

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 07/2006: "A Closer Look at Field Observation Services"

July, 2006

A Closer Look at Field Observation Services

Article courtesy of Professional Liability Agents Network (PLAN)

What design professionals do – and don't do – on the jobsite is crucial to the risk management efforts of their firms.

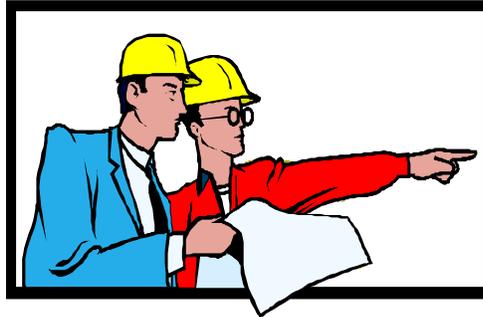
Certainly, design firms have been warned many times to avoid taking responsibility for jobsite safety (and we've written entire newsletters on the subject). Because the contractor controls the construction process, it rightfully assumes full responsibility for the safety of workers. Design professionals must ensure none of their words or actions on the jobsite transfer that responsibility to the design firm.

While safety issues are certainly key to your risk management efforts while in the field, they are not the only area of liability when architects and engineers are on the jobsite. A design firm's overall field observation services are key to limiting your professional liability and avoiding future disputes and claims.

Your Job on the Site

A design firm's primary role on the jobsite is to ensure that the contractor and subcontractors maintain general conformance with the design documents to

achieve the client's objectives. Unfortunately, that is often easier said than done. Challenging field conditions, unanticipated problems with products and materials, and simple human errors often lead to the misapplication or miscommunication of design plans and intent. The goal of field observation is to spot deviations at the



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earliest opportunity and work on the client's behalf to ensure the project delivers on expectations. That means keeping the project on schedule and within budget without sacrificing quality.

It is very important that design professionals assume this role as a teammate of the contractor, not as an adversary. Your job is not to point fingers and sound alarm bells each and every time a contractor deviates from your plans. Rather, your job is to bring the deviation to the contractor's attention, determine the reason for the deviation and work to find the best solution – whether that means approving a change order or helping the contractor execute according to the original plan. You should be cooperative, flexible and –when necessary – insistent.

To implement this role effectively, field observers must understand and adhere to the limits of their authority as established in your contract with your client. Specific responsibilities may include:

- Interpretation of plans and specifications
- Construction observation for compliance
- Record-keeping
- Coordination of reviews, tests and approvals
- Project sign off

Make sure you, your client and the contractor are perfectly clear as to your company's role on the jobsite, your areas of authority and the contractor's areas of authority, including jobsite safety.

Interpreting Plans and Specifications

Your plans and specifications are communication tools that convey your design intent to the contractor. Like all communication tools, they are imperfect. Errors, omissions and misinterpretations can lead to serious project flaws. This is why we believe field observation services should be part of your scope of services on virtually every project. It allows you to clarify your design in-



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TIMELINE

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September 15 - October 15, 2006
- **Orchids & Onions Award Ceremony**
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tent and answer the contractor's questions at the earliest possible moment.

For most projects, you will be asked to interpret your designs and specifications throughout the course of construction. These inquiries typically come in the form of "Requests for Information" or RFIs from the contractor, subcontractors or material suppliers.

Be aware that a contractor who submits an inordinate amount of RFIs may have ulterior motives for doing so. Some low-bid contractors hope to pad their income by using RFIs to generate money-making change orders. If you feel this is happening, address the issue with the contractor and, if necessary, your client.

In most cases, however, RFIs are simply attempts by the contractor to ensure your designs are being interpreted correctly, or to raise an issue that perhaps your design does not significantly address. It is very important to give each and every RFI immediate attention – no matter how trivial – and provide a timely response – no matter how brief.

In some cases, a contractor may ask for a revised drawing. If that is agreeable to you, provide an estimated time of completion. Work with the contractor to maintain schedule conformance.

