



Professional Liability Update

A Loss Prevention Newsletter for the Design Profession

MSP PL — 11/2010 "Negotiating Client Form Agreements"

November 2010

Professional Liability Update Newsletter

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Negotiating Client Form Agreements

Article Courtesy of Professional Liability Agents Network (PLAN)



A contract is a legally enforceable agreement that sets forth the obligations of one party to another. In simple terms, it is a communication tool that is supposed to spell out who is supposed to do what, by when, and what happens if they don't. If the project goes well, you may never refer back to the contract again. If the project doesn't go well, however, the contract becomes critical. In litigation the judge or jury will scrutinize every word of a contract to try and determine the intent of the parties.

There are numerous ways that an architect may enter into an agreement. These include Purchase Order Agreements, Industry Standard Agreements (AIA and EJCDC, for example), and ideally the architect's own Professional Services Agreement. By far the most common contract an architect will enter

into is a client-drafted agreement. It will not come as a huge shock that these agreements are crafted by the client's attorney to protect the client.

For the sake of discussion, let's assume that the design professional has made every effort to get his/her own Professional Services Agreement on the table. Unsuccessful, he/she is now faced with negotiating the client's agreement. Since the client's agreement is typically crafted to protect the client, it usually attempts to transfer as much risk and responsibility as is legally possible from the client to the design professional. The problem is compounded by the fact that the owner will often say:

- 'It's non-negotiable...if you want the job, sign it!' Or...
- 'Everyone signs this, if you don't want to sign it I'll get XYZ Design to sign it.'

So What Is a Design Professional to Do?

Be prepared! Have a Contract Review Process in place, and recognize that these may just be initial bargaining ploys.

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Contract Review Process

The contract negotiation process provides an opportunity to set the client's expectations on a sound and productive course. A contract establishes the scope of services, system of communication, standard of care, and the rights and responsibilities of both parties. The likelihood of misunderstandings, disputes, and litigation decreases significantly if the contract is in writing and clearly represents the agreement of the parties. Although many perceive negotiation as an adversarial procedure, it doesn't have to be. You are expected to serve as the client's trusted professional advisor, and the contract negotiation phase of your relationship gives you an opportunity to demonstrate your professionalism.

Your company should have a process that is followed every time a new contract is entered into. Anyone in your company who negotiates contracts on your behalf should have a basic understanding of contracts. There are various sources for this, but it is imperative that they understand what their company's Deal Makers and Deal Breakers are. A Deal Maker provision is a provision that is so important that if it is not in an agreement, then the agreement is unacceptable (lack of Construction Phase Services is a good example). A Deal Breaker provision is a provision so onerous that, unless it is deleted or modified, the agreement is unacceptable (a poorly written indemnity, for example).

Review the Contract

There are two basic parts to a contract: the Scope of Services and the Terms and Conditions. Make certain the Scope of Services is clear. A well written scope should include:

- What you will do and by when
- What you can do for an additional fee
- What you are not doing that someone else is doing

Terms and conditions are equally as important. These spell out everything else required in the



2010-11 Risk Management Series

- **Victims, Villains, and Heroes (HR)**
Friday, November 19, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- **Sexual Harassment Prevention Training (HR)**
FINAL Training Session for 2010!
AB 1825 Compliant
Friday, December 3, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- **Workers Compensation 101**
Post Accident Response Training (HR)
Friday, December 17, 2010
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- **OSHA 300 and Safety Issues in the Office**
Friday, January 14, 2011
Registration: 7:30 am
Program: 8:00 am - 10:00 am
- **Measuring Safety Performance for Your Bottom Line**
Friday, February 11, 2011
Registration: 7:30 am
Program: 8:00 am - 10:00 am

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

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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.

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agreement. It is imperative that you understand what the law requires of you and what your insurance covers. The law requires that you perform to the Standard of Care. The Standard of Care is basically that degree of care and skill ordinarily exercised by members of the same profession currently practicing

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under similar circumstances at the same time and in the same or similar locality. The law does not require you to be perfect. It is understood that mistakes will be made. You should avoid any contractual wording that requires you to perform beyond the standard of care.

Your professional liability insurance coverage will protect you if your level of performance falls below the standard of care. However, if you agree contractually to perform at a level above the standard of care, then technically that would not be covered. Clients will attempt to elevate your required performance in any number of contractual provisions, including timely performance, certifications and guarantees, estimates of cost, and most importantly, indemnity provisions, to name a few.

It helps to have a Contract Review Checklist to make certain you are not overlooking something.

Seek Help

Everyone in your company should have clearly defined levels of authority when it comes to contract review. Ideally, someone in the company is designated as the Contracts Officer. This principal will have ultimate authority and will be the resource for questions that arise in the contract review process. You should also work with both your Risk Management advisor or insurance broker, as well as your attorney, to make certain you understand the implications of the contract from an insurance and legal perspective.

