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# PROFESSIONAL LIABILITY UPDATE

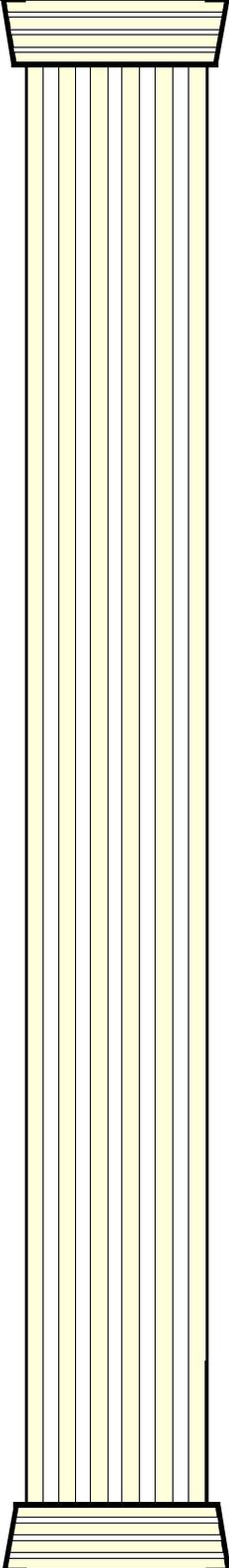
A Loss Prevention Newsletter for the Design Profession

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MSP PL 11/2003: "A Failure to Communicate"

November, 2003

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## A Failure to Communicate

*Article courtesy of the Professional Liability Agents Network (PLAN)*

*Special thanks to DPIC Companies for excerpts from*

*Lessons in Professional Liability: DPIC's Loss Prevention Handbook for Design Professionals*

Today's construction projects can be extremely complex, often requiring the input of dozens of specialists, all of whom need to communicate with each other. You must interact and communicate daily with diverse personalities in order to inform clients, present proposals, listen to sub-consultants, deal with public officials, respond to contractors and resolve inevitable conflicts. In this "sue-first-and-ask-questions-later" world of ours, the truth is that any or all of these personalities can be the source of a claim against your firm.

Indeed, a large number of claims made against design professionals result not from technical errors or omissions, but from a breakdown in communication between parties to the construction project – either in the written project documentation or in day-to-day conversations. In fact, a recent study by professional liability insurer DPIC Companies showed that non-technical factors contribute to 70% of claims against design professionals. Leading among these non-technical factors that result in claims are communication failures.

This failure to communicate need not happen. You can anticipate and deal with many of these problems by considering the factors that lead to misunderstandings between design professionals

and other members of the construction team. The need for effective communication starts early in the design process.

### Communicate from the Start

It can't be said too many times: **never overestimate a client's knowledge** of your capabilities, services and procedures. Just as the general public may not understand the role of a design professional, so a client may not understand the scope and limitations of your

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Published by

**Cavnac & Associates**

INSURANCE BROKERS

License No. OA99520

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professional services. It is your responsibility during the earliest stages of negotiation to explain to your client what you do as a design professional and – just as important – what you *don't* do.

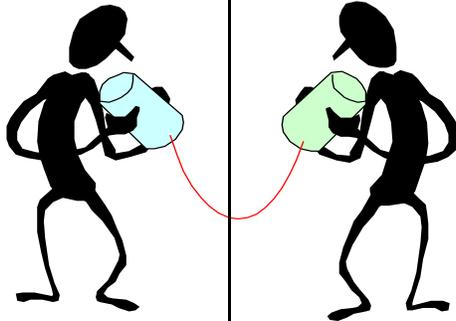
It may be inconceivable to you that a client could think that you are responsible for a perfect set of plans and specifications. Yet a client can assume you have detailed knowledge of every item you specify or that you participate in actual performance testing before you write your specifications.