2006 Seminar Series

Cavnac & Associates' Training Room

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

- **OSHA 10-Hour Training Course**
Thursday, July 20th, 2006 — 7:00 AM - 5:00 PM
- **How to Lower Your Workers Compensation Premiums**
(using hiring practices, safety programs and claim management techniques)
Friday, August 18th, 2006 — 9:00 AM - 11:00 AM
- **OSHA 10-Hour Training Course**
Thursday, September 15th, 2006 — 7:00 AM - 5:00 PM
- **Sexual Harassment Prevention Training**
October 26th, 2006 — 9:00 AM - 1:00 AM
- **Property Management Seminar**
November 16th, 2006 — Time TBD

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

For more information about upcoming seminars:

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

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Observation for Compliance

Should you observe work that fails to comply with your design intent, address it with the contractor immediately. Specify as clearly as possible why you feel the work does not comply. Determine how the contractor intends to proceed. Hopefully, you can reach a workable solution that brings the work into conformance without unnecessary delays or added costs.

Sometimes, a work-around can be found that brings the work into general conformance with contract documents and design intent. Other times, rework is the only acceptable alternative. In such cases, agree with the contractor to a rework schedule and examine the revised work upon completion.

Should you reach an impasse with the contractor, bring in an owner's representative to address



the situation. In no instance should you demand the contractor to stop work. A stop-work order opens your firm up to a variety of liability problems, including delays and jobsite safety. Unless it is an issue of imminent danger to the safety or lives of people on the site – a potential trench collapse, for example – design firms should never stop work and thereby take control over construction means and methods.

Record-Keeping and Reporting



Key to effective field observation is a formal system of record-keeping and reporting. Formal records provide the best defense in the event a claim is filed against the design firm, either during the construction process or years later.

Every project is unique. However, there is certain information that should be gathered at any jobsite. Major industry associations, such as the AIA, ACEC, ASCE, NSPE and ASFE, have developed a variety of forms for collecting vital field information. In addition, firms can develop their own forms and reporting systems that ensure important information is captured.

Consider implementing a system of daily field reports (DFRs). Typically, these are daily reports that record information such as weather conditions, the particular trades currently working on the project, materials on site or delivered, observations of the work, comments about progress (or lack of it) in relation to the schedule, visitors to the site, conversations with contractors and owner representatives and any other information deemed pertinent to the project. Summarize significant events (such as the completion of a major project phase) as well as unresolved issues (such as delays and noncompliance) that could lead to later disputes.

Visual records of the worksite are great supplements to your DFRs and they are becoming increasingly easy to compile. Video cameras, digital cameras and Web cams are commonly used to create project progress reports and to illustrate nonconformance and other perceived problems.

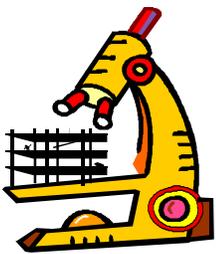
In addition to keeping DFRs, it is recommended that you maintain access to the following information while on the jobsite.

Field Observation (continued on page 4)

Field Observation (continued from page 3)

- Original contract documents
- RFIs
- Testing & inspection reports
- Shop drawings
- Change orders
- Substitutions
- Payment requests
- Conference minutes
- Punch lists

When necessary, set up a field office on the site. Record-keeping procedures should mirror those at the home office.



Testing and Inspections

Most projects will involve independent testings and inspections required or performed by public agencies, manufacturer reps and other parties. It is important to keep on top of the schedule of inspections. If these site visits are not carefully scheduled and coordinated, parties can miss one-time opportunities to perform functions that are vital to the project's progress.

Realize that testing and inspection schedules are never etched in stone. As construction progresses, work closely with the contractor and the testers to track schedules against actual progress and revise dates as necessary.

A representative of your firm should attend all tests and inspections. Make sure you obtain copies of test results and include notes in your DFRs regarding testing procedures and inspections.

