



Topics Concerning Buyers of Commercial Insurance

MSP C 04/2009 – “Getting Paid... in a Slow Economy”

April 2009

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# Getting Paid... in a Slow Economy

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and Professional Liability Agents Network (PLAN)

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Poor Pay seemed like a good client. You competed among four other firms to earn his business, and the project went well... at first. The project is now nearly complete, but you haven't been paid for the last two months.

Initially you avoided raising this issue because Poor Pay was a new client and you didn't want to upset him. But after three months, the outstanding amount reached an unacceptable level. It finally rose to the boss's level, and he insisted that you collect what was owed.

When you finally did talk to Poor Pay, he indicated that he was not really happy with certain aspects of your services. A month later, you still hadn't been paid, and at this point you felt that you had no other choice than to sue Poor Pay for fees.

A month after you sued Poor Pay, you were served with a countersuit for negligence. But... oh, by the way... Poor Pay is willing to drop his countersuit if **you** drop your suit for fees. You are owed \$250,000 and you know it may cost that much to defend the negligence counter-suit... how in the world did it come to this?

## What Can You Do to Avoid Such a Situation?

Careful client selection is a cornerstone of risk management. In bad economic times, it becomes paramount. As difficult as securing new clients is, it is imperative to avoid the temptation to take on any project offered when business is slow.

Instead, check a potential client's history of litigation with other firms. Examine financial statements. Consider the viability of the work itself. How are similar projects progressing in your locale?

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Assuming the client and project check out, your next line of defense is your contract.

## Contractual Rights to Be Paid

There are contractual measures you can take to increase the chances of being paid and to help avoid the problem of a countersuit related to client nonpayment.

Add language to your client agreement that spells out payment provisions for services rendered and your rights to remedies in the event you are not paid according to contract terms. The more precisely you define the details of these payment terms and your right to enforce them, the more likely you'll receive prompt payment — and the less likely your client will consider a counterclaim. Work with your legal counsel to draft the following contractual terms.

## Billing and Payment Terms

Your billing and payment terms should address the following issues:

- Retainer — Require the client to make an initial payment upon execution of the agreement. Hold the retainer and apply it to the final invoice.
- Payment Terms — Specify the timing of your invoices, e.g., weekly, monthly or upon completion of project phases. Specify the period of time for payment (e.g., upon delivery, net 30) and when payment is considered past due. It is always advisable to specify that payment for services rendered shall be due regardless of any subsequent suspension or termination of the agreement by either party.
- Interest — Establish interest due on late payments and how that interest rate is accrued. Also set how future payments are applied — e.g., first to accrued interest and then to the unpaid principal.
- Collections — Address how any collection costs will be recovered. Contractual clauses often

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## Risk Management Seminars

2009 Series

450 B Tower, 450 B Street, Suite 1800, San Diego, CA 92101-8005

- 10 Legal Traps for the Unwary  
Friday, April 24, 2009 — 8:00 - 10:30 a.m.
- HR That Works Overview  
Friday, May 15, 2009 — 8:00 - 10:30 a.m.
- Workers Compensation 101  
Thursday, May 21, 2009 — 8:00 - 10:30 a.m.
- Navigating the Leave of Absence Minefield  
Friday, May 22, 2009 — 8:00 - 10:30 a.m.
- Sexual Harassment Prevention Training  
Satisfies AB1825 requirements  
Friday, June 12, 2009 — 8:00 - 10:30 a.m.
- Certified Ergonomic Evaluation  
Advisor Program  
Friday, June 19, 2009 — 8:00 a.m. - 2:30 p.m.
- All You Ever Needed to Know about  
Unemployment, Disability and Family Leave  
Friday, June 12, 2009 — 8:00 - 10:30 a.m.

All training sessions available to our clients  
Reserve early / seating is limited! \*

For more information about upcoming seminars  
Contact Darcee Nichols at [dnichols@cavignac.com](mailto:dnichols@cavignac.com)  
or 619-744-0596

\* NOTE: Due to the popularity of our seminars and limited seating, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

specify that the client agrees to pay for all collection costs incurred, including legal fees, collection agency fees, court costs, reasonable consultant staff costs, and other expenses.

## Use a Satisfaction-with-Services Clause

If possible, incorporate a satisfaction-with-services clause in your contract. Such a clause can help you in the event a client fails to pay a subsequent invoice and later claims dissatisfaction with your entire range of services.

Essentially, the clause states that your client's payment of an invoice shall be taken to mean that they are satisfied with your services to date and that they are not aware of any deficiencies in your services unless otherwise noted.

