

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 05/2006: "Get Paid without Counter-Claims"

May, 2006

Get Paid Without Counter-Claims!

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

What's a surefire way of being hit with a lawsuit from one of your clients? Threaten to sue your client for unpaid fees.

Clients who are sued for fees are very likely to respond by suing the design firm for negligence, and these counter-claims are not always meritless in the client's eyes. Almost all instruments of service have some degree of error, omission, inconsistency or ambiguity. While such imperfections may not rise to the level of negligence, a client's lawyer will have little trouble finding a "hired-gun" expert witness who will testify that the design firm performed below the standard of care. They will contend that negligent performance damaged the client – and presented a valid reason for non-payment.

In many cases, the cost of defending a negligence claim will be greater than the amount of fees you would likely net from a claim of non-payment. This puts your client in a position of great leverage, especially if payment terms are not detailed in your contract. That's why many design firms are willing to settle a dispute by ac-



cepting only a fraction of the fees they are owed.

Increase Your Chances of Getting Paid

There are contractual measures you can take to help avoid the problem of a countersuit related to client non-payment. Add language to your client agreements that spells out payment provisions for services rendered and your rights to reme-

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Published by

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dies in the event you are not paid according to contract terms. The more precisely you define the details of these payment terms and your right to enforce them, the more likely you'll receive prompt payment — and the less likely your client will consider a counter-claim.



Billing and Payment Terms

Here is sample billing and payment contract language from XL Insurance that you and your attorney should consider adding to your client agreements:

Billing and Payment Terms

Retainer – *The Client shall make an initial payment of ____ dollars (\$____) (retainer) upon execution of this Agreement. This retainer shall be held by the Consultant and applied against the final invoice.*

Payment Due – *Invoices shall be submitted by the Consultant (monthly, bimonthly, weekly, upon completion of each phase), are due upon presentation, and shall be considered past due if not paid within ____ (____) calendar days of the due date.*

Interest – *If payment in full is not received by the Consultant within ____ (____) calendar days of the due date, invoices shall bear interest at one-and-one-half (1.5) percent (or the maximum rate allowable by law, whichever is less) of the Past Due amount per month, which shall be calculated from the invoice due date. Payment thereafter shall first be applied to accrued interest and then to the unpaid principal.*

Collection Costs – *If the Client fails to make payments when due and the Consultant incurs any costs in order to collect overdue sums from the Client, the Client agrees that all such collection costs incurred shall immediately become due and payable to the Consultant. Collection costs shall include, without limitation, legal fees, collection agency fees, and expenses, court costs, collection bonds and reasonable Consultant staff costs at standard billing rates for the Consultant's time spent in efforts to collect. This obligation of the Client to pay the Consultant's collection costs shall survive the term of this Agreement or any earlier termination by either party.*

2006 Seminars

Cavignac & Associates' Training Room

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

- **Sexual Harassment Training**
(AB 1825 Compliant)
Thursday, May 25th, 2006 — 9:00—11:00 AM
- **Contractual Risk Transfer**
Friday, June 9th, 2006 — 9:00 — 11:00 AM
- **How to Prepare for a Formal OSHA-Type Contractors Job Site Inspection**
Thursday, June 15th, 2006 — 9:00 — 11:00AM
- **How to Conduct an OSHA-Approved Accident Investigation (for Automobile, Property and Workers Compensation Insurance)**
Thursday, July 20th, 2006 — 9:00 — 11:00AM

All training sessions available to our clients

Reserve early / seating is limited!

For more information about upcoming seminars:

- Visit our Web site at www.cavignac.com
- Contact **JASMIN ADRIANO** by e-mail jadriano@cavignac.com or by phone at **619-744-0596** ✪

Set-Offs / Backcharges / Discounts –

Payment of invoices shall not be subject to any discount or set-offs by the Client, unless agreed to in writing by the Consultant. Payment to the Consultant for services rendered and expenses incurred shall be due and payable regardless of any subsequent suspension or termination of this Agreement by either party.



Satisfaction With Services

If possible, incorporate a satisfaction with services clause in your contact. This language can help you in the event a client fails to pay a subsequent invoice and later claims dissatisfaction with your entire range of services. XL Insurance recommends the following language:

Satisfaction with Services

Payment of any invoice by the Client to the Consultant shall be taken to mean that the

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Client is satisfied with the Consultant's services to the date of payment and is not aware of any deficiencies in those services.

