

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 01/2006: "Communicate Early and Often"

January, 2006



Communicate Early and Often



*Article courtesy of Professional Liability Agents Network (PLAN)
with special thanks to XL Insurance for its contribution*

A great number of claims made against design professionals result not from technical errors or omissions in design, but from non-technical factors. In fact, a study of more than 17,000 closed claims published by the professional liability group of XL Insurance shows that non-technical factors contribute to approximately 70% of claims against design professionals. Leading among these non-technical factors are communication failures, which were a contributing factor in 27% of claims.

This failure to communicate need not happen. You can anticipate and avoid many potential project upsets by correcting the factors that lead to miscommunication between design professionals, their clients and other members of the design and construction team. The need for effective communication starts early in the design process.

The Negotiation Phase

Never overestimate a client's knowledge of the design services you provide. Just as John Q. Public may not fully understand the role of an architect, a civil engineer, a structural engineer and so on, your client may not clearly understand the scope of your 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 – equally important – what you do not do.

It may be inconceivable to you that a client would expect you to design a perfect set of plans. Yet a client can easily assume you are responsible for delivering such perfection unless you have a frank and honest discussion regarding your scope of services.

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2006 Training Sessions

To be held in the Cavnac Training Room

Bank of America Plaza, 450 B Street, 18th Floor, San Diego, CA

- **OSHA Recordkeeping, Inspections & Citations**
Friday, January 20th, 9:00—11:00 AM
- **Having the Right Safety Attitude — Changing Your Safety Culture**
Friday, February 10th, 9:00—11:00 AM
- **OSHA 10 Hour Course — Part 1**
Friday, February 24th, 8:00—12:00 Noon
- **How to Run an Effective Safety Meeting and Make Your Toolbox Talks Fun**
Friday, March 10th, 9:00—11:00 AM
- **Sexual Harassment Training (AB1825 Compliant)**
Friday, October 21st, 9:00—11:00 AM

All Training Sessions Available to Our Clients

Seating Is Limited — Reserve Your Seat Early!

Contact **Stuart Nakutin** for information about upcoming training sessions:

- e-mail snakutin@cavnac.com
- phone **619-744-0589** ✂

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Similarly, clients may feel you are responsible for specifying foolproof materials and systems that will never fail, even after the guarantees given by the equipment manufacturers have expired. They may allege in a claim that you were negligent in specifying a failed material, or that you should have personally tested the system before you specified it.

Clear communication can make sure your clients have the information they need to understand your responsibilities and liabilities regarding specified materials and systems.

Clients, especially those new to the design and construction process, tend to get particularly upset when you add items to your specifications after the initial design and budget is accepted. They may perceive add-ons as a sign of incompetence or even an unscrupulous attempt to increase your fees and profits.

They don't understand that your original estimates and specifications were based on your opinion of probable cost and fully within the legal standard of care. Your client needs to be educated to

expect changes and budget revisions as a normal part of the design and construction process.

All of these issues need to be communicated clearly before you begin a new project. From the earliest conceptual stage, through the refinement of your work scope, through the negotiation of your contract, through the development of your final design and into construction, make sure you communicate every step of the way.

Make sure this communication is two-way. Have your client explain his or her desires, needs and expectations. Discuss the client's ability to handle a few surprises along the way. Set up a formal communication channel so that any errors, omissions, changes, surprises and other perceived problems are dealt with swiftly and constructively, with the intent to fix the problem rather than fix the blame.

Similarly, make sure communication channels are open with the contractor, subconsultants and other parties important to the project. In fact, it's a good idea to invite all parties to a pre-construction meeting to review plans and procedures as well as clarify roles, expectations and methods of reaching problem resolution.

It is really quite amazing how much a little open communication can do to get a project off to a smooth start and help get it back on track if a problem occurs.

The Formal Contract



Every important issue that was discussed with your client during negotiations needs to be formalized in a written professional services contract. Discussing your areas of responsibility and limits of your liabilities is not enough. Even a hearty handshake won't do. Formalize your agreement in a written contract.