## Withholding Fees for Disputes

Refuse to allow your client to include contract language that permits the withholding of all fees for disputed invoices. If the client insists on a clause regarding disputed fees, make sure it reserves your right to collect fees on all undisputed portions of the invoice.

Set a time limit (e.g., within 10 business days of receiving your invoice) for notification of any objection or dispute regarding the invoice. Require that the client identify in writing the specific cause of the disagreement and the amount in dispute. Also require that the portion of the invoice not in dispute be paid according to your payment terms.

Your contract should specify that any disputes over an invoiced amount will be settled according to the dispute resolution provision of your contract. Require that interest be paid on any disputed invoice amounts that are subsequently settled in your favor.

## Suspension of Services

One of the most effective contract provisions for getting paid on time requires the client to pay any undisputed due portion of the bill within a specified period or otherwise face a curtailment of your services. But first, check with your attorney to determine whether such language is enforceable within your state.

If you can use a suspension-of-services clause, have it specify that if your client fails to make payments when due under your contract terms, you have the right to suspend your services upon reasonable notice to your client (e.g., when payment is 60 days late.)

The clause should also state that you will not be liable to the client for any costs or damages that may result from your suspension of services due to nonpayment. Agree to resume your services upon payment in full of your latest invoices. The clause should state that upon resumption of services the time schedule and compensation will be



equitably adjusted to reflect any delays or additional costs caused by the suspension of services.

## Termination of Services

When all else fails in your efforts to collect fees due, you should have the right to lower the final hammer – the termination of your contract. A termination-of-services clause should state that the client's failure to make payments to you for services rendered in accordance with the payment terms of the contract constitutes a material breach of your agreement and this material breach is cause for termination of the entire agreement.

## Withholding Transfer of Documents

For design professionals, consider making payment in full for services rendered a condition of transferring the ownership of your design documents to the project owner. This condition often serves as effective leverage to ensure you receive your final payment. Similarly, you might make payment of all due invoices to date a condition for you submitting documents for permit approvals and other activities during the course of construction.

Work with your attorney to develop payment terms and language best suited to your firm's unique needs. Check out the advice offered by your professional societies as well. Once you have language in place, seek to apply it consistently among all of your clients.

## Be Wary of a Resistant Client

Be wary of any potential client who balks at signing any language that protects you from nonpayment.

Occasionally, however, clients may have legitimate problems with specific obligations of your payment terms. For example, a client's billing and accounting procedures may require it to extend the length of invoice payment beyond 30 days. A client who wants to pay in 60 or 90 days should expect to pay a premium for that luxury.

If the client balks at accepting a termination-for-nonpayment clause, as opposed to objecting to its specific terms, be aware that the client may be contemplating slow or no payment and does not want you to have the ability to suspend or stop services. In such cases, you have to ask yourself, "Do I really want to deal with this client?"

By using appropriate contract language with real teeth and by following a consistent, well-designed billing and collection system, you can minimize the risks of write-offs and slow pay accounts as well as threats of retaliatory liability claims.

## Pay-When-Paid Clause

When it comes to payment terms, subconsultants have the right to be treated by the prime as the prime wants to be treated by the client. The prime expects to be paid promptly for work done for his or her client; so does the subconsultant.

In some instances, however, a prime consultant may feel the need to insist on a pay-when-paid provision in its agreement with subconsultants. In such cases, the subconsultant should consider accepting such an agreement as long as the contract language provides adequate protection. For example, the pay-when-paid clause should have an outer limit by which time payment must be made, whether the prime has been paid or not.

Consider these elements when drafting a pay-when-paid clause:

- The schedule of submitted invoices to the prime consultant – e.g., monthly, quarterly, by project phase.
- An approval process of the invoice and method for resolving disputes.



- The method and timing of the subconsultant's invoices being submitted to the client.
- The payment schedule once the prime is paid by the client – e.g., the subconsultant is paid within ten days of the prime receiving payment from the client.
- The time limit within which the subconsultant is paid for services regardless of whether the client pays the prime – e.g., within 90 days of services rendered.
- Any interest due the subconsultant for payment beyond the contractual terms.

If a prime consultant and subconsultant enter into a joint venture sharing the risks and rewards of working with a client, then each may share the risk of nonpayment. However, in a typical consultant-subconsultant relationship, the subconsultant has the right to expect to be paid within a reasonable time, whether the prime gets paid or not.

## Surviving Hard Times

A counterclaim filed over fee disputes is one of the fastest growing areas of litigation. The chances of nonpayment and subsequent litigation only increase during bad economic times when clients face illiquidity and must pick and choose who gets paid on time and who doesn't.