Withholding Fees for Disputes

 Refuse to allow your client to include contract language that permits him or her to withhold all fees for disputed invoices. If the client insists on a clause regarding disputed fees, make sure it reserves your right to collect fees on all undisputed portions of the invoice. Here is a sample clause from XL Insurance to discuss with your attorney:

Disputed Invoice

If the Client objects to any portion of an invoice, the Client shall so notify the Consultant in writing within _____ (____) calendar days of receipt of the invoice. The Client shall identify in writing the specific cause of the disagreement and the amount in dispute, and shall pay that portion of the invoice not in dispute in accordance with the other payment terms of this Agreement.

Any dispute over invoiced amounts due that cannot be resolved within ten (10) calendar days after presentation of invoice by direct negotiation between the parties shall be resolved within thirty (30) days in accordance with the Dispute Resolution provision of this Agreement.

Interest as stated above shall be paid by the Client on all disputed invoice amounts that are subsequently resolved in the Consultant's favor and shall be calculated on the unpaid balance from the due date of the invoice.

Suspension of Services

 One of the most effective contract provisions for getting paid on time requires the client to pay any undisputed due portion of the bill within a specified period or otherwise face a curtailment of service. A sample clause from XL Insurance is presented here. Check with your attorney to determine whether such language is enforceable within your state.

Suspension of Services

If the Client fails to make payments when due or otherwise is in breach of this Agreement,

the Consultant may suspend performance of services upon _____ (____) calendar days' notice to the Client. The Consultant shall have no liability whatsoever to the Client for any costs or damages as a result of such suspension caused by any breach of this Agreement by the Client.

Upon payment in full by the Client, the Consultant shall resume services under this Agreement, and the time schedule and compensation shall be equitably adjusted to compensate for the period of suspension plus any other reasonable time and expense necessary for the Consultant to resume performance.

Termination of Services



When all else fails in your efforts to collect fees due, you should have the right to lower the final hammer – the termination of your contract. Here is sample termination language from XL Insurance to consider:

Termination of Services

If the Client fails to make payment to the Consultant in accordance with the payment terms herein, this shall constitute a material breach of this Agreement and shall be cause for termination of this Agreement by the Consultant.

Be Wary of Client Resistance

Work with your attorney to develop payment terms and language best suited to your firm's unique needs. Check out the advice offered by your professional societies as well. Once you have language in place, seek to apply it consistently among all of your clients.

Be wary of any potential client who balks at signing language that protects you from non-payment. Occasionally, however, clients may have legitimate problems with specific obligations of your payment terms. For example, a client's billing and accounting procedures may require it to extend the length of invoice payment beyond 30 days. A client who wants to pay in 60 or 90 days should expect to pay a premium for that luxury.

If the client balks at accepting a termination for non-payment clause, as opposed to objecting to its specific terms, be aware that the client may be con-

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templating slow or no payment and does not want you to have the ability to suspend or stop services. In such cases, you have to ask yourself, “*Do I really want to deal with this client?*”

By using appropriate contract language with real teeth and by following a consistent, well-designed billing and collection system, you can minimize the risks of write-offs and slow pay accounts as well as threats of retaliatory liability claims.



Pay-When-Paid Clause

When it comes to payment terms, sub-consultants have the right to be treated by the prime, as the prime wants to be treated by the client. The prime expects to be paid promptly for work done for his or her client; so does the sub-consultant.

In some instances, however, a prime consultant may feel the need to insist on a Pay-When-Paid provision in its agreement with sub-consultants. In such cases, the sub-consultant should consider accepting such an agreement as long as the contract language provides adequate protection. For example, the Pay-When-Paid clause should have an outer limit by which time payment must be made, whether the prime has been paid or not. Here is a sample clause provided by XL Insurance:

Payment Terms

The Sub-consultant shall submit invoices monthly to the Consultant, who shall review them promptly. The Consultant shall either approve these invoices or notify the Sub-consultant of any invoices not approved. The Consultant and Sub-consultant shall confer and attempt to resolve such disputed invoices.

The Consultant shall promptly invoice the Client for the Sub-consultant's service in accordance with the billing terms of the Consultant's agreement with the Client and shall use reasonable and diligent efforts to collect payment from the Client. The Consultant shall pay the Sub-consultant within _____ calendar days after receiving payment from the Client. Regardless of whether or not the Client pays the Consultant in full, the Consultant shall pay the Sub-consultant for all undisputed invoices within a

reasonable period of time after the completion of the Sub-consultant's services under Agreement.

If payment is not received by the Sub-consultant for undisputed invoices within ten (10) calendar days after the Client pays the Consultant for such services, or within forty-five (45) calendar days after the Sub-consultant submits its invoices for such services, then such invoices shall bear interest at one-and-one-half (1.5) percent (or the maximum rate allowable by law, whichever is less) of the PAST DUE amount per month, which shall be calculated from the tenth or forty-fifth day, as above, whichever occurs first. Payment to the Sub-consultant shall first be applied to accrued interest and then to the unpaid principal.

