



# PROFESSIONAL LIABILITY UPDATE

A LOSS PREVENTION NEWSLETTER FOR THE DESIGN PROFESSION

MSP PL 01/2009 'Prudent Project Selection'

January, 2009



# Prudent Project Selection

Article courtesy of Professional Liability Agents Network (PLAN)

## Assessing Project Risk

An architectural firm in a small Midwest town was celebrating a new project. It was a condo conversion involving an historic hotel. Sure, the client had a history of being litigious, but he was so nice and so enthused with the innovative design. That enthusiasm was pretty remarkable, considering the architectural firm had never done a condo conversion or historic restoration before.

The project budget was rather tight, but there were plenty of shortcuts the architect could take to save on expenses. Plus, the contractor was selected on a low-bid basis, so money was being saved there as well. It was a fast-track project and the scope of services was limited, so the architect wouldn't have a lot of long-term overhead expenses either.

It sounded like a quick, slam-dunk project with high visibility in the community. The firm's principal thought it might be the perfect project to get this new architectural firm on the map. Right? Wrong!

Obviously the above scenario is far from ideal. Still, in the real world, it isn't always easy to pick and choose among potential projects. Sometimes, any project can look good. Yet careful project selection is essential because accepting the wrong project almost guarantees professional liability claims.

Let's look at several factors that must be weighed when selecting projects.

## Type of Project

Some types of projects are so litigation-prone that only the most qualified – or most foolhardy – architect or engineer would accept them. Condominiums, for example, are so high-risk that most insurance

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companies are hesitant to insure firms that design them. Historic renovations are also high risk due to the chance of hidden problems such as asbestos, lead paint and other hazardous conditions.

According to insurance industry studies, other project types that present higher than average risks include wastewater/sewage plants, residential custom homes, schools (K-12), high rises, hotels, residential subdivisions, airports and bridges/trestles. Lower-risk projects include malls/retail and commercial industrial buildings of nine or fewer stories.

This is not to say that no design firm should take on condos, historic restorations or other types of higher-risk projects. Design firms, however, should approach these types of projects cautiously, make sure they are qualified to do them, set their fees to reflect the higher risk, and insist on protective contract language.

### Project Delivery Method

More and more projects vary from the traditional design-bid-build delivery method. It is important to realize that each alternative delivery project involves specific risks and requires a different allocation of responsibilities for those risks.

For example, your risk on a design-build project varies depending on the role and contractual relationships you undertake. If you lead a design-build project, you become responsible for risks traditionally associated with contractors and not normally assumed by engineers and architects. On the other hand, with a contractor-led design-build project, your risk may be little different from that of the traditional delivery method.

The same holds true for design firms that provide construction management services. Your risk as a

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## Cavnac & Associates

2009 Seminar Series

### Risk Management

- Post-Accident Response Training  
Thursday, February 19th  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am
- HR that Works Overview / Introduction to Clients  
Thursday, March 19th  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am

### Risk Control — Human Resources

- Managing in Tough Economic Times  
CPE and HRCI credits are available for this seminar.  
Friday, February 27th  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am
- Sexual Harassment Prevention Training  
This course satisfies AB1825 training requirements.  
Friday, March 13th  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am
- Victims, Villains & Heroes  
Friday, March 27th  
Registration: 8:00 am  
Program: 8:30 am - 10:30 am

### Risk Control — Loss Control & Claims

- Competent Person Excavation & Trenching Training  
Friday, January 30th  
Registration: 8:00 am  
Program: 8:30 am - 2:30 pm
- Cal Trans Traffic Safety and Flagger Training  
Friday, February 20th  
Registration: 8:00 am  
Program: 8:30 am - 2:30 pm
- OSHA Inspections  
Friday, March 20th  
Registration: 8:00 am  
Program: 8:30 - 10:30 am

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

Register for upcoming seminars — Contact Darcee Nichols at [dnichols@cavnac.com](mailto:dnichols@cavnac.com) or 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.



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construction manager depends on which role you play on a project and what contractual obligations and relationships you undertake.

Project delivery methods also include fast-track projects. These “ready, shoot, aim” projects often involve substantial modifications to plans and thus big change-order expenses. Unsophisticated clients won’t expect change orders and, most likely, will not understand the need to have sufficient contingency reserves set aside in their project budgets.