Adding protective language to your client agreements not only helps reduce the chances of such counterclaims, it enables you to judge your clients attitude regarding contract provisions that give you the ability to enforce the agreed-to fee and payment schedule for your services. ✨



**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.

# Avoid Work Station Problems

## Tips to Stay Healthy and Comfortable

By *Stuart Nakutin, CSA, COA, CET, WCCP, CHMC*  
Director of Safety & Claims, Cavignac & Associates



A personal computer, desk, and chair – commonly called a “work station” – can be your worst enemy if not properly designed. Long hours of repetitive typing or data entry can create pain or fatigue in the arms, back, neck, and wrists, as well as cause eye strain. Most problems of this nature are caused by a lack of flexibility to adjust the chairs or desks to suit the operator. Below are general guidelines for work stations.

### Tables or Desks

For fixed-height tables and desks, the top should be about 27 inches high, and the table top no thicker than one inch. Ideally, a height-adjustable table or desk should be used. Small “wells” or recessed areas for the keyboard are **not** recommended.

Edges and corners should be round. The area for the user’s feet should be at least 27 inches wide by 27 inches deep.

### Computer Monitors / Screens

Height and position of computer monitors/screens should be adjustable. The viewing distance from the user’s eyes to the screen should be between 17 and 25 inches, but never more than 27 inches. The center of the screen should be 10-20 degrees below the horizontal plane of the operator’s eyes.

Copyholders are highly desirable. They should be located directly to the side and at the same height of the screen. Adjustability is important.

### Chairs

The seat height should be easily adjustable from 15-20 inches above the floor. The seat should be at least 16 inches wide, preferably 18-19 inches. Seat depth should not be more than 17 inches (16 inches is preferred). The seat should tilt backward slightly, but not more than 7 degrees.

The angle between the seat and back should be about 100-120 degrees. The seat should be fairly firm and the padding should not compress more than 1 inch when seated. The back should have a lumbar support located about 9-10 inches above the seat.

The front edge of the seat should be rounded downwards. Casters appropriate to the type floor covering are desirable.

### Accessories

A wrist rest or a chair with arms should be provided for those who prefer it. In order to maintain good circulation, a foot rest should be available for those whose legs are not able to comfortably reach the floor. Task lighting should be utilized to maintain levels in the 30 to 50 foot candle range. This provides bright enough light for close work and viewing detail.

Take a few minutes to look at your work station. Adjust your chair to the proper height, check the monitor height (raise or lower if needed), and request a copyholder if you need one. A comfortable work station will make your job easier and more productive.

### Suggestions for Reducing Your Exposure to Carpal Tunnel Disorder (CTDs)

- Take a tip from athletes – do warm-up exercises before beginning work.
- Plan ahead! If you will be doing a job that is awkward, think of ways to make it easier.
- Rotate your work position to change how muscles are used during your work shift.
- Use the proper tool for the job to avoid awkward movements and the need for overexertion.
- Take a rest break when fatigue sets in. Just a few minutes can make a difference.
- Carefully stretch tired or overworked muscles to improve circulation and relieve tension. ✂

## Did you know?

As part of our ongoing Risk Management & Risk Control Services Program, Cavignac & Associates offers Ergonomic Evaluations to individual firms on a fee basis.

Stuart Nakutin will offer a Certified Ergonomic Evaluation Advisor Training Program to train individuals in this art on Friday, June 19th. For more information, contact Stuart at [snakutin@cavignac.com](mailto:snakutin@cavignac.com)



Articles courtesy of Cavignac & Associates Employee Benefits Department

## LIVE WELL, WORK WELL

### Respect Your Mother!

**M**other Earth, that is! Earth Day is April 22. But you don't need a complete overhaul to your lifestyle in order to make a difference. There are several minor things you can do in order to help conserve the Earth's resources:

#### On the Job

- Turn off the lights when you leave a room at the end of the day. Even better, install sensors that can detect when someone enters a room and turn off lights automatically when there is no activity for a specified period of time.
- Shut off faucets tightly; report any leakage to your supervisor or building maintenance immediately.
- Only print out e-mails when necessary. Whenever possible, use the back side of pages when printing.
- Turn off the actual power strip instead of simply the piece of equipment itself.
- Do you work in an office that has televisions in the reception area? Assign the person who stays latest to turn them off at the end of the day. If you are a 24-hour business, consider shutting off several monitors during non-peak business hours.
- Bring your lunch to work in a reusable lunch bag. Not only is it Earth-friendly, it's healthier too!

#### At Home

- Use Energy Star®-rated light bulbs and appliances. These are proven to use significantly less energy than those not branded.
- Purchase nontoxic cleaning products and biodegradable soaps.
- Pay bills online rather than through the mail. You will be more likely to get your bill in on time, and save the cost of a stamp as well!



