

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 11/2007: "Jobsite Safety — Part 2"

November, 2007

Jobsite Safety – Part 2

Steps for Avoiding Liabilities



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

- The client-contractor agreement
- General liability provisions
- Stop work authority
- Shop drawing review
- A field manual

Contractual Language

Consult with your attorney and your professional liability insurance specialist for help in developing the jobsite safety

Jobsite Safety – Part 2 (continued on page 2)

Because jobsite safety is such a serious liability concern, every architect and engineer should become knowledgeable of the risks and remedies. Design firms must avoid any contract language that could make them liable for safety and instruct their staff to conduct themselves cautiously while on the jobsite.

Part I of this two-part report examined some of the more notable court decisions regarding jobsite safety. We demonstrated a range of outcomes and examined the primary issues considered by the courts. Now, in Part 2, we will examine steps every design firm should take to avoid finding themselves potentially liable for jobsite safety. Major areas we'll examine include:

- Contractual language
- Scope of services

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* 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.

Jobsite Safety – Part 2 (continued from page 1)

language in your agreement. Work to ensure that the client has a provision in the General Conditions to the construction contract requiring the contractor to indemnify your client, you and your subconsultants for all claims arising from the performance of the contractor and his or her subcontractors.

Under no circumstances should you accept a contract clause that makes you responsible for any losses or injuries that occur at the jobsite. Also, avoid any language in a client-drafted agreement that calls for your “supervision” on a jobsite, as well as any language that calls for you to “assure strict compliance” with plans, specifications or any health or safety plans or programs. Your responsibilities for construction observation at the jobsite should be limited specifically to determining general conformance with the design. Consider working with your attorney to adopt the following sample contract language provided by XL Design Professional:

Jobsite Safety

Neither the professional activities of the Consultant, nor the presence of the Consultant or its employees and subconsultants at a construction/ project site, shall relieve the General Contractor of its 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 its personnel have no authority to exercise any control over any construction contractor or its employees in connection with their work or any health or safety programs or procedures. The Client agrees that the General Contractor shall be solely responsible for jobsite safety, and warrants that this intent shall be carried out in the Client's contract with the General Contractor. The Client also agrees that the Client, the Consultant and the Consultant's subconsultants shall be indemnified by the General Contractor and shall be made additional insureds under the General Contractor's policies of general liability insurance.

Scope of Services

When developing your scope of services, carefully define your construction-phase services to avoid assuming responsibility for jobsite safety. This is especially important if you are offering full-time, resident or expanded field services.

Make it clear to the client 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 rightfully belong with the general contractor, who has the largest degree of control of the jobsite.

The Client-Contractor Agreement

Also consider giving your clients sample language for their use in the Client-General Contractor agreement. The following example supports the intent of your Client-Consultant agreement:

The General Contractor agrees to waive any claim against the Client and the Client's agents, architects, engineers, environmental consultants and their employees acting within the scope of their duties, and to defend, indemnify and hold them harmless from any claim or liability for injury or loss that allegedly arises from the General Contractor's performance or the work described herein, but not including the sole negligence of the Client or the Client's agents, architects, engineers, environmental consultants or employees. The General Contractor will require all Subcontractors to conform with this provision before

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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. However, with proper contractual protection you can reject or recommend rejection of portions of the work that, based on your observations and judgment, do not conform to your construction documents. Here is a sample Rejection of Work clause to discuss with your attorney:

Rejection of Work

The Consultant shall have the authority to reject any Work that is not, in the judgment of the Consultant, in conformance with the Construction Documents or work plans. Neither this authority nor the Consultant's good-faith judgment to reject or not reject any Work shall subject the Consultant to any

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they start any work. The General Contractor shall ensure this provision is in conformity with the insurance provisions of this contract.

General Liability Provisions

Help your client ensure that the general conditions require that the contractor provide evidence of satisfactory general liability insurance coverage and that the policy names the client as well as the design professional and its subconsultants as Additional Insureds. This allows you to tender back to the contractor any claim from an injured worker in the event you are named in a jobsite injury suit.

An insurance provision in the client-general contractor agreement might read:

The General Contractor shall require the General Contractor's insurance carrier to add the Client and the Client's professional consultants and their agents as additional insureds under the General Contractor's general liability insurance policy with respect to services performed by the General Contractor for the Client. The General Contractor's insurance carrier shall acknowledge that the protection so extended shall be primary protection for the Client and the Client's professional consultants and their agents.