### Other Parties Involved

Even the most “plain vanilla,” mundane type of project can be high risk if the other parties involved in the project are litigious or prone to errors and omissions. Indeed, the client may be the greatest risk factor associated with a project. A client with a history of litigation against design firms, contractors and others should be a huge red flag when considering a project. So is a client who does not recognize the value of a design firm’s construction-phase services.

Likewise, the contractor assigned to a project is a significant risk factor. This is particularly the case when a contractor has been selected on a low-bid basis. It is always wise to investigate the history of the contractor as part of the project selection process. Subcontractors and subconsultants (or the prime if you are a subconsultant) should be scrutinized as well.

### Level of Experience and Knowledge

Take a hard look at the capabilities of your own firm when selecting projects. How much experience do you have with this type of project? Who on your staff has the necessary expertise? Have you worked with the owner or contractor before?

Consider your projected workload and the mix of other projects you will be working on concurrently. If you will need additional personnel to take on a new project, are those professionals available? Taking on a project that stretches your available staff and skills can be a recipe for trouble.

### Project Funding

An underfunded project is a high-risk project. Clients with insufficient capital will want to skimp on quality and will encourage their design firm and contractor to do the same. They may even delay payment for services or file trumped-up claims as a ploy to avoid payment altogether.

If a project appears to be underfunded, be sure to conduct a financial check of your client. Don’t let the client reduce your scope of services to the point you can’t adequately control your risks. Also make sure you have a suspension of services clause in your contract that gives you a way to pull out of the project in the event funding problems result in project delays, slow payment or other breaches of your contract.

### Scope of Services and Fees

Even when overall project funding seems adequate, avoid projects for which you are offered a severely limited scope of services and/or inadequate fees. Projects that omit your construction observation services, for example, are more prone to errors because you are not available to provide guidance in the execution of your plans.

### Contractual Provisions

Beware of the “contractually hazardous” project. This could be any type of project – even a simple, single-story commercial building – for which the client

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issues a contract containing such unfair or onerous provisions that you could wind up accepting most or all of the client's liability.

Sometimes an unsophisticated client may attempt to issue a purchase order or similar contract form that is thoroughly inappropriate for engaging a design professional's services. Some might argue that such a project is among the riskiest of all because you have none of the standard contractual provisions professionals need for protection.

Alternately, strong contractual language can make an otherwise risky project palatable. Contractual limitations on your liabilities could be a make-or-break negotiating point.

### Project Selection Checklist

Project selection is rarely a cut-and-dried, yes-or-no decision. Projects usually contain a number of risk factors that, considered separately, might be acceptable. But together, these risks could add up to a big liability headache.

For example, take a well-financed client who wants to build an apartment complex as a speculative project and then sell it to the highest bidder. You might be able to negotiate a solid contract. But can you protect yourself from the subsequent purchaser of the complex? What could you do to mitigate risks if the apartment complex sells and then becomes a condo in a



few years and the complex suddenly has 300 new owners?

Your best course during project selection is to strive to identify all of the potential risks on a prospective project and then make a calculated decision based on a combination of factors. Some architects and engineers use a Project Evaluation Checklist to evaluate projects before submitting a proposal or negotiating an agreement. This can save a lot of time and money spent chasing projects you really shouldn't accept.

A Project Evaluation Checklist should cover issues such as:

- Is the project type one that is inherently risky, such as condominiums, amusement rides, or renovations?
- Does the project team, including the owner, the prime consultant, subconsultants and the contractor, have experience with this type of project?
- Is the project adequately financed?
- Does the project owner or contractor have a litigious history?
- Does the project include an adequate scope of services?
- Are you receiving an adequate fee?
- Is the project schedule realistic?
- Are there any unusual factors, such as unfamiliar code requirements, new technologies, or unstable geological conditions?
- Can mitigating factors be offset with contractual protection, such as a limitation of liability clause or indemnity provisions?



**AIA San Diego**  
The American Institute of Architects

### ❖ Lunchtime Learning CES Program

**TOPIC** Structural Engineering:  
The Architects' Role in  
Reducing Business Interruption

**WHERE** **Cavignac & Associates**  
FOCUS Room  
450 B Street, Suite 1800  
(enter from A Street)

**WHEN** Wednesday, February 4, 2009  
Noon to 1:00 p.m.

**LUNCH** Served 12:00 noon

**CONTINUING  
EDUCATION** Earn 1 HSW LU

Add your own checklist items based on the unique characteristics of your firm.