Claims are often made against design professionals regarding specifications of products or systems, often after the standard guarantee periods given by the contractor and equipment manufacturer have expired. A client who does not grasp your professional obligations may allege that you were negligent in specifying an item or that you should have personally tested the system before you specified it. Make sure you provide your clients with the information they need to understand your responsibilities and limitations.

Clients may be particularly suspicious of your motives when you add items to your specifications after the initial design and budget is accepted. For instance, assume you made the decision, after some deliberation, to omit an item from the specifications for a project. As construction progresses, circumstances change. It now seems reasonable, in your judgment, to add the item to the project as extra work.

When you made your original decision, it was reasonable and within the legal standard of care, and you might have saved the owner some money. Now, however, the client, faced with a change order and the resulting increased cost, decides to question your judgment. The client may complain that you were negligent in not specifying the item originally. Another allegation may be that you implied a warranty that the drawings would be complete and sufficient for the purpose intended.

Neither of these allegations is true. Yet, somewhere along the line you failed to communicate to your client what to expect from you or your drawings. Your client should have been prepared to expect changes as a normal part of the construction process. Instead, because your professional role was misunderstood, you face litigation.



Another misunderstanding surfaces in suits arising from persons injured at the construction site. Again, it is commonly believed the designer has an active role in determining the contractor's safety procedures and programs. Your contract and the general conditions of the contractor's contract should be perfectly clear on this issue. And you should verbally discuss the issue with your client long before construction takes place.

A third area that frequently confuses clients concerns your opinions of probable construction cost. Each time you use the phrase "cost estimate" with a client, you run the risk of a claim. Why? Because the client may believe that your estimate is a guaranteed maximum figure and will budget accordingly. If the final costs exceed your estimate, the client may argue that he or she properly relied on your estimate and expert evaluation.

Instead, when you are required to provide information on the expense of an item or project, it is better practice to use the phrase "opinion of probable cost." This correctly conveys the idea that ultimate costs may, and often do, vary from your opinion and gives you valuable flexibility in defending your efforts.

The solution to these and similar problems is to talk to your client. From the earliest conceptual stage, through the refinement of your work scope and negotiation of your contract, during the development of your design and into construction, make sure your client is on board every step of the way. Explain the problems that can – and will – occur during design and construction. And at all times, be very clear about your role and limitations in the process.

## Communicating During the Project

Sometimes, once the professional service contracts are signed, parties to a design and construction process do not take the time to sit down and communicate on a regular basis. In most cases, this is simply an unfortunate oversight.

**Communication** (Continued on page 3)

## **Communication** (Continued from page 2)

Most architects and engineers would be quite willing to answer any reasonable question a client or contractor may have. Indeed, it would be rare to find a design professional who would not welcome the opportunity to discuss the relative merits of one system or design over another. Yet, unless you initiate a schedule of regular communications with these parties, they may get the impression that you would rather not be bothered.

To keep lines of communication open and encourage frequent feedback, schedule regular meetings with all key parties to the construction project. On large jobs, consider scheduling weekly project review sessions with representatives of the contractor, the client and the other design consultants involved. These sessions can often pinpoint potential construction problems before they become serious, and foster solutions that are satisfactory to all involved parties.

Also plan weekly internal conferences among all key members of your staff working on a project. Make it mandatory that designers identify their progress over the past week. List problems that need resolution and make requests for whatever information is necessary but has not been received. Progress reports of this type serve as an effective diary of the project that can be reviewed after project completion – or when a project dispute arises.

Clients will find progress reports to be valuable as well. As part of a client communication program that includes personal visits and regular meetings, progress reports can help form a bond of trust that will keep you and your client working together, even when adversity strikes. Nothing demonstrates a professional approach as effectively as well-planned, timely transmission of clear information.

## **Document, Document, Document**

Even when verbal communications are frequent, memory failure or misunderstanding can cost huge sums of money and precious time when disputes or litigation result. Design professionals often expect that they, their clients and other parties

to the project will remember all of the details of telephone conferences or face-to-face discussions concerning an active project without the help of written documentation. **No one remembers everything.** It is important to record in writing all important discussions that concern or influence a project.

