



PROFESSIONAL LIABILITY UPDATE

A LOSS PREVENTION NEWSLETTER FOR THE DESIGN PROFESSION

MSP PL 05/2009 'Managing Client Expectations'

May, 2009



Managing Client Expectations

Article courtesy of Professional Liability Agents Network (PLAN)

The majority of claims against architects and engineers have one thing in common – an upset client. Clients file the vast majority of claims against design professionals and each one of these claims involves unmet client expectations.

In many cases, the client has every right to be upset. When a design firm’s negligent errors or omissions result in long project delays, extensive added costs or serious project flaws the client is justified in filing a claim against the design firm to try to recoup its losses. That’s why you have professional liability insurance.

In other cases, however, clients simply expect too much from their design teams – they expect perfection. Any minor delay, added cost or design change is taken as a sign of incompetence on the part of the architect or engineer. Unreasonable clients are quick to file a claim or make a demand against a designer even though the cause of their upset is nothing more than a typical project snafu that can – and should – be resolved through amicable cooperation rather than antagonistic confrontation.

Managing client expectations is key to avoiding these unnecessary confrontations, demands and claims. When clients are educated as to what to expect during the design and construction of their project and what standards a design firm must meet, then minor upsets can be viewed as a necessary evil of the design and build process and energy can be directed toward resolving those routine problems amicably and effectively.

Sophisticated clients are aware of the ups and downs of the design and construction process and usually work

with the designer and contractor to remedy project upsets. However, clients unfamiliar with the trials and tribulations of a major project need to be educated on the process before design and construction begins. One of the first concepts to explain to these clients is the prevailing “standard of care” for design professionals.

Understanding the Standard of Care

Your clients need to understand that all that is expected or required of you is to render your design services with the ordinary degree of skill and care that would be used by other reasonably competent practitioners of the same discipline under similar circumstances and conditions. This “standard of care”

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concept dates from English Common Law doctrine. It holds that the public has the right to expect that those providing services will do so in a reasonably normal, careful and prudent manner, as tested or established by the actions of one's own peers under like circumstances. In other words, being perfect isn't required as long as you act with due skill and care.

Acting with care includes practicing within the limitations of your firm's skills and expertise. If you accept a project in an area outside of your expertise, you will be expected to perform to the standards of those experienced with that type of work. You must also make sure that only experienced, competent staff is assigned to the project, and that qualified subconsultants are used. Continuing education and training can be essential to keeping up with prevailing knowledge, technology and standards of care.

Watch Your Language

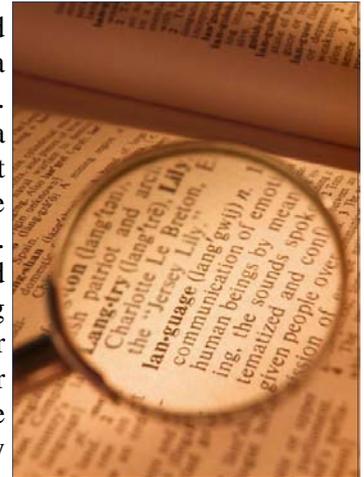
Some clients may attempt to raise your standard of care by imposing contract language that requires you to perform above the prevailing norm. Such language may demand that you perform "to the highest standard of practice" or "in a non-negligent manner."

Agreeing to such language could be construed as making a guarantee or warranty, with all the related issues of insurance and statutes of limitation. If you accept any contract language that raises your standard of care beyond that which is reasonable and customary for your profession you are dramatically increasing your risk. Worse yet, your professional liability insurance may not cover you for the added exposure you have accepted since it represents a voluntary contractual assumption of risk for which you would not otherwise be responsible.

You also leave yourself open to greater liability risk if you overstate your firm's abilities in exaggerated terms ("the best" or "most qualified") in your correspondence, marketing materials or project proposals. These statements can be perceived as warranties that raise your performance requirements beyond those of your peers.

If your client drafts a contract clause that raises the standard of care to a higher level, you must delete the

offending language and return the standard back to a normal or reasonable level. It is a good idea to have a clause in your contract that defines the standard of care to which you will perform. Such language should confirm that in providing services you will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.



Should you feel it necessary, or if the client demands it, you can expand this contract clause by offering to correct defective services without additional fee. However, make it clear to your client that this offer does not include any construction or material costs or add items not included in the original design you agreed to perform. Such language might state that, upon notice and by mutual agreement, you will correct any design services that do not meet the standard of care at no additional fee to the client. As always, work with your legal counsel to draft appropriate language.