## Managing Risks

Once you've analyzed the risks of a potential project, determine how the risks you've identified might be managed. You can minimize some risk by educating your clients, providing more comprehensive services, and insisting on qualification-based selection of a competent contractor. You can also reduce your risk by developing a contract that is fair and precise, that accurately defines the intent of both parties – and that includes reasonable indemnities and a limitation of liability clause. And, of course, you can limit your risks by purchasing adequate professional liability insurance.

It is in everyone's best interest for you and your client to take a good, hard look at the risks you cannot prevent or control. Understand that on a high-risk

project, the risk should be borne by the party best able to control it. If no one can control the risk, then it rightly remains with the project owner, who has the most to gain from the project. If the owner refuses to shoulder his or her share of the risk, you should probably decline the project.

The risks that remain on your plate – those that rightly belong to you and cannot be otherwise transferred or managed – will require a hard-nosed business decision. Is the fee or other incentive so attractive that you can afford to accept the risk? Making that determination may be the toughest decision you make on the project. ✨

*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.*



# Human Resource Challenges in 2009 – Are You Ready?

By Sandra W. Rugg, SPHR-CA, Director of Human Resources

## How will you:

- Manage the effects of layoffs, reduced hours, and frozen wages?
- Stay current with Federal and California employment law?
- Guard against frivolous employment lawsuits?
- Implement new and maintain good HR policies and procedures?
- Maintain a “best place to work” environment, attractive to workers you'd like to employ?
- Retain your best employees who may be “romanced” away by competitors?
- Protect your unemployment insurance contribution rate from significant future increases?

The people we employ are not only our biggest asset, they are one of the four major areas of risk that all businesses must manage.

In addition to property, general liability and loss of income protection, personnel (human resources/workers comp) is an area of risk deserving particularly close attention.

Employment lawsuits, employee turnover and work comp claims hit the bottom line of businesses in a

major way and can have a long-lasting negative effect. One way to help maintain solid fiscal health, in a tough economy or otherwise, is for companies to carefully select the best employees for their business and treat them fairly and equitably.

A resource we make available to our clients to assist with human resource management is [HRthatWorks](#). This powerful, Web-based HR tool provides our clients with:

- More than 200 employee forms
  - An employee handbook writer
  - An employment contract builder
  - Special reports and white papers
  - Live and archived Webinars on the most current HR topics
  - Training modules
  - An HR Department Improvement Plan
  - Access to local employment law attorneys
- ...all of which will help reduce workforce risk exposures and increase productivity.

If you are interested in learning more about [HRthatWorks](#), please contact:

Sandee Rugg, SPHR-CA  
srugg@cavignac.com. ✨



Articles courtesy of Cavignac & Associates Employee Benefits Department

## LIVE WELL, WORK WELL

### Survive the “Big Chill” Experience

Now that we’re in the thick of winter, battling the elements and frigid temperatures is not the only concern. Many people also experience damage to their skin during winter months, which could make for an uncomfortable snowy season.

Interested in getting some relief from the deep freeze? Here’s how:

- Since cells cannot regenerate as quickly in colder temperatures, skin can get dull and flaky quite easily. Use a skin-cooling exfoliator to remove surface debris and speed up cell turnover.
- Use a moisturizer with SPF 30 or more, even in winter months. The sun is still as powerful in cold temperatures.
- When returning indoors after being out in the cold, moisture is stripped from your skin. Use a mist humidifier in your home to help the proteins and collagen in your skin work more effectively.
- Your lips have no oil glands or melanin to protect against cracks and chapping. Apply a lip balm with a sunscreen to guard against the elements and cold sores.
- Shower with warm water, not hot, and use bath oil or shower gel to bathe yourself. These products leave a film on your skin that helps prevent water from evaporating. ✨

### Make Your Resolution Stick!

It’s that time of year again, when most of us feel compelled to make modifications to our lives for the New Year. This is usually accompanied with gaining five pounds since Thanksgiving and over-spending on gifts for our loved ones.