Often these professionals may have worked with your client already and may be able to assist you directly with the negotiation.

Negotiate

It is imperative that responsibilities be clearly outlined at the start of a project. During this 'Honeymoon Phase' your relationship is at its strongest. If you can't agree on who is supposed to do what at this time, when you are on good terms, you certainly won't be able to figure this out later if there is actually a problem. This is the goal of negotiation: to generate an agreement that clearly spells out the responsibilities of each party.

Recognize that at the end of the day you may not be able to negotiate everything you want. In simple terms, if you make a mistake that falls below the standard of care, your Professional Liability will probably cover you. If you agree contractually to be responsible for more than your own negligence, then the additional liability would not be covered. If forced to agree to a challenging agreement, the design professional has a business decision to make: do the possible rewards from the project exceed the risks?

Recognize as well that it is only by going through the negotiation process and evaluating the pros and cons of the proposed agreement that you will be able to effectively quantify the risks in order to make this decision.

If the contract is so poorly written and onerous that you have to walk away from the project, you may not lose the job. Often clients with whom you are unable to come to terms will be sufficiently impressed by your professionalism to rethink their own position. On the other hand, you may never hear from them again. In the long run, not doing business with a questionable client with a lousy contract may have been the best decision.

Negotiation is as much a part of being an architect as design. Effective negotiation is a critical skill. A number of resources are available to those who want to become better negotiators. Some of the better books I've come across that can help you improve this skill include *Getting to Yes* and the sequel *Getting Past No. Bargaining for Advantage* is also excellent, as is anything written by Harvey Cohen.

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.



Articles courtesy of Cavignac & Associates Employee Benefits Department

LIVE WELL, WORK WELL

'Tis the Flu Season

Every year, between 5 and 20 percent of the U.S. population gets sick from influenza, around 200,000 people are hospitalized due to its complications and 36,000 die from it, according to the Centers for Disease Control and Prevention (CDC).

To ward off the flu and colds, consider the following prevention tips:

- Get the annual flu vaccine. This year's vaccine protects against multiple strains of influenza, including H1N1, and only requires one shot.
- Wash your hands often with antibacterial hand soap.
- Clean surfaces that may have been contaminated with a virus, such as doorknobs, computer keyboards, countertops, remote controls and phones.
- Cover your mouth when you sneeze or cough.
- Try to avoid contact with those who are ill, and avoid touching your eyes, nose and mouth.
- Maintain a healthy lifestyle, which will help you to maintain a healthy immune system as well.

If you contract the flu virus, consider these tips to help you toward a speedy recovery:

- Stay home from work or school. The CDC recommends staying home for at least 24 hours after your fever breaks. This will help prevent spreading the virus to others and ensure that you get adequate rest.
- Get plenty of sleep, and drink adequate fluids to stay hydrated.

Most who contract the flu virus do not need medical care or antiviral drugs, but some are more likely to have complications, such as young children, those 65 and older,

those with asthma, diabetes or who are pregnant. Talk to your doctor about whether you need to be examined when you have flu-like symptoms.

Seek medical attention if you or your child experiences any of these symptoms:

- Fast breathing or trouble breathing
- Bluish skin color
- Pain or pressure in the chest or abdomen
- Sudden dizziness or confusion
- Severe or persistent vomiting
- Flu-like symptoms that improve, but then return with fever and worse cough.✂

Pre-Diabetes Precautions

Before developing type 2 diabetes, many suffer from pre-diabetes, a serious medical condition in which blood glucose levels are much higher than normal. But pre-diabetes does not have to lead to type 2 diabetes. This starts with knowing the risk factors and prevention strategies.

Risk factors

- If you are overweight and age 45 or older, you should be screened for pre-diabetes during your next routine check-up.
- If you are not overweight and age 45 or older, ask your doctor during your next visit if testing is appropriate.
- If you are overweight and under age 45, your doctor should recommend testing if you have any other risk factors for diabetes.

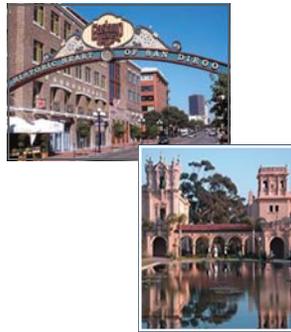
Prevention

If you are diagnosed with pre-diabetes, you can still prevent or delay the onset of type 2 diabetes through lifestyle changes, such as:

- Moderate weight loss: reduce your total body weight by 5 to 10 percent.
- Regular exercise: aim for 30 minutes of exercise a day, five days a week.
- Healthy diet: talk to your doctor about a healthy meal plan that is right for you.¶ ✂

Community Bulletin Board

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