Some might argue that if your contract says you will perform to the standard of care, it might give rise to an additional cause of action against you for breach of warranty. Fortunately, the courts have disagreed with this position. A 1992 decision (*Gibbes Incorporated v. Law Engineering*, 960 F 2d 146 4th Cir. 1992) expressly found that contract language stating that an engineer "will use that degree of care and skill ordinarily exercised under similar conditions by reputable members of our profession practicing in the same or similar locality" simply incorporated the professional standard of care and did not create any warranty obligation.

Give No Guarantees

Have your legal counsel consider including a contract clause stating that you will not be required to sign any documents from any parties that would result in you having to certify, guarantee or warrant the quality of your services or the existence of any jobsite conditions whose existence you cannot ascertain. Also have your client agree not to make resolution of any dispute or payment of any amount due to you contingent upon you signing any guarantee or certification.

You and your attorney can go even further to make certain everyone understands you do not have to be perfect.

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2009 Risk Management Seminars

2009 Risk Management Series

- **Workers Compensation 101**
Thursday, May 21st
Registration: 8:00 am
Program: 8:30 am - 10:30 am
- **Navigating the Leave of Absence Minefield**
Friday, May 22nd
Registration: 8:00 am
Program: 8:30 am - 10:30 am
- **Sexual Harassment Prevention Training**
Satisfies AB1825 requirements
Friday, June 12th, 2009
Registration: 8:00 am
Program: 8:30 am - 10:30 am
- **All You Ever Needed to Know about Unemployment, Disability Leave, and Paid Family Leave**
Friday, June 26th, 2009
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 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.

Expectations *(continued from page 2)*

You can suggest language to be placed in the general conditions of the client/contractor contract that sets reasonable expectations for your performance. Have the contractor acknowledge it understands that the design documents may be imperfect and may contain errors, omissions, conflicts, inconsistencies, code violations or improper use of materials. Agree that such deficiencies will be corrected when identified. Have the contractor agree to study and compare the individual contract documents and report in writing to the client any

deficiencies discovered. Also have the contractor agree to require each subcontractor to study the documents and report on a timely basis any deficiencies they may find.

Defects in Service

Help your client understand that the contractor may be in the best position to first spot design defects and minimize any potential damages. Consider adding contract language that requires your client to promptly report any defects or suspected defects in your services so that you may take measures to minimize the consequences of such defects. Have the client further agree to impose a similar notification requirement on all contractors and subcontractors. Have your contract clause specify that failure by the client and the client’s contractors or subcontractors to notify you of defects or suspected defects shall relieve you of the costs to remedy the defects above the sum such remedy would have cost had prompt notification been given when such defects were first discovered.

Final Contingency

To make sure any imperfections will be corrected, attempt to add a contingency fund provision to your contract. This provision should have the client recognize that the final design and construction cost may exceed the estimated cost. Further, it should require the client to set aside a contingency fund equal to a reasonable percentage of the estimated construction cost as a reserve to pay for unanticipated expenses. Seek agreement from the client that it will not make a claim against you or your subconsultants with respect to increased costs within the agreed-to contingency.

Finally, if there is going to be a contingency fund in the owner-contractor agreement, you might attempt to have included in the list of contingencies those costs resulting from discrepancies in your design documents.

It’s the Law

Regardless of what your client may think or expect, perfection is impossible to attain. Your best approach is to ensure that your client has realistic expectations of you and your services. Communicate early and often with your client stressing that perfection is unattainable at any price, and errors and omissions are common parts of the design and construction process.

Your client contract does not have to state that you agree to abide by the standard of care. However, the law requires you to do so – and to compensate those who are damaged or injured due to your negligence.

When facing litigation, the plaintiff’s expert witness will likely testify that you did not meet the standard of

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Expectations (continued from page 3)

care. Your expert witness will testify the opposite. No hard and fast rules apply, especially when dealing with an unsophisticated jury. However, educating your client as to the prevailing standard of care, having appropriate contact language that does not raise that standard, and receiving expert representation from your insurer will significantly increase your chances of avoiding an expensive judgment. ✨

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.

Sleep Deprivation

By Stuart Nakutin, CSA, COA, CET, WCCP, CHMC

Whether it's due to workloads, working side jobs for more income or after-work activities, the results are the same – many workers arrive on the job overly-tired or sleep-deprived. Sleep deprivation or fatigue can affect a worker's manual dexterity, reaction time, and alertness.

Worker fatigue or lack of sleep can affect judgment and safety. Workers aren't the only ones suffering the consequences of sleepiness on the job. It's costing employers money and, in some cases, putting the public's safety at risk.

