



# a/e RISK REVIEW

A PUBLICATION OF THE PROFESSIONAL LIABILITY AGENTS NETWORK

## Correction...

We wish to point out two corrections and clarifications to the article “New Reporting Requirements for California Architects and Engineers” which appeared in the *a/e Risk Review*, Volume 15, Number 6.

*These clarifications apply to Licensed Engineers only.*

In the second paragraph of “II. For Licensed Engineers”, the quotation from SB 1549 (now Business & Professions Code 6770) inadvertently added a comma between “Civil action” and “judgment” where none

should appear. This could incorrectly imply that all civil actions must be reported. Actually, only those proceedings which result in a judgment, settlement or award of \$50,000 or more need to be reported.

The third paragraph of that same section of the article, noting the duty of the insurance company to report matters to the board, should correctly refer to “such claims”, meaning those resulting in an award or settlement of \$50,000 or more.

*We regret any inconvenience to our readers.*

## Top 10 Risk Management questions facing design firms today

With a nod to TV’s *The Late Show* host, David Letterman, here are the top ten professional liability concerns we have been hearing from our A/E clients and prospects.

It’s not a scientific poll, mind you, but a fair reflection of what’s on the mind of many of today’s design firms when considering their professional risks. In no particular order:

**#10. Should I consider expanding the scope of services my firm offers in order to increase our annual revenues, or is this risky business?**

As a rule, expanding your scope of services on each project is an excellent way to increase revenues. What effect such a move will have on your risks depends largely on what types of new services your firm offers to your clients.

Some new services may actually lower your risk. For example, expanded jobsite observation services can help spot potential problems in the early stages and avoid project upsets. Where you might increase your risks is expanding into services in which your firm has limited experience—branching into designing complex medical facilities, for instance.

Realize that any increase in revenues may result in an increase in the

size of your premiums, since annual fees are a key component in determining the cost of your PL insurance. This, however, does not necessarily reflect an increase in your risks.

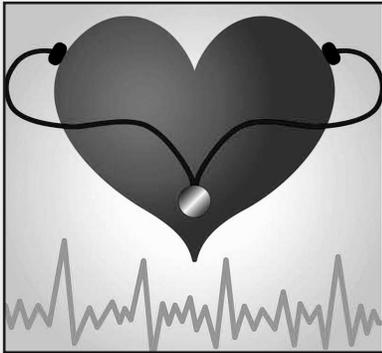
**#9. Is mold covered on my professional liability policy?**

Generally, yes. While specific mold exclusions have shown up on homeowners’ policies and other types of personal and commercial property insurance, they are not typically found on professional liability policies. Review your own policy to make certain. This doesn’t mean, however, that mold is not a significant risk factor for design professionals.

A mold exclusion could be added to a professional liability policy if an insurer feels your work presents a particularly high mold exposure due to factors such as geographic location or project type.

*C o n t i n u e d*

## Did you know DRA has an Employee Benefits Department??



❖  
We can help you find the best plans for your employees and your budget.

Contact DRA at 510.465.3090.

Your best advice is to design with mold in mind. Be aware of mold risks in your locale and with your project types. Don't skimp on mold-control measures. Pay close attention to plumbing, HVAC equipment and humidity-control systems, ventilation and filtration, window and door installations, drainage and runoff controls, and roofing and envelope systems.

### #8. Should I sign my client's take-it-or-leave-it contract?

This is a difficult question to answer. First, the fact that a client would take such a stance should send up a red flag. Is this the type of entity or individual you want to do business with? But if it's a project or client that is attractive to you from a business standpoint, a client-drafted contract is not necessarily a bad thing. The key is to ensure the contract does not contain onerous language you simply cannot accept.

First of all, take the required time to read the contract in its entirety—or have legal counsel do so. Highlight any language that you feel presents risks to your firm. Look for language that asks you to indemnify the client from risks that might otherwise logically belong with them. For example, does it ask you to take responsibility for the client's negligence or actions? Once you've reviewed it, send it to us with your comments. We can focus on your areas of concern and review it for insurability issues. Keep in mind, if you agree to accept liabilities that would not be yours absent the contractual obligation, those liabilities will most likely NOT be insured.

In the end, it comes down to a risk-versus-reward business decision. We'll be happy to provide advice, but only you know whether you can live with the contract conditions.

### #7. What happened to project insurance?

Long ago and far, far away, most professional liability insurers offered a product called Project Specific insurance. Generally, this type of insurance covered all of the design firms working on a single project up to the policy's dedicated limits. It was typically paid for by the project owner and the fees earned by the design firms did not count in the calculation of their own practice policies.

Sounds great, right? Who could lose when project owners had guaranteed coverage up to their desired limits and the design firms avoided most if not all the cost? The insurance company, that's who. These policies, for a variety of reasons, resulted in monumental losses for insurers. Insurance companies pulled their products off the market as claims and loss ratios rose to levels they could

not sustain, and project policies went the way of the dinosaurs.

Actually, there are still a few insurers who may offer project policies under the right conditions, but prices are extremely high and policy conditions are not as attractive as before. If you or your client think a project policy may make sense, we'll be happy to investigate options. Please understand, however, that the attractive product offered back in the 1990's no longer exists.

### #6. Are condos still no-no's?

Condos remain one of the riskiest types of projects in the eyes of insurance underwriters. They have a horrific claims history due to a number of factors: fly-by-night developers, low fees for design professionals, poor maintenance, and lawsuit-happy attorneys who petition homeowners' associations.

That said, not all condo projects are bad. The name of the game is Designer Beware. Check the history of the developer and the litigious environment surrounding condos in your area. Understand that as your book of condo projects grows, you may find professional liability insurance more expensive and perhaps harder to get. Take these factors into consideration when deciding whether to design condos and what to charge for such services.