Memorialize meetings and telephone conversations with clients, sub-consultants and contractors. As a matter of routine, require that all discussions involving design decisions be documented by brief memoranda.

A written record helps jog the memory and enhances communication; it may also prove important in the event of a claim. These memoranda and logs are particularly useful if, for some reason, the principal project professional cannot continue and another professional unfamiliar with the project is required to take over and complete the work.

Have all written correspondence that concerns projects or plans reviewed by a senior member of your firm – a project manager, department head or principal – before it is sent out to other parties. Careful use of the written word takes experience, and most principals and managers have developed this skill. Their review of correspondence will provide a crosscheck to discover misstatements and avoid misunderstandings.

## **Communication Is the Key**

It may seem almost too obvious: clear communication is the key to a successful project void of disputes and claims. Yet at the core of most litigation between design professionals, their clients and other parties to the design and construction process are misunderstandings based on the failure to communicate.

Effective communications should be a core competency of any design firm that strives to understand and meet the needs of its clients. And communications also help ensure the client understands the true scope and extent of the services you can be expected to provide. With expectations properly communicated, documented and verified, any project upsets can be addressed quickly, calmly and effectively with minimal negative impact on time, costs, reputations and relationships.✧

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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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# Standard Contract Provisions to Consider

By Jeffrey W. Cavnac, CPCU, RPLU

In many cases, you have no choice but to sign your client's contract. Whenever possible, however, you should have the client sign *your* agreement.

There is no substitute for a well-written standard client contract. Although each project is different, there are certain provisions that should always be included. Below is a listing of provisions you might consider incorporating into your standard form agreement. If acceptable provisions are already included in either the current CELSOC or AIA forms, those provisions are listed. If you would like sample wording or specific assistance, please contact us.

Recognize that this list of contract clauses is provided from a risk management and insurance perspective. There are many other provisions dealing with scope, payment and other issues that need to be addressed as well.✧

No.	Provision	CELSOC 2003	AIA B141 1997	Your Contract
1.	Americans with Disabilities			
2.	Assignment	3	1.3.7.9	
3.	<b>*Attorneys Fees Clause</b> (Prevailing Party)	49		
4.	Betterment			
5.	Builders Risk Insurance	45		
6.	<b>*CADD Electronic Files</b>	12		
7.	Certificate of Merit (Contractual)			
8.	"Certify," Definitions of		1.3.7.8	
9.	Changed Conditions	44		
10.	Code Compliance			
11.	Condominiums (if applicable)			
12.	Confidential Communications			
13.	<b>*Consequential Damages</b>	35	1.3.6	
14.	Contingency Fund			
15.	<b>*Corporate Protection</b>		2.1.7	
16.	Cost Estimates	37	1.3.1, 2.1.7	
17.	Delays			
18.	<b>*Dispute Avoidance &amp; Resolution</b>	51	1.3.4	
19.	Entire Agreement	4		
20.	Fast Track (if applicable)			
21.	<b>*Hazardous Materials</b>	46, 47	1.3.7.6	
22.	Information Provided By Others			
23.	<b>*Job Site Safety</b>	42		
24.	Lenders Requirements	22		
25.	<b>*Limitation of Liability</b>	52		
26.	Instruments of Service		1.3.2	
27.	Mold	48		
28.	Multiple Prime (if applicable)			
29.	Ownership of Instruments of Service	10, 11		
30.	Owners (Other) Consultants	39		
31.	Prototype Designs (if applicable)			
32.	Record Documents			
33.	Renovation / Remodeling (if applicable)			
34.	<b>*Severability</b>			
35.	Statute of Limitation (Contractual)		1.3.7.3	
36.	Suspension of Services			
37.	Termination (Project Re-Start)	14	1.3.8	
38.	Warranty	23, 40		

**\* Critical**