If a prime consultant and sub-consultant enter into a joint venture sharing the risks and rewards of working with a client, then each may share the risk of non-payment. However, in a typical consultant-sub-consultant relationship, the sub-consultant has the right to expect to be paid within a reasonable time, whether the prime gets paid or not.

A counter-claim filed over fee disputes is one of the fastest growing areas of litigation among design firms. Adding protective language to your client agreements not only helps reduce the chances of such counter-claims, it enables you to judge your clients attitude regarding contract provisions that give you the ability to enforce the agreed to fee and payment schedule for your services. ☘

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.

“We could certainly slow the aging process down if it had to work its way through Congress.”

— Will Rogers

Top Ten Excuses for Accepting Unreasonable Risks

By Michael Strogoff, AIA
© 2003, Strogoff Consulting.

10. Let's cross that bridge when we get to it.
9. We'll just have to be extra diligent.
8. That's why we have insurance.
7. What's the alternative – walking away from the project?
6. That clause is so one-sided it will never stand up in court.
5. They said they never enforce that provision even though it's part of their standard contract.
4. It's just a condominium.
3. Don't worry. I know the developer.
2. A homeowner's association wouldn't sue us. They don't even know us.

1. The firm doesn't have a lot of assets. What are they going to do – come after us personally?

"If you think you're too small to have an impact, try going to bed with a mosquito in the room."

— Anita Koddick

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This article initially appeared in Negotiating Strategies, published by Strogoff Consulting, a management consulting firm dedicated to helping design professionals in practice management, negotiation, ownership transitions and business development. For more information about Strogoff Consulting or Negotiating Strategies, visit www.StrogoffConsulting.com or call 866-ARCH ENG (1-866-272-4364). ☺

Personal Ergonomics

By Stuart Nakutin, CSM, AIC, PHR, WCCP, CPDM
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What Is “Ergonomics?”

Ergonomics is the science of matching tools and tasks to the work environment. In other words, ergonomics tries to make your job fit you, rather than making you fit your job.

The purpose of ergonomics is to reduce or eliminate injuries and illnesses that can result from stress on muscles, nerves, and joints. These types of injuries have been common to workplaces for a long time, but



safety standards concerning them are new. If OSHA finds that poor ergonomics is a threat to employee well being, it can cite a company for violating its duty to provide a safe and healthy workplace.

A variety of ergonomically-related injuries take place and a variety of terms exist to describe them. The most common terms used are musculoskeletal disorders or Cumulative Trauma Disorders (CTDs). They are also known as

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repetitive motion or stress disorders. Whatever they're called, they account for approximately one-half of all reported workplace illnesses each year. These are technically called "illnesses" because the problems generally build up over time, rather than being the result of a single event, as in the case of an accident.

Physical Problems from Cumulative Trauma

These usually involve pain and damage to muscles, tendons, and nerves in the back, neck, shoulders, wrists, hands, and elbows. Discomfort can be mild and periodic, or long lasting. Typical ailments include: tendonitis, "tennis elbow," "trigger finger," lower back pain, Carpal Tunnel Syndrome (which causes hands and wrists to tingle or become numb), and Reynauds Syndrome, which causes fingers to become white.

Disorders can be caused by making the same motion over and over, staying in one position too long, or working in awkward positions. They also result from working with tools that don't fit the body, using a great deal of physical force, and exposure to long periods of heavy vibration.

How to Avoid Discomfort

Ergonomically related disorders occur to all types of workers, from laborers to office personnel. You can often help yourself by learning and practicing basic ergonomic principles. There are many ways to reduce or eliminate the disorder; here are a few:

- Use two hands instead of one for a task to reduce excess demand on a single muscle group
- Use tools that are right for the job and proportioned for your body
- Use power tools instead of manual tools when possible
- Take frequent breaks from repetitive motion tasks
- Avoid repeating awkward movements or holding yourself in awkward positions

- Wear protective gloves that reduce pressure or tool vibration on your fingers
- For computer use, keep the screen 12 to 18 inches from your face and just below eye level
- Position the keyboard so that your wrists are straight and your elbows are close to your body
- Change positions, stretch often to improve blood circulation, and take breaks regularly

Report Early Symptoms

Repetitive motion injuries are a growing concern in the workplace. Employees who experience numbness, tingling or pain in their hands, arms or neck should seek the advice of a supervisor. Changes in work stations and equipment can often alleviate these problems before they become chronic, and medical attention should be sought if the problem persists. Following this simple advice can help eliminate physical stress and keep employees feeling good all day. ☺

Stuart Nakutin is Cavignac & Associates' Director of Safety, Claims and Loss Control.

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