



# Construction Industry Update

MSP PL -03/2011 "Where There's Construction, There's Litigation—How to Survive the Battle"

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Construction Industry Update Newsletter

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## Where There's Construction, There's Litigation — How to Survive the Battle

By Pamela J. Scholefield, Esq., P.E.

SCHOLEFIELD, P.C.

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This may not be true with every project, but the construction industry is — and always has been — a hotbed of litigation. This is an unfortunate aspect of construction in America. Once a construction dispute starts to snowball downhill, it tends to take with it any and all persons that touched the project, even the engineers and architects. Heading towards litigation is almost a guarantee that the road will be rough and loaded with traps for the unwary.

### Three-way tie

Regardless of the type of project — a custom home, commercial building, wastewater treatment plant, power distribution system, or a highway system — there are three common levels of participation: owners, design professionals, and builders/contractors.

What ties them all together are the contractual relationships and legal obligations between the parties. From an overall project standpoint, each player's input has a direct effect on the other two. An owner provides funding. A design professional creates detailed and buildable plans. A contractor turns the vision into reality. If any of the three participants do not perform, they can doom a project. It is truly a symbiotic relationship.

### Red flag warnings

The first clue that something may be going wrong is that one of the parties starts documenting everything. Red flags should go up when notices start appearing frequently. Don't ignore them. It may just be a sudden surge in project management discipline,



but be skeptical and expect the worst, here's why: He (or she) with the best documentation wins.

With the ease of email, there is no excuse as to why you can't shoot off a quick email to confirm an oral decision that is made at a meeting or during a teleconference. Don't rely on other people or requests-for-information to document the story. There

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are too many decisions that are made on the fly, at job site meetings, and in teleconferences that are not tied to any specific RFI. These meeting notes and e-mails may end up being critical pieces of evidence if something is delayed, built wrong, or costs more.

### Just the Facts

It is extremely important to remember when sending emails to avoid making personal opinions, such as the state of the project or frustrations with workmates, contractors, etc. Your personal opinions often become your professional opinions by opposing parties. Don't expect privacy, and write as if your emails will be reviewed by a judge — no sarcasm, no derogatory remarks, no slamming the owner, engineer or contractors, and — above all — no admissions that you, or anyone who works with you or for you, have done anything wrong!

These rules should apply even with your own internal emails. We have heard how internal emails can provide the "smoking gun" that wins or loses a case. This goes beyond e-mails and other written communications, so think before you speak as well. The rules for emails should also apply to any oral communications or conversations you have with anyone throughout the project. Remember, your litigation opponent-to-be may be documenting these impromptu meetings as well. The bottom line is that a good defense begins with a good offense. And, you may find yourself taking the stand and answering questions about a project two or three years after the project's completion.

Knowing this now may make your life easier when you are testifying. So, at a minimum, you should adopt the following as standard procedures for doing business:

1. Document all meetings and then forward to all attendees for review. If you are an attendee and you receive meeting minutes that you believe to be incorrect, make your changes known in writing and forward to all attendees.



### 2011 Risk Management Series

- Identity Theft  
Friday, April 8, 2011  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am
- Disaster Recovery  
Friday, April 22, 2011  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am
- HR 101: What You Really Need to Know  
Friday, May 13, 2011  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am
- Sexual Harassment Prevention Training  
Friday, June 3, 2011  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am

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

Register for upcoming seminars

Contact Darcee Nichols at [dnichols@cavignac.com](mailto:dnichols@cavignac.com) or call 619-744-0596

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

2. Document all informal meetings, such as jobsite walks or impromptu discussions. All you may need is something as simple as an email summary of what was discussed.
3. Keep a paper copy of all electronic correspondence. Don't let emails get deleted before printing out copies.
4. Take plenty of photos when you walk the site. Note the dates when taken. Copy them to CD's for archiving.
5. Handle RFI's promptly. Keep an accurate and updated RFI log.

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License No. OA99520

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

✦ Phone 619-234-6848

✦ Fax 619-234-8601

✦ Web Site [www.cavignac.com](http://www.cavignac.com)



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6. Handle submittals promptly. Keep an accurate and updated submittal log.
7. Date-stamp all correspondence you receive, from any source.
8. Document communications with engineers, utility personnel, suppliers, consultants, construction managers and project managers, etc.
9. Document all attempts at communications; use phone logs for conversations, sent and received, and voice messages. Set your fax machine to print out confirmations and keep failed fax transmissions. Keep a copy of returned email deliveries.
10. Document the dates that plan revisions are issued and request a delivery receipt from all recipients if you are the issuer. Require that all revisions on plans be noted and clouded in.
11. If appropriate, keep a daily jobsite journal with as much detail as possible, even if not required.
12. Document and retain all calculations used for the project, such as engineering, labor, material, or down-time estimates.

