’s contract is unreasonable or heavily biased in favor of the client.** Unreasonable contracts are indicative of unreasonable or distrusting clients.
- **The client or its representatives lack integrity.** Clients that mislead others, tell people conflicting information, play design professionals off of one another or act dishonestly in other ways have only their interests in mind.
- **Discrepancies exist between a client’s verbal statements and what they will commit to writing.** Clients will gladly include in a contract statements they intend to stand behind.
- **The client is fee shopping.** Clients that select architects and engineers based primarily on price don’t appreciate the value design professionals provide and are more prone to initiating claims against them.
- **The client has champagne taste and a beer budget.** Clients whose expectations are higher than their budget allows will likely be disappointed with your recommendations or solutions.
- **Your gut tells you not to proceed.** Follow your instincts. If it doesn’t feel right, it probably isn’t.

Remember, the easiest time to jettison a questionable client is before you start working with them. ✨

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*This article initially appeared in **Negotiating Strategies**, the monthly newsletter for design professionals and their advisors with practical, proven techniques for negotiating better and more profitable agreements.*

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