Here are some ways to create realistic New Year’s resolutions and make them stick throughout the year:

- **Create a resolution for the right reasons** — To do so, think about what you really want and what benefits you will receive from that resolution.
- **Determine how difficult** you want your resolution to be. You will be the most successful if your resolution challenges you but is not so far out of reach that you feel discouraged to even try and achieve it.
- **Be specific in what you want to achieve** so that you can verbalize if your resolution has been accomplished. For instance, don’t vow to “lose weight this year.” Instead, vow to “lose 10 pounds by May 1st.”
- **Create a strategy** for how you will achieve your resolution with a step-by-step plan and due dates for those steps. Identify any potential obstacles you may run into along the way.
- **Seek out assistance to stay on track** - a personal trainer or motivating relative.

Finally, stick with it! It’s a new year and you can do anything if you put your mind to it. ✨

# Preventing Slips, Trips and Falls

By *Stuart Nakutin, CSA, COA, CSIT, WCCP, CPDM*

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**W**hen you think of workplace falls, dramatic falls from higher elevations come to mind. However, during the course of a workday, anyone can slip, trip, or fall anywhere under a broad range of conditions, even in the seemingly benign office setting.

Some walking/working surface hazards include clutter, protruding objects, and wet conditions. In 2005, floors, walkways, and ground surfaces accounted for 19% of all sources of injury or illness, according to the Bureau of Labor Statistics.

## What Causes a Slip, Trip, or Fall?

Generally, a fall is the result of a progression of events. Three laws of science are involved in a slip, trip, or fall: friction, momentum, and gravity.

1. **Friction** — The resistance between things, such as between your footwear and the walking surface. Friction is necessary to maintain a grip on the walking/working surface. Remove the friction and you will slip.
2. **Momentum** — Speed and size make up the scientific measure of momentum. In terms of the workplace, it means that large items moving at higher speeds will fall harder than the same item moving at a slower speed. When you encounter an object in your walking path and are thrown off balance, your momentum (the speed at which you are moving) will cause you to trip.
3. **Gravity** — Obviously, this is the force that pulls you to the ground when you fall. The key point here is to keep your balance so you don't fall. Once a slip or trip is in progress, the end result is usually a fall, which can only be stopped by changing surface levels.

Falls are classified into four general categories: slips, trips, falls on stairs, and falls from elevation.

Slips and trips occur on the same level. Stair and elevated falls occur from one level to another.

## Tips for Prevention

- Install slip-resistant flooring material such as textured, serrated, or punched surfaces, or steel grating. These types of floor surfaces are good for wet, oily, or dirty operations.
- Apply anti-slip solutions that contain gritty compounds on concrete, wood, and metal floors. These products are especially useful for aisles, walkways, ramps, and loading docks.
- Provide absorbents to clean up spills where oily materials or corrosive liquids are accidentally spilled.
- Install guardrail systems, handrails, ladder cages, or barriers surrounding or nearly surrounding the climbing area of ladders.
- Provide personal fall protection (such as body harnesses) when guardrail systems cannot eliminate the risk of falling.
- Place barriers around unprotected sides and edges. Install safety net systems to catch employees who fall.
- Use hole covers to guard floor openings of at least two inches in size.
- Pay (fully or in part) for slip-resistant footwear.
- Make sure hallways, stairs, and work areas are properly lit.
- Repair or report stairs or handrails that are loose or broken.
- Don't use stairs or aisles as storage areas. ✖

# Community Bulletin Board

*"Neighbors helping neighbors in San Diego"*

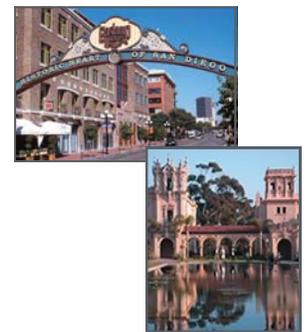


Senior  
Community  
Centers

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- ✦ Upcoming Events



- ✦ SDAF Film Series
- ✦ Architectural Tours
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Contact **Alicia Gettys** by phone at 619-232-7451 or e-mail [agettys@ymca.org](mailto:agettys@ymca.org)



- ✦ **Tips for Pet Owners During Tough Times**
- ✦ **Events**