Work with your legal representative to draft a solid contract specifically written to reflect your practice and the particular project. You can start with recommended contract language provided by your industry associations.

As your professional liability specialist, we can provide additional resources and assistance in helping you draft a fair and equitable contract.

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If you are asked to sign a client-written contract, ensure it is thoroughly reviewed by your attorney. Again, we can provide advice as well, particularly regarding the insurability of the client's contract language. Any liability you agree to take on contractually for which you would not otherwise be responsible can be uninsurable.

Communicating During the Project



Too often, once the professional service contracts are signed, communications diminish. Parties do not take the time to sit down and correspond on a regular basis over the life of the project.

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 weekly project review sessions with representatives of the contractor, the client and the other design consultants involved.

Smaller projects may not require such frequent formal meetings involving all parties, but regular communication is crucial nonetheless. These sessions can pinpoint design and construction problems before they become serious. They also foster solutions satisfactory to all involved parties.

Also plan weekly internal conferences among all key members of your staff working on a project. Have staff convey their progress since the previous meeting. List problems that need resolution and make requests for whatever information is necessary to solve them.

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. Reporting regularly to your client on the progress of their project can avoid surprises and 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 and honest information.

Put It In Writing



Even when verbal communications are frequent, memory failure and misunderstanding can cost huge sums of money and precious time when disputes or litigation result. No one remembers all the details of telephone calls, group tele-

conferences or face-to-face conversations. It is important to record in writing all important information and decisions that concern or influence a project.

Memorialize meetings and telephone conversations with clients, subconsultants and contractors. Require that all discussions involving design decisions be documented by brief memoranda. Have clients formally approve such memoranda as accurate and complete.

These memoranda and logs are particularly useful in the event of a dispute or claim. They are invaluable if there is a change in the project team and a new member needs to be brought up to speed with the current state of affairs.

It is a good idea to have all of your firm's written correspondence concerning projects or plans reviewed by a senior member of your firm – a project manager, department head or principal – before it is sent out to the client, contractor or other parties. An internal review provides a crosscheck to discover misstatements and avoid misunderstandings. For sensitive correspondence, a legal review by your attorney should be required as well.

E-Mail and Other Electronic Communications



It is amazing how email, text messaging and other electronic communications have taken the place of a phone call, a formal letter or a face-to-face conversation. While such technology has certainly been a boon for productivity, it can

also be a bust when it comes to formal communication.

Emails and text messages are easily forgotten, deleted, lost or ignored. We often assume someone has received an electronic message, but it may go unopened or otherwise be lost in cyberspace.

It's a good idea to formalize your company electronic communications policy. It should address not only email, but also extranets, chat rooms, text messaging, instant messaging, news groups, bulletin boards and any other electronic media being used. Make sure all employees are aware of and adhere to the policy.

Try to keep electronic correspondence regarding a project filed in an orderly manner within your computer. Back up all critical information sent by email on your network, in printed hard copy or on electronic media such as CDs. Use the "return receipt" email function that confirms your message has been received and opened. Follow up quickly when your electronic messages appear to be ignored, misdirected or lost.

Communication Is the Key



It seems so obvious: clear communication is a vital key to a successful project void of disputes and claims. Yet at the root of litigation between design professionals, their clients and other parties to the design and construction process are misunderstandings based on the failure to communicate.

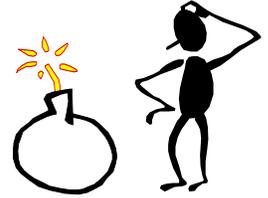
Effective communications should be a core competency of any design firm that strives to understand and meet the needs of its clients. A program of regular communication helps ensure the client understands the true scope and extent of your services. With expectations properly communicated, documented and verified, project upsets can be addressed quickly, calmly and effectively with minimal negative impact on time, costs, reputations and relationships. ✂

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.

