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# PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

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MSP PL 07/98: "Preventing Jobsite Safety Claims"

July, 1998



## Preventing Jobsite Safety Claims

### Responsibility for jobsite safety is an issue for design professionals

Among the most dangerous of all industrial workplaces, project sites are treacherous for architects and engineers, too. Roughly one in every 10 liability claims against design professionals is related to safety on the site. Moreover, the Federal government increasingly seeks to impose substantial and uninsurable fines on architects and engineers for construction worker injuries.

### The search for "deep pockets"

If a construction worker is injured on the job, the worker generally cannot sue his employer, and must accept as sole remedy from the employer the state-mandated workers compensation benefits. These benefits rarely cover medical costs and lost time, and are certainly lower than the awards one might hope for through successful litigation against a third party. This inequity can set into motion a search for "deep pockets" and an attempt to impose responsibility on a source other than

the employer – in other words, *you*.

Except for design/build and "at risk" construction management projects, jobsite safety usually – and rightly – is the primary responsibility of the general contractor. The general contractor has control over its own employees and of the site, and is the overall coordinator of the work. That is why it is important that nothing in your professional services agreement or your actions can be taken to imply that you will in any way assume this responsibility – and the liability that goes with it.

### What do the courts have to say?

It seems the courts are continually looking at the issue of jobsite safety. Two recent cases are worth noting.

In one, a structural engineer was telephoned by the contractor for the engineer's opinion about removing a temporary shoring from under a recently poured concrete deck. The

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subsequent collapse resulted in a fatality.

Although the engineer's contract disclaimed responsibility for jobsite supervision, the lawsuit claimed he was responsible for "means, methods and safety" for the deck's construction. The court disagreed. It held the engineer was not responsible because he had not exercised the necessary control for the means, method or safety.

In a more recent New Jersey case, a court held that a civil engineer's inspector was responsible when a contractor's employee died in the collapse of an unshored trench. Even though the engineer's contract disclaimed responsibility for means, methods and safety, it was found that the inspector was present and observed the collapse; had observed a similar collapse a week before, and took no action to protect the worker in a situation of imminent danger. Although the engineer insisted it was not his responsibility, the court found otherwise, noting that the engineer had the opportunity and capacity to alleviate the risk of harm, and failed to properly exercise his duty.

Upon examination, these two decisions are not inconsistent. They spell out two important messages about your responsibilities when providing field services:

- It is important to have contractual protections from responsibility for jobsite safety.
- You cannot avoid your duty as a licensed professional – or as a fellow human being – to step forward and warn people in the face of immediate threats to their life or safety.

## How to protect yourself

Jobsite safety has become such a vital concern that every consultant must thoroughly understand the issue. You must be able to explain it to your clients and, more importantly, conduct your practice prudently by training your field employees and avoiding any contract language that could make you liable for safety on the site.

- When you and your client develop your scope of work, carefully define your field or construction phase services to avoid in-

advertently assuming responsibility for site safety, especially if you are offering full time, resident or expanded field services.

- Carefully negotiate your professional service agreements so that they accurately reflect those responsibilities you intend to assume. Make it clear to the owner and the contractor that ***you are not responsible in any way for the means, methods, sequence, procedures, techniques or scheduling of construction activities – or for jobsite safety.*** These duties below with the general contractor, who has control of the jobsite.
- Under no circumstances should you accept a contract clause that makes you responsible for any losses or injuries that occur at the jobsite.
- Delete any language in an owner-drafted agreement that calls for your "supervision" on a jobsite. Likewise, do not accept any extreme contract language that calls for you to "assure strict compliance" with plans and specifications, or with any health, safety plans or programs. Your observation of the work is meant only to determine general conformance with the design concept and information contained in the contract documents. If you are not using AIA or EJCDC standard agreements, consider the following clause:

### ***Jobsite Safety***

***Neither the professional activities of the Consultant, nor the presence of the Consultant or his/her employees and/or Subconsultants at a construction/project site, shall relieve the General Contractor of their obligations, duties, and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. The Consultant and his/her personnel have no authority to exercise any control over any construction contractor or their employees in connection with their work or any health or safety precautions. The Client agrees***

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*that the General Contractor is solely responsible for jobsite safety, and warrants that this intent shall be carried out in the Client's agreement with the General Contractor. The Client also agrees that the Client, the Consultant and the Consultant's consultants shall be indemnified and shall be made additional insureds under the General Contractor's general liability insurance policy.*

- Make certain that your agreement does *not* give you the authority to stop work. Having that authority can be construed as having the *duty* to stop work if you see a safety problem. This could be a significant factor for the courts when determining whether you might be subject to civil, criminal or OSHA penalties if a site worker is injured. It is the owner – and only the owner – who should make the decision to stop work. (You can, however, with proper contractual protection, undertake to *reject* or *recommend rejection* of portions of the work that, based on your observations and judgment, do not conform to your construction documents.)
- Consult with your attorney and your professional liability insurance specialist for help in developing the language in your agreement, and to make certain it is insurable.
- Ensure that the client has a provision in the General Conditions of the construction contract requiring the contractor to indemnify your client, your subconsultants and you for all claims arising from the performance of the contractor and his or her subcontractors.
- Ask the client to have you named (along with the client and your subconsultants) as additional insureds under the general contractor's general liability policy. This allows you to tender back to the contractor

any claims from an injured worker in the event you are named in a jobsite injury suit.