Final Review and Sign Off

Your final reviews at the jobsite are often the most frustrating and can easily lead to disputes and litigation. The contractor, subcontractors and the owner are anxious to get the job completed and signed off. The owner wants to meet the original



schedule and the contractor wants to get paid. So a design firm that continues to point out deficiencies and delays completion will not be making many friends. Still, you must stand firm if the work is lacking.

Once the contractor notifies you that work is complete, thoroughly inspect the project. Document any perceived deficiencies in writing and, if possible, with a camera.

Prepare a punch list of all work for which the contractor is still responsible. Arrange a punch-list review meeting with the contractor and all affected subcontractors. Be prepared to justify each punch list entry. Conduct a project walkthrough to verify mutual understanding of what work still needs to be done.

As punch-list items are completed, inspect the work. Advise the contractor whether the work is acceptable or needs further modification. If the owner retains a commissioning firm to test mechanical systems, attend those events.

When you are satisfied that the project is substantially complete, participate in a site tour with the contractor and owner's representative. This review is conducted to confirm that the work is complete, or substantially complete, and that the project is ready for full or partial occupancy. Assuming the building tour results in no major surprises, a certificate of substantial completion can be issued. Append to the certificate a list of any items requiring completion or correction. Once these items are taken care of, a certificate of payment can be issued.

Field of Dreams?

When your scope of services includes field observation services, you become the client's eyes and ears on the jobsite. It is your responsibility to ensure that the contractor follows your design intent to achieve your client's dream project. You must help the contractor interpret your designs and specifications and keep them in compliance. You must keep complete and accurate records as the project progresses and ensure all tests and inspections are conducted in the prescribed manner. Finally, you must work on the client's behalf to ensure all aspects of the project are completed to required standards.

How you and your staff handle these jobsite responsibilities will go a long way toward avoiding

Field Observation (continued from page 4)

disputes and claims. By being cooperative and flexible, yet diligent and steadfast, you can end your project with a happy client and a satisfied contractor.

Finally, PLAN has published the third edition of its *Project Representatives Manual, A Guide to Preparing A Construction Administration Manual for Design Professionals*. This tool is a great aid in developing a customized manual for your field rep-

resentatives, from pre-construction activities through project close-out. The cost is \$35. Contact Cavnac & Associates if you would like to obtain a copy. ✂

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.

Timely Reporting of Claims and Claim Circumstances

By Jeffrey W. Cavnac, CPCU, RPLU, CRIS



Your professional liability policy requires that you report any claims or circumstances which may give rise to a claim in a timely fashion. **Failure to do so can jeopardize your coverage.**

Professional liability policies for architects and engineers are written on a 'claims made and reported' policy form. This means the policy only covers claims that are made and reported to the insurance company during the policy year.

Claims made policies also have retroactive dates. Ideally, the retroactive date is the day the firm started business, but it can also be the day that it first purchased professional liability coverage. Assuming the retroactive date has not been advanced, the policy in force when a claim is made is the policy that will respond, regardless of when the negligent act, error or omission took place. However, there is one important qualifier. Shown below is a provision that can be found in most, if not all, professional liability policies for design professionals:

This insurance applies to claims that meet each of the following:

1. *The **claims** arise out of your **professional services** and performed after the **retroactive date**, if any, shown in the **Declarations** or any endorsement, but prior to the end of the policy period, **provided that you had no knowledge of the claims prior to the effective date shown in the Declarations** [emphasis added].*

In other words, if you knew of a claim prior to the time you renewed your professional liability policy but did not report it, if the claim is subsequently made, the insurance company can deny coverage. It doesn't matter whether or not it's been continuously renewed by one insurance company; the policy excludes it.

