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# PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

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MSP PL—02/98: A "David" Client can become a "Goliath" Headache

February, 1998



## A "David" Customer Can Become a "Goliath" Headache

A review of professional liability losses for architects and engineers indicates that a significant number of claims are associated with "small" clients who are often new customers to the design firm.

Because of the insignificance of fees to be derived from a small, new project, some design firms are apparently inclined, logically, to minimize the time and resources to be allocated to this type of project.

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This attitude might make sense at the bottom line of the financial statement except for the fact that this "small" client might be the source of a large lawsuit which could destroy the possibility of any money trickling down to the bottom line.

### What can you do to minimize your risk?

What should or can you do about this? The simple, perhaps unpleasant, answer is: Either don't accept the work, or plan to devote adequate time and resources to the project.

If you accept the work, you should remind yourself that the "first time" client is likely to have unrealistic expectations, and that unfulfilled expectations are one of the most common triggers to lawsuits.

### Things to consider:

#### Educate the client

Educate your new client by using the contract formation process to explain the "facts of life." Avoid oral agreements at all costs.

#### Contract negotiation

Focus on money issues so that the new client is fully aware of his financial obligations.

#### Contingency fund

Encourage the client to establish a contingency fund. Such a fund establishes a percentage of the project budget to cover unanticipated costs.

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### **Cavnac & Associates**

INSURANCE BROKERS

501 West Broadway, Suite 1340  
San Diego, CA 92101-3505

**Phone: 619-234-6848**

**Facsimile: 619-234-8601**

License No. OA99520

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### Dispute resolution and limitation of liability

Incorporate an alternative dispute resolution clause and a limitation of liability clause into each of your client agreements.

### Annual or open-ended agreement

If there are a number of small projects for the same client, consider an annual or open-ended agreement spelling out terms and conditions as well as a fee schedule.

### Project management

Don't leave the project entirely in the hands of a fledgling project manager. There should be careful oversight by experienced personnel.

## Conclusion

If you are already paying careful attention to the small, new client, great. It might, however, be worthwhile to route this article to other members of your firm as a reminder that small projects have the potential to cause large losses. ▲

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*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.*

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## Test your professional liability loss prevention IQ

Do you know as much about professional liability as you should? Following are five true/false statements about loss prevention and related concerns. Take your best shot at determining the correct response to each, and then review our answers to see if you're on target.

### Questions

- 1 The absolute best defense against professional liability claims filed by clients is high-quality deliverables. True / False
- 2 If a firm does not have a written agreement with a client, it has no agreement at all. True / False
- 3 Third-party claims filed by people looking to "strike it rich" by using contingency-fee lawyers are the most common claims design professionals have to defend. True / False
- 4 "Standard of Care" is determined in a court of law by expert witnesses who testify. True / False
- 5 Owners may reduce their risk by using qualifications-based selection. Design professionals are best served by selecting their subconsultants by bid. True / False

- 1 False. Since most claims are filed by clients, the best defense is maintaining good relationships with clients so problems can be resolved without lawsuits.
- 2 False. Whenever a firm undertakes work for a client, it always has a contract with the client. The question is, "Is the contract written, or is it oral?" If oral, each party's understanding of the contract will differ.
- 3 False. Third-party claims are rare. Most claims are filed by clients.
- 4 False. "Standard of Care" is determined by the trier of fact – a judge or jury – based on the testimony of expert witnesses.
- 5 False. Design professionals, just as owners and others, are best served when they use qualifications-based selection. Qualification-based selection is the only method that permits the client and consultant to agree on a vision of the end result, thus also permitting them to agree on the services required.

### Scoring

Points	Your Ranking
100.....	Genius
80.....	Pretty bright
60.....	Need a refresher
40 or less.....	<b>Get help fast!</b>

### Answers