This will help support any claims. Better safe than sorry. Some of you may think that all this is overkill for smaller projects, but you're going to wish you had done this if you're ever caught in the middle of a construction lawsuit — regardless of the value of the project. Plus, the better documentation you have, the easier it is for your attorney to represent you. Making your attorney's job easier will reduce your legal bills in the long run.

And, most people find that litigation creates quite a bit of unwanted personal stress. So, the better your defense, the less stress you will suffer as you wind your way through the long process of litigation. Nothing you do will make litigation enjoyable, but at least you will know you are in the best possible position to defend yourself when needed. ✨

About the Author:

Scholefield holds an active PE license in Colorado, an undergraduate engineering degree from the University of Florida, and received her JD from the University of San Diego. She served on the executive committee for AGC San Diego and currently teaches a graduate level claims course at the J.R. Filanc Construction Engineering and Management Program in the Department of Civil, Construction and Environmental Engineering at San Diego State University.

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e-mail jschabarum@cavnac.com





Articles courtesy of Cavignac & Associates Employee Benefits Department

## LIVE WELL, WORK WELL

### Healthy Colors

The 2011 National Nutrition Month® theme is “Eat Right with Color,” which means making sure your plate has a variety of color and nutrients at each meal. The American Dietetic Association offers a color guide:

**Red** fruits and vegetables are heart-healthy, help immunity, and may reduce cancer risks. Try beets, cherries, cranberries, pomegranate, red grapefruit, red potatoes, red grapes, rhubarb, tomatoes, and watermelon.

**Orange and yellow** fruits and vegetables contain nutrients that contribute to vision and immunity, and may reduce the risk of some cancers. Great choices include apricot, cantaloupe, carrots, grapefruit, mango, papaya, peach, pineapple, sweet potatoes, yellow corn, and yellow peppers.

**Green** fruits and vegetables have a high antioxidant potential. Try artichoke, asparagus, avocado, apples, broccoli, grapes, green peppers, honeydew, kiwi, lime and spinach.

**Blue and purple** fruits and vegetables may have antioxidant and anti-aging benefits. They may also help with memory, urinary tract health, and reduce cancer risks. Great choices include blackberries,



blueberries, eggplant, plums, purple cabbage, and raisins.

**White, brown and tan** fruits and vegetables promote heart health and may reduce cancer risks. Try bananas, brown pears, cauliflower, dates, mushrooms, onions, parsnips, turnips, white potatoes, white corn, and white peaches.

Choose a variety of colors when shopping for produce. And if you’re looking for fruits or vegetables that are out of season, opt for frozen or dried choices that are available throughout the year. Colorful meals are not only more flavorful, they contain a variety of nutrients that are essential to you and your family’s health.

For more information on National Nutrition Month, visit [www.eatright.org](http://www.eatright.org). ✨

### Watch for IRS Return Scams

Protect yourself from online identity theft and other scams that increase during the tax filing season by taking the following precautions. Tax return scams have been known to impersonate the logo, names and design of the IRS or U.S. Department of Treasury to mislead taxpayers and lure them into providing personal and financial information.

#### Watch for e-mails that:

- Threaten to add additional taxes or withhold the tax refund should you not respond to the e-mail.
- Request personal or financial information. The IRS does not request such information through e-mail, nor do they send any communication requesting tax account information, PINs, passwords or similar access information for credit cards, banks or financial accounts.

If you receive a suspicious IRS-related e-mail do not reply, do not open any attachments and do not click any links. Forward the e-mail to the IRS at [phishing@irs.gov](mailto:phishing@irs.gov). After forwarding the e-mail delete it from your inbox and outbox. ✨

# Community Bulletin Board

*"Neighbors helping neighbors in San Diego"*



## Monarch Schools

✦ Web Site



## Senior Community Centers

### Mission:

To provide quality and compassionate services for the survival, health and independence of seniors living in poverty

✦ Web Site



✦ Web Site



The San Diego Police Foundation supports the men and women who "protect and serve" by raising community awareness of important unbudgeted or "discretionary" needs that will improve crime-prevention and law enforcement efficiency. The Foundation puts your tax-deductible contributions to measurable work in local communities.

✦ Web site

✦ For more information, contact [info@sdpolicefoundation.org](mailto:info@sdpolicefoundation.org)



✦ Web Site

✦ Questions? Contact **Alicia Gettys** by phone at **619-232-7451** or e-mail [agettys@ymca.org](mailto:agettys@ymca.org)



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## Society for Design Administration

An Affiliate of the American Institute of Architects

### Mission:

The Society for Design Administration advances management and administrative professionals in the A/E/C industry through education, networking and resources.

✦ Web Site

✦ For more information, e-mail [vicepresident@sdasandiego.org](mailto:vicepresident@sdasandiego.org)