Stop-Work Authority

Make certain that your agreement with the client 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

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Nominate your Orchid or Onion today at www.sdarchitecture.org

liability or cause of action to the Contractor, subcontractors or any other supplies or persons performing work on this project.

Shop Drawing Reviews

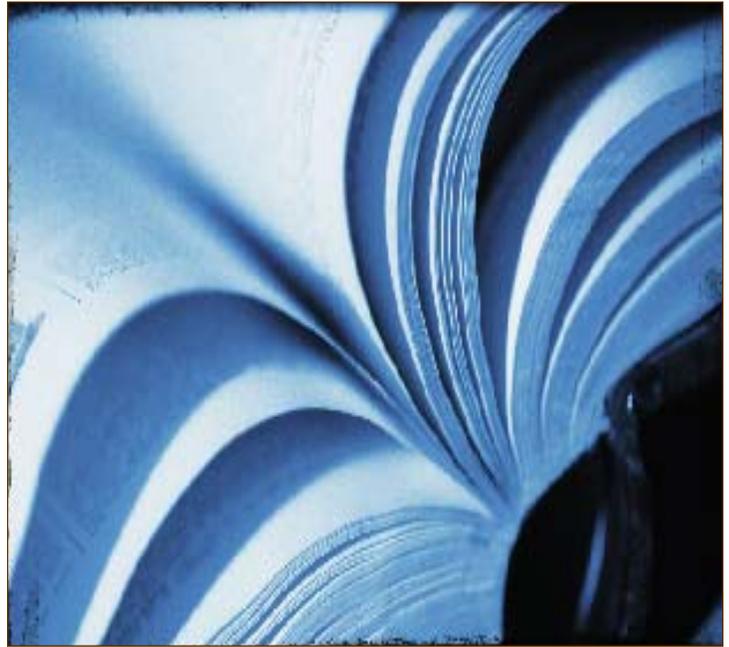
One added level of protection is to establish and follow appropriate procedures with respect to shop drawing review. Your principal concern is to avoid reviewing and commenting on any aspect of shop drawings that relates to jobsite safety. To handle shop drawing reviews effectively:

- Clearly describe in your client contract your duties in reviewing submittals. State that you will not review shop drawings for anything related to the means, methods, techniques, sequences and procedures of construction, or to safety procedures and programs. Spell out, too, the individual items that are the contractor's duty, such as dimensions, gauges, quantities and weights.
- Define exactly what types of shop drawings you will review and inform the contractor of your decision via contract documents. Also, advise contractors that you will not review shop drawings not specifically requested or approved.
- Require that the contractor provide and adhere to a schedule of submittals. Allow adequate time for thorough shop drawing review and obtain an appropriate fee.
- Be careful how you indicate shop drawing "approval." Use a shop drawing stamp to indicate you have reviewed submittals for "general conformance with the design concept," or similar language.
- Do not allow contractors to use a shop drawing to obtain approval for a variation. Require contractors to review and approve in writing all shop drawings before submitting them to you.

A Field Manual

With the assistance of legal counsel, develop a field manual that establishes standard procedures to be followed should your project representatives observe an unsafe condition on a project site. Here are some general guidelines to consider:

- Field representatives should assume the role of observer, not director, of jobsite conditions.



- If a workplace condition poses a potential safety risk but no immediate hazard or danger, then your field rep should report the risk to the contractor or the contractor's representative as soon as possible. The rep should report what was observed, but not instruct the contractor what to do.
- If the reported situation is not remedied or becomes more serious, the field representative should notify the owner (and perhaps even appropriate public officials). It is also advisable to record the observation and notification of appropriate parties.
- If danger to human life is imminent, your professional duty of care to protect the health and safety of the public requires that your field representative take immediate action.

Reinforce these procedures by requiring that your field personnel receive periodic training. Insist on adequate documentation of your project representative's visits to the construction site. Likewise, 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. ✨

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.



The Facts about Influenza

Article courtesy of Employee Benefits Department

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Most people experience several bouts with influenza, or the flu, several times in their lifetime. It can range from an annoyance that keeps us from work for a few days, to a serious condition that can be life threatening.