- Develop a field manual for your own project representatives that establishes standard procedures to be followed if they observe an unsafe condition on a project site.
  - If the condition poses no immediate hazard, then it should be reported to the contractor as soon as possible.
  - If the situation is not remedied or is more serious, the owner (and perhaps even appropriate public officials) should be notified. If danger to human life is imminent, your professional duty of care to protect the health and safety of the public requires that you take immediate action.
  - Reinforce these procedures by requiring that your field personnel receive periodic training, and be certain to insist on adequate documentation of your project representative's visits to the construction site.
- Develop procedures and train your firm's employees to safeguard their own safety and health wherever they perform their services. You have an inescapable duty to protect your employees, both in your office and on the project site.

*The preceding article was contributed by Sheila A. Dixon and Richard D. Crowell, adapted from the second edition of DPIC's "The Contract Guide," to be published later this year. ✦*

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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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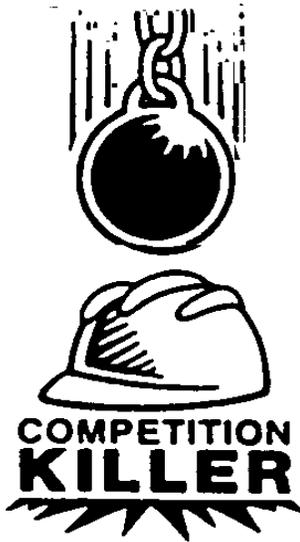
# Proposition 224 Defeated

Needless to say, defeating the PECG initiative was a huge victory for local architects and engineers. Had this measure passed, it would have devastated the local design professional community.

Officially, DPIC/ Orion Capital contributed \$70,000 to defeat Proposition 224, and delivered what amounted to a \$200,000 interest-free loan (see reprint of article below) to ensure that the message got across to California voters.

In addition, both DPIC California agencies (Dealey Renton Associates and Cavignac & Associates) made substantial contributions. Furthermore, Dick Crowell and Sheila Dixon of DPIC spent numerous hours hitting the campaign trail, working with professional societies and delivering the message. ✦

PECG  
INITIATIVE



# Y2K compliant? Find help at websites!

Last August, a Michigan grocer sued the supplier of its cash registers when they wouldn't take credit cards with year 2000 expiration dates.

In November, a New York-based computer hardware company filed the first class-action lawsuit against a database software company because the software does not recognize dates after 1999.

Small businesses facing the Year 2000 (Y2K) computer glitch now have access to several sources on the Internet to help them cope and solve this technological dilemma.

The U. S. Small Business Administration has a Y2K site at [www.sbaonline.sba.gov/hotlist/year2000.html](http://www.sbaonline.sba.gov/hotlist/year2000.html), offering background, checklists, solutions and related websites. Other company Y2K sites include:

- Microsoft: [www.microsoft.com/cio/year.asp](http://www.microsoft.com/cio/year.asp) and [www.microsoft.com/CIO/Articles/YEAR2000FAQ.htm](http://www.microsoft.com/CIO/Articles/YEAR2000FAQ.htm)
- Apple: [macos.apple.com/macOS/2000.htm](http://macos.apple.com/macOS/2000.htm)
- Digital Equipment Corp: [www.digital.com/info/year2000/y2k-oz.htm](http://www.digital.com/info/year2000/y2k-oz.htm)
- Hewlett-Packard: [www.hp.com/ibpprogs/gys/advantage/dec96/news/2.html](http://www.hp.com/ibpprogs/gys/advantage/dec96/news/2.html). ✦

## DPIC Guarantees ACEC Support to CA

*(reprinted from the American Consulting Engineers Council's (ACEC) May 26, 1998 newsletter, **The Last Word**)*

Just as ACEC's Board of Directors voted to approve the new three-year budget at the annual convention, DPIC, a long-time supporter of ACEC, stepped forward to offer what amounts to an interest-free loan to cover the budget's special PECG Initiative assessment. Dick Crowell, Senior Vice President, said that DPIC would provide up-front funding of the first-year special dues assessment so that CELSOC will have the money to use now, in the critical weeks prior to the vote on June 2. The Board ac-

cepted DPIC's offer and gave DPIC a standing ovation. "DPIC is a true partner, and their generosity reflects their commitment to be there when one of their most important client groups – ACEC – needs them," said Howard Meisner, Executive Vice President.

The money will be used to buy advertising time on radio and television throughout California. DPIC will be reimbursed with income from the first-year special dues assessment. ✦