This underscores the importance of timely reporting of any claim each year prior to renewal. Although the definition of 'claim' varies between insurance companies, in general it is defined as:

- a. *A demand against you for money or services, or the filing of a suit, or the initiation of an arbitration proceeding naming you and seeking damages for an alleged error, omission, negligent act, or*
- b. *An event, a circumstance, an incident or unresolved fee dispute of which you have knowledge that may result in a claim as described in (a).*

Best Practices

Educate your staff on what is and what is not a claim. Appoint a Risk Management Officer in your company so any employee can approach him/her to discuss potential problems.

When completing your renewal application each year, you should touch base with the com-

Timely Claims (continued from page 5)

pany's principals and project managers to determine if there are any claims that need to be reported. A simple e-mail to each party requiring a response can read as follows:

We are in the process of renewing our professional liability insurance coverage. We need to know if you are aware of any claims or circumstances that may give rise to a claim that should be disclosed to our insurance company.

*A **claim** is defined as a demand against us for money or services, or the filing of a suit or the initiation of an arbitration proceeding naming us that seeks damages for an alleged error, omission or negligent act. It also includes an event, a circumstance, an incident or an unresolved fee dispute of which we have knowledge that may result in a claim as described above.*

If you are not aware of any such claim or circumstance, please confirm this.

If you are aware of a claim or circumstance that could give rise to a claim in the future,

please complete the attached Claim Supplement Form for each claim and/or circumstance, and submit it to me no later than _____, 2006.

Typically, this type of correspondence is first sent about 90 days prior to renewal. A similar e-mail should be sent on or about the renewal date to make certain that nothing has occurred in the meantime.

If there are questions as to whether or not a circumstance merits being reported to the insurance company, discuss it with your insurance broker, or if necessary, your attorney. Whether or not the decision is made to report the circumstance, the decision will be documented and will protect your insurability.

Timely reporting of claims or claims circumstances is critical to maintaining coverage under your professional liability policy. We welcome the opportunity to discuss any questions you may have. ✨

Jeff Cavnac is President and Managing Principal of Cavnac & Associates.

Cavnac's Contractual Risk Transfer Seminar Benefits the San Diego Humane Society



The June 2006 Contractual Risk Transfer seminar for design professionals presented by Jeff Cavnac in Cavnac & Associates' downtown Training Room was a huge success. Cavnac & Associates donated 100% of the seminar registration fees — a total of \$1,500 — to the San Diego Humane Society (SDHS).

Recognized as one of the finest humane societies in the country, SDHS conducts animal abuse investigations, offers animal adoptions, and sponsors classes in behavior training for both dogs and cats as well as many other programs for pet owners and animal lovers.

After Hurricane Katrina, SDHS sent rescue teams to Louisiana and southern Mississippi to assist overwhelmed local agencies with animal rescues. Numerous abandoned and lost pets were transported to San Diego, treated for injuries and malnutrition, and either reunited with their owners or placed with new families.

Nearly 30,000 homes were destroyed in southern Mississippi alone during the devastating 2005 hurricane season, and the need for homes for rescued pets continues. Today, SDHS is a member of the "Love Train" group of animal welfare organizations and individual philanthropists accepting adoptable pets from the still overloaded Humane Society of Southern Mississippi.

Other SDHS programs include the Seniors for Seniors Adoption Program (senior dogs 7+ years of age are made available at no cost to qualifying senior humans 60 or over). Studies have proven that the well-being of seniors with pets is far greater than those without.

For seniors unable to have or care for pets of their own, SDHS sponsors the Pet-Assisted Therapy (P-AT) Program in which selected animals, their owners and/or SDHS handlers visit senior centers and nursing homes on a monthly basis. Other SDHS programs include:

- Animal Adventure Camp
- Animal Rescue Reserve
- Annual Adopt-A-Thon
- Annual Fur Ball Fund Raiser
- Annual Walk for Animals
- Behavior and Training Classes
- Foster Care
- Litter Abatement Program
- Mobile Adoption sites

For information about these and the many other SDHS programs and functions, and the various ways to volunteer or donate, please visit the SDHS Web site at www.sdhumane.org.