Studies show that workers are not only getting less sleep than they should, they're getting less than they used

to. The real danger arises when workers don't realize they're tired and go to work as if they were fine. Workers who try to function without enough sleep have a reduced ability to recognize or avoid risks. They have a slower reaction time and fail to make appropriate responses. Their quality and quantity of work is reduced. They have a poorer safety record, and they contribute to higher workers compensation costs.

Workers should take responsibility for getting enough rest. They should decide how much sleep they need to perform optimally. They should examine their off-work activities to see how they're impacting their sleep. If they feel they haven't gotten enough sleep to function well at work, they should take a sick or vacation day to recuperate.

During their work shift, workers should notice when they lose concentration or start to nod off. When they find their attention wandering, they should get up and stretch or walk around or grab a quick snack. Casual chats may help maintain alertness and improve rather than detract from productivity. Since dehydration increases the effect of fatigue, workers should also drink more water during the day.

Although workers' sleep habits are largely out of an employer's control or influence, employers need to be aware of the effects of worker fatigue and make adjustments so that workers can do their jobs more safely and efficiently.

Although there's no solution that will apply to all work situations, there are some simple things that employers or supervisors can do on the job about sleep deprivation.



Employers can educate workers on the effects of inadequate sleep and resulting fatigue. They can evaluate their work force and assign tasks to optimize performance and safety. If a worker is too tired, requiring work beyond a regular shift may increase the risk of accidents or injuries.

To insure a good night's sleep, the National Sleep Foundation suggests that individuals should exercise during the day, establish a regular sleep schedule, and relax before bedtime. Before going to sleep, they should avoid heavy meals or caffeine, consume less or avoid alcohol and nicotine, and drink fewer fluids that may disrupt sleep. The Foundation cautions that certain drugs or sleep aids can sometimes interfere with natural sleep.

Worker fatigue due to inadequate rest can affect more than the individual involved. It can have catastrophic safety or financial effects on coworkers, their families, businesses, and even the general public. Workers need to get adequate sleep before going to work. They owe it to themselves and others. ✨



Articles courtesy of Cavignac & Associates Employee Benefits Department

LIVE WELL, WORK WELL

Straighten Up for Your Health!

Have you paid attention to your posture lately? You should, in order to avoid injury. Follow these tips from the Cleveland Clinic to keep your body pain-free:

- Sit up with your back straight and shoulders back. Your bottom should touch the back of your chair, and your feet should be flat on the floor.
- When driving, your knees should be at the same level or higher than your hips.
- Before lifting an object, make sure you have firm footing. Keep the item close to your body and lift with your knees, avoiding twisting during the lift.
- When sleeping, your pillow should be under your head – not your shoulders – and the thickness should allow your head to be in a normal position.

What does correct posture do for your entire body? A lot! It may prevent arthritis, strain, backaches and other pain, and it decreases the stress on the ligaments holding the joints of the spine together. Plus, you look a whole lot better with proper posture. ✨

May is Correct Posture Month!

For more information on posture, visit the American Chiropractic Association (ACA) at:
www.amerchiro.org

Or visit the Cleveland Clinic – ranked as one of the nation’s best hospitals – at:
www.clevelandclinic.org.



Calling All Women!

The American Association of Retired Persons (AARP) reports that women over the age of 65 are more likely to be poor than men of the same age. This is especially troubling if you consider that the life expectancy for women is on average three years longer than for men. In many cases, Social Security is the only income for many retired people.

With these statistics in mind, what can you do *now* to ensure your financial security?

- Participate in your employer’s 401(k) plan. In many cases, employers will match your contribution, so by not participating, you are essentially passing up free money.
- Take a look at what you are currently putting aside and consider adding an extra \$10-\$20 to that per month.



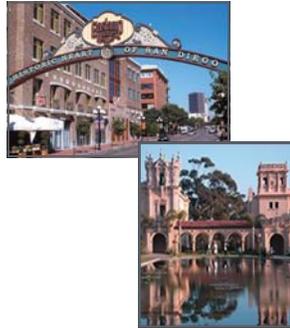
It might not seem like much now, but after 20-30 years plus interest, you will have yourself a handsome little nest egg.

- Invest wisely. If you are just entering the workforce or are in your 20s, you can afford to take more risks and be aggressive. However, if you are nearing retirement age, your portfolio should be more conservative.

If you’re not where you’d like to be savings-wise, try not to feel overwhelmed. Remember, saving even one penny is better than not saving that penny at all! ✨

Community Bulletin Board

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