### #5. Will my clients really accept a limitation of liability (LoL) contract provision?

You'll never know until you try! The fact is, many clients accept LoL contract provisions once the reasoning behind them is explained.

The primary line of reasoning goes something like this: The client has the most to gain from a successfully completed project. The designer's gain is

limited to project fees minus expenses. So if the owner has the bulk of the reward, shouldn't it also be willing to accept its fair share of risk?

The best negotiating stance is to avoid a yes/no decision. Provide your client an option—you can either perform your services with unlimited liability for one fee, or you can lower that fee if the client is willing to accept the LoL. We'll be happy to help by advising you regarding your negotiations of this important contract clause.

#### #4. What's up with BIM—will it lower or increase my risks?

Building Information Modeling (BIM) has great promise in reducing professional liability risks. By having all project information contained in a single, continuously updated database, it should be easier to manage the accuracy of data and integrate all aspects of the project during the

design stage. This leads to better specifications, estimations, budgets, schedules and compliance.

However, most in the insurance and design industry agree that in the short term, BIM may actually increase a design firm's liabilities. New processes are rarely adopted without trial and error. Since the prime designer now compiles and manages virtually all project information, contractors and others who rely on the prime for complete and accurate project information will likely point fingers when an error occurs in the project. There are also liability issues regarding ownership of that information.

The insurance and legal fields will be challenged to adapt to BIM and establish new standards regarding the allocation of liabilities. So in the short term, be prepared for new liability challenges; in the long term, you should reap benefits with time and experience.

#### #3. Should my firm be going "green," and what are the liability issues?

Like BIM, green design represents a significant portion of future design work. Every design firm needs to investigate the skills needed to design green buildings and move forward with education and training if it decides to go in that direction.

As with BIM, new processes invite errors. Liabilities may increase initially. Green design has the added danger of unrealistic client expectations. Building owners will be expecting significant savings in operating costs as the result of increased energy efficiency. If these savings are not immediately achieved, they'll likely consider it the designer's fault. So, managing client expectations will be a significant risk management tool for those going green.

*This material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*  
 © Copyright 2008 by PLAN, the Professional Agents Liability Network. All rights reserved.

Dealey, Renton & Associates  
 www.dealeyrenton.com  
 • 66 Franklin Street, Suite 210  
 Oakland, California 94607  
 510.465.3090  
 Fax 510.452.2193  
 info@insdra.com  
 MAILING ADDRESS:  
 P.O. Box 12675  
 Oakland, CA 94604-2675

• 199 S. Los Robles Ave., Suite 540  
 Pasadena, California 91101  
 626.844.3070  
 Fax 626.844.3074

• 3 Imperial Promenade, Suite 440  
 Santa Ana, California 92707  
 714.427.6810  
 Fax 714.427.6818  
 MAILING ADDRESS:  
 P.O. Box 10550  
 Santa Ana, CA 92711-0550

An ESOP Company · License No. 0020739

#### #2. How much will my PL insurance cost next year?

That's going to depend on a number of factors. Your premium will be based on your fees, your claims history, project types and loss prevention practices in place.

Insurance premiums are generally stable, and with good risks rates are lower. This will likely continue for the near future. As claim trends develop, this will allow rates either to continue to go lower, or if trends worsen significantly, to level off or go up.

Beyond your rate and premium, you should also consider the experience and capabilities of your insurance company when a claim or problem arises. Insurers with risk management pro-

*C o n t i n u e d*

### Employment Practices Liability Insurance

**Could this happen in your firm:**

- Wrongful termination?
- Retaliation?
- Harassment?
- Discrimination?

If you have employees, the answer is **YES**. We see more claims filed each year by disgruntled employees. Employment Practices Liability Insurance (EPLI) can provide surprisingly affordable protection.

**Call 510.465.3090 for a quote.**

grams, pre-claim service and support during an actual claim, and experienced claims professionals will provide you with invaluable services that can help your practice in the present and the future.

**# 1. What is the best thing I can do to reduce my PL risks?**

That one is pretty easy: manage your client relations. Claims studies show that non-technical factors are the leading cause of claims, and topping the list are communication problems between designers and their clients.

Stress within your firm the need to have open, honest and clear communications with your clients. Good communications go a long way to uncovering misunderstandings, omissions and errors at the earliest stage possible, before they require an expensive fix.

Equally important, if you have a solid, open and trusting relationship with your clients, they are more willing to seek amicable solutions to any project upsets that arise, rather than immediately calling in their lawyers and threatening you with claims. When your client's attitude is one of "how can we fix it?" rather than "how are you going to fix it?", you've won half the battle.

**Can we be of assistance?**

If you have questions about this article, please call on us for assistance. DRA is a member of the Professional Liability Agents Network (PLAN).

**We're here to help.**



**Visit our website at  
[www.dealeyrenton.com](http://www.dealeyrenton.com)**

*January 1, 2008*

**Change in ERISA Bonding Requirements**

The Pension Protection Act of 2006 changes the bonding requirement for Employee Benefit plans holding employer securities after December 31, 2007.

The ERISA bond/protection requirement remains 10% of plan assets subject to a maximum of \$500,000, *except for those plans holding employer securities*. Employee Benefit plans holding employer securities are required to be bonded or protected in the amount of 10% of plan assets subject to a new maximum of \$1,000,000.

If this situation applies to your Employee Benefit plan or you would like additional information, please call your contact here at Dealey, Renton & Associates.



**Dealey, Renton & Associates**  
*Insurance Brokers*

P.O. Box 12675  
Oakland, CA 94604-2675