Facts About the Flu

The flu is an infection of the respiratory tract that is caused by the influenza virus. It is spread mainly through airborne transmission, unlike the common cold, which is spread by direct contact. This means that when a person who has the flu sneezes, coughs or even speaks, they are filling the air with microscopic droplets that are filled with flu particles. These droplets are small enough to remain in the air long enough to be inhaled by another person, and once they land in the new host they begin reproducing rapidly.

Why do we remain susceptible to the flu year after year? The influenza virus is coated with proteins that change constantly. This gradual change in the virus, called an antigenic drift, renders it unrecognizable to our immune systems, and makes it possible for us to be susceptible to influenza year after year.

In addition, entirely new subtypes of the virus appear from time to time. An antigenic shift occurs when a completely new subtype of the influenza virus suddenly emerges. New strains of influenza may result in a worldwide epidemic, and combined with the life threatening complications the flu can cause, make it a major public health concern.

Flu Symptoms

Flu symptoms are often confused with those of the common cold, when in reality the symptoms of the two conditions are

quite different. Influenza is most often associated with the sudden onset of fever, headache, chills, muscle aches, cough and sore throat. If flu symptoms persist for more than three to four days, medical attention is recommended. Influenza can lead to pneumonia, a serious infection of the lungs.

Prevention

The flu vaccine, or the flu shot, is your best chance of preventing the illness, and it can help to lessen the severity of the flu if you do get it. Anyone who wants to lower their chances of acquiring the flu virus can and should get the flu shot. In addition, people who have an increased risk of getting the flu and experiencing serious complications from it should be vaccinated each year, including:

- People over age sixty-five
- Nursing home patients
- People over six months old with health problems
- Children and teenagers who take aspirin regularly
- People who have close contact with the elderly or those with health problems
- People with weakened or compromised immune systems

The best time to receive flu vaccine is from October through mid-November. Influenza season runs from November until April, and peaks from December through March. ✨

Did you know...?

During the last century three major flu epidemics occurred. Those three epidemics — in 1918, 1957 and 1968 — resulted in over 600,000 deaths.



Community Bulletin Board

"Neighbors helping neighbors in San Diego"



Your help is needed to supply seniors with various household, health and holiday items. If you would like to donate any of the items listed below, call Sheona at 619-235-6572, Extension 305.

All Locations

- Christmas trees (to be placed in the lobby and dining rooms at each site)
- Raffle prizes for resident group meetings and social activities. These can include:
 - Kitchen supplies
 - Canned goods; other non-perishable items
 - Small storage containers
 - Crock pots
 - Gift cards are always welcome (Albertson's, Rite Aid Pharmacy, etc.)

Health Services

- Ensure (regular and diabetic)

Transitional Housing

- Toilet paper
- Razors and shaving cream

Potiker Family Senior Residence

- Centerpieces for holiday meals

For other ways in which you can help, please visit <http://www.serving seniors.org>. ✨



The San Diego Humane Society is looking for volunteer



foster parents to care for litters or young and neonatal kittens and puppies until they are ready to be adopted. The Society provides all the necessary supplies, equipment, and support that the volunteer will need to care for their foster animals, including food, bowls, bedding, toys, litter, medication and any veterinary services.

Foster Program pets include kittens and puppies under eight weeks of age; cats and dogs with litters; animals with minor medical needs; animals recovering from surgery or illness, and animals that have been in the shelter for long periods of time and would benefit from a home environment. Animals that may be having difficulty adapting to a shelter environment are also candidates for the foster program.

How to Become a Foster Volunteer

- Attend Volunteer Orientation at the Society
- Attend Foster Care Orientation/ Training Class and interview
- Complete Foster Application and home inspection

To find out more about the Society's Foster Care Program, please visit <http://www.sdhumane.org> or call 619-243-3454. ✨



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2008 "Diamond in the Rough" Gala

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Not all kids are given the same opportunities. Monarch School provides accredited education to homeless and at-risk kids while caring for basic needs such as health care, food, clothing and personal hygiene. Your help can make a difference!

Monarch School is the sole beneficiary of the 2008 "Diamond in the Rough" Gala at the Manchester Grand Hyatt. The incomparable Natalie Cole is the headliner!

To make reservations, donate auction items, or for sponsorship information, please contact Paula Kelly at (619) 685-8242, Extension 227, or visit Monarch School's Web site at www.monarchschoools.org. The earlier you reserve your seat, the closer to the stage you will be!