Tips for Screening Prospective Clients

By Michael Strogoff, AIA

Most design professionals have had clients whom they wish they had never met. Likely, initial signs warned of a lurking problem. But because early clues often go unheeded, design professionals may suffer months or years of agony placating difficult clients while telling themselves, *"I should have known."*



When screening and negotiating with prospective clients, observe the following red flags:

- 1. The client is reluctant to meet.** If clients insist on conducting negotiations via letters, faxes or e-mails rather than face-to-face, they probably place a low value on the relationship or the importance of effective communication. You will likely face an uphill battle throughout your commission.
- 2. The client is inflexible or unwilling to negotiate.** Statements such as, *"our contract is not changeable"* or *"other architects (or engineers) have signed this"* indicate an unwillingness to collaborate, and this attitude will last well beyond the negotiation.
- 3. The client doesn't listen to or respect the design professional's opinion.** Clients need to trust design professionals as their advocates and valued team members. While it's their prerogative not to accept a design professional's recommendations, successful relationships require mutual caring and respect.
- 4. The client undervalues architects or engineers.** These clients might jokingly say things such as, *"If they let me, I could get this project done without an architect,"* or *"Architects make too much money."* Be warned — they wouldn't make these statements if they didn't believe them.

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5. **The client has unrealistic expectations**, such as that design professionals should deliver an error-free set of documents or reimburse clients for the full cost of change orders.
6. **The client assigns a representative who doesn't have the authority to make decisions.** During a negotiation, you will be at a disadvantage if the representative must seek approval from the client between meetings. (The client can easily reject proposals when you are not physically present.) And if the representative must obtain approvals throughout the project, design professionals can expect untimely decisions, delays and poorly communicated second-hand information.
7. **The client is reluctant to disclose available information to the A/E team.** Imagine if architects and engineers, based on what they deemed appropriate, parceled out portions of their construction documents to contractors.
8. **The client's contract is unreasonable or heavily biased in favor of the client.** Unreasonable contracts are indicative of unreasonable or distrusting clients.
9. **The client or its representatives lack integrity.** Clients that mislead others, tell people conflicting information, play design professionals off of one another or act dishonestly in other ways have only their interests in mind.
10. **Discrepancies exist between a client's verbal statements and what they will commit to writing.** Clients will gladly include in a contract statements they intend to stand behind.
11. **The client is fee shopping.** Clients that select architects and engineers based primarily on price don't appreciate the value design professionals provide and are more prone to initiating claims against them.
12. **The client has champagne taste and a beer budget.** Clients whose expectations are higher than their budget allows will likely be disappointed with your recommendations or solutions.

13. **Your gut told you not to proceed.** Follow your instincts. If it doesn't feel right, it probably isn't.

Remember, the easiest time to jettison questionable clients is *before* you start working with them. ✂

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*This article initially appeared in **Negotiating Strategies**, the newsletter for design professionals and their advisors with practical, proven techniques for negotiating better and more profitable agreements.*

*For more information about **Negotiating Strategies**, call 866 ARCH ENG (1 866 272-4364), or email Newsletter@StrogoffConsulting.com.*

Cavignac Staff's 2005 Charitable Fund Donations Largest Yet



Cavignac & Associates' Charitable Fund, established and administered by the Agency's staff members, donated over \$6,700 for holiday gifts to the Polinsky Center, Monarch School, San Pasqual Academy, Voices for Children, the Marine Support Fund, and Becky's House.

"Our staff members have always been generous in giving to those in need in our community," said Jeff Cavignac, President and Principal of Cavignac & Associates, "but never more than this year. They've been awesome."

In addition to holiday gifts, staff members donated close to \$2,500 for Hurricane Katrina Relief. Their donations were matched by the Agency and again by the Principals, for a total of nearly \$7,500. \$1,000 went to the San Diego Humane Society, which sent two teams to Louisiana to rescue animals. The balance went to the Bush-Clinton umbrella relief fund for rebuilding in the Gulf states. ✂

Democracy is two wolves and a lamb voting on what to have for lunch. Liberty is a well-armed lamb contesting the vote!

— Benjamin Franklin