- Utilize a “green” dry cleaner, who only uses natural products.
- Make sure to find out from your city council how to dispose of old batteries and CFL light bulbs properly; most communities recycle these and do not allow them to be thrown in the trash. ✨



**D**id you know that April is Cancer Control Month? Furthermore, were you aware that you can eat specific foods to significantly reduce your risk of cancer? It's true! Try incorporating the following into your diet:

- Dark, leafy green vegetables such as **romaine lettuce** and **chicory** contain carotenoids, a form of antioxidant that removes cancer-causing agents from the body. They also are rich in folate, which reduce the risk of lung and breast cancer.
- **Grapes** contain resveratrol, thought to stop cell damage before it starts.
- Decaffeinated **green tea** contains flavonoids that slow or prevent the development of colon, liver, breast and prostate cancer cells.
- **Soy** contains isoflavones that protect against bladder, cervix, stomach and lung cancer. Try soybeans as a healthy and filling snack.
- **Whole grains** contain fiber, antioxidants and phytoestrogen compounds. Making whole grains part of your everyday diet can reduce the risk of every kind of cancer. Look at the ingredients in the bread and cereal you buy, and try to choose those that list whole grains as one of the first ingredients. ✨



## Give LTC Some TLC

It's not pleasant to think about, but chances are, you or someone you love may require long-term care (LTC). It may be wise to consider a Long-Term Care insurance policy.

According to a recent study by Georgetown University, the cost of LTC will triple by the year 2050. Some tips on LTC insurance:

- The number one most important factor when considering LTC insurance: Make sure you can afford the premiums!
- While LTC coverage may seem expensive, put it into perspective: The average cost of a private room in a nursing home is \$77,380 *per year*.
- Consider a policy with no premiums; instead, choose to pay in full upon retirement. It may be a huge chunk to pay at that point, but you will not have to worry about making a monthly payment thereafter.
- Keep in mind, there is a chance you may need LTC at a younger age due to an unforeseen illness; the Kaiser Family Foundation reports that of the 10 million Americans who needed LTC in 2007, 42 percent were *under* the age of 65. ✨

## Green Machine Smoothie

Change the title to "Green Monster" Smoothie, and it's likely your kids will go wild for this nutritious and energizing drink!

- 1 cup of fresh spinach leaves
- ½ cup frozen pineapple
- 1 small banana
- 1 6-oz. container of yogurt (*try to find Greek yogurt, which has twice the protein and fewer carbs than regular yogurt*)
- 3-5 ice cubes
- Lemonade or orange juice (use sugar-free or diet lemonade if possible)

Blend together and serve – and that's it! Perfect for before or after a workout.

Recipe courtesy Chris Freytag; [www.chrisfreytag.com](http://www.chrisfreytag.com)

## HR Tidbits...

### Is Your I-9 Information Current?

- Is your company using the recently updated I-9 (Rev. 02/02/09) that became effective April 3, 2009?
- Is it available in both English and Spanish?
  - To download the English version, click: <http://www.uscis.gov/files/form/i-9.pdf>
  - To download the Spanish version, click: [http://www.uscis.gov/files/form/I-9\\_Spanish\\_Rev\\_01-29-09.pdf](http://www.uscis.gov/files/form/I-9_Spanish_Rev_01-29-09.pdf)

An excellent Questions and Answers document is provided by the U.S. Department of Homeland Security which explains what the changes are and why they were made. You can download this document at:

[http://www.uscis.gov/files/article/I9\\_qa\\_12dec08.pdf](http://www.uscis.gov/files/article/I9_qa_12dec08.pdf)

The person at your company responsible for processing the I-9s will find the recently revised (04/03/09) **Handbook for Employers, Instructions for Completing the Form I-9 (M-274)** to be an extremely valuable risk management tool pertaining to I-9 issues. It is a must read! Download at:

<http://www.uscis.gov/files/nativedocuments/m-274.pdf>

### COBRA and the American Recovery and Reinvestment Act of 2009

Whether you are a COBRA or Cal-COBRA employer you need to know about and stay informed on this subject. There is an excellent two-hour Webinar on this subject on the HR That Works Web site which we will make available to you if you are not yet up to speed on this topic.

There are also forms and other written materials available on HR That Works which can assist you with compliance. Please contact Sandee Rugg at [srugg@cavignac.com](mailto:srugg@cavignac.com) for a temporary password to the site. ✨



# Community Bulletin Board

*"Neighbors helping neighbors in San Diego"*



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- ✧ Walk for Animals  
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