

LIFE  
AND  
LIMB

**FOUR PRINCIPALS  
TALK ABOUT RISK  
MANAGEMENT.**

BY WENDY GILMARTIN



**ABOVE**  
Haley Duggar and  
Chad Goddard in  
the Charlotte, North  
Carolina, office of  
LandDesign.

**I**t is probably the thing principals like to talk about least—managing risk in the design practice. But it is the vital housekeeping item that makes everything else possible, and its complexity only increases as designers find themselves constantly expected to shoulder more risk. Having professional liability insurance is crucial, but it’s only a part of the full risk-management picture. Frank Musica, a senior risk management attorney at Victor O. Schinnerer & Company in Chevy Chase, Maryland, says that beyond traditional concerns such as errors and omissions, bodily injury, and property damage, firms have to beware of breaches of their information systems by cybercriminals that could affect clients’ confidentiality and privacy—a topic one of our respondents raises alongside numerous others. *These interviews have been edited and condensed.*

**LANDDESIGN**  
CHARLOTTE, NORTH CAROLINA  
**STEPHANIE POWELL,**  
PARTNER AND CFO

**Usually at the project management level or senior level, staff understand how to manage risk, but is there a move to impart some kind of best practices to junior staff?**

We are constantly updating our process for training younger staff and even the new project managers regarding contracts. At one time the only people who really dealt with contracts or dealt directly with the clients were partners or principals. Now we’ve involved more senior staff, and we’re starting to bring junior staff into it. They see what’s going on, and they understand some of the issues.

**You’ll begin some of that training or education by actually bringing junior**

**staff to participate in a higher level of client relations?**

Right. They may be involved with helping to write the contract. If they are on the receiving end of a client’s contract [not the standard Land-Design contract] they’ll get to see that, too. We started telling some of our staff: “Well, look over it, and see what you think.”

**Is there wording you’ve come to insist upon in contracts?**

One thing that has become more concerning to me—and it’s one of those things that doesn’t seem like it would be a big deal, but really is—is an understanding of the standard of care for work. A lot of contracts that we’ll get from clients say that you’ll use your best judgment and best effort. And I’m not an attorney, but I’ve worked with contracts enough to know that *does* matter. If the contract



says something other than that we're going to do this work to the standard of care acceptable in this industry, it's uninsurable. And those kinds of things are items that designers, even designers who have moved up to the top level of firms, usually aren't aware of. They want to design a great project, one that's perfect and that makes perfect sense. In the good old days, you said, "We're going to do this work for you." They said, "We're going to pay you this," and you went on and did the work. Right now, one of the big issues in the design world is that there are so many specifics in

contract law that we can't begin to understand. Words like "warranty" or "guarantee," from a legal perspective, mean something very specific.

Also, [there are times] when you're doing design work, and then construction begins, and you may not be involved in the construction portion of it, and whoever is doing the construction may or may not follow your design. That to me is a big challenge, because clients don't always want you to do construction observation or administration.

**So you're wary of delivery types that might remove quality control during construction?**

Really, yeah. You can have the best, most perfect design of whatever it is you're doing, but if in construction, the construction manager or someone else decides that that just isn't

the way, and they're going to do it another way, it's not only challenging from a risk-management standpoint; it's also really discouraging.

**SCHMIDT DESIGN GROUP**

SAN DIEGO

**GLEN SCHMIDT, FASLA, PRESIDENT**

**What's your approach to risk management in your office?**

It's a big issue that takes way too much of our time, from my perspective. What is stifling sometimes is to pay so much attention to liability that it handcuffs your design. And we have vowed not to let liability handcuff our designs. But there is the reality of the world out there. Our professional errors and omissions insurance carrier does a nice annual review of liability issues, and it's a requirement for us in terms of our getting as much of a discount as possible on our premium. Many of our staff participate, and we encourage them to participate. We also have a program that we call "Picky Tuesdays" here in the office where we get together and discuss issues of liability, but also, you know, all sorts of different issues to try and keep our skills sharp and our office on the same page on a variety of issues. That could be everything from AutoCAD process to actually, sometimes, visiting projects. We do postoccupancy visits and evaluate our designs and how they're performing. Other times we'll invite experts into the office, so we have a whole variety of programs to keep us all up to speed as best we can.



**TOP**  
Partners meet in LandDesign's Alexandria, Virginia, office.

**RIGHT**  
A few staff members of the Schmidt Design Group in San Diego.

LAND DESIGN/DENISE RETALLACK, TOP; SCHMIDT DESIGN GROUP, INC., BOTTOM

## WE CONTINUE TO STRUGGLE TO GET REASONABLE CONTRACT LANGUAGE.

—GLEN SCHMIDT, FASLA

### What things occur to mitigate risk?

We have a very detailed quality control process that we're constantly trying to improve upon. It includes checklists and redline review of drawings before they leave the office. It's a constant quest to improve quality control. But we are humans, and humans make errors. So it's impossible to have 100 percent accuracy, but we try and come as close as we can.

### Are there instances when quality control and best practices aren't enough?

Unfortunately, the culture of contracts, both private and public, has become terribly onerous. Every private and public entity we deal with seems to be adding more and more of the responsibility and liability, trying to transfer it to the consultants. We are really the definition of a small business, and it's very unfair for these very large corporations or public entities to apply so much of the responsibility and the exposure to

us. It's a troublesome trend. If there's one constant in my professional career, it's been a fight for more favorable indemnity wording. We've got to figure out a way that we can change this culture, and there have been attempts, but we've never been really successful at it. We continue to struggle on a contract-by-contract, project-by-project basis with trying to get reasonable contract language.

And there are certain agencies that are requiring us to sign contracts in which they ask us to defend them if almost anything happens out on the site. Some of it is just quite, quite unfair. And we fight hard and, you know, respectfully request changes. Sometimes we are successful. Many times we're not, and then it gets down to a business decision. And I have signed contracts that are terrible contracts, mostly because the type of work was not going to expose us to significant liability.

I wish we could do more landscape architecture than contract review. That's an exaggeration. I do a lot more landscape architecture than contract review, but the point is, I wish we would be able to spend less time at this and concentrate more on practice rather than contract language.

### UPLAND DESIGN

CHICAGO

MICHELLE KELLY, ASLA, PRINCIPAL

### What elements of your office culture help avert risk?

We learned early on that communication with the clients should be ongoing; if there's an issue, if there's a problem, we're there. We're working with them solving it rather than getting into some kind of adversarial relationship. Client-oriented focus is overall part of our culture. Being problem solvers for our clients, being on the team for our clients, and having that as a culture is something we teach from the get-go. So anybody who answers the phone—they want to solve someone's problem, and that makes a culture of everyone trying to take care of everyone else.

### What type of insurance do you carry, and have you ever obtained extra or different insurance for a one-off project?

We carry general liability, aggregate, and umbrella, so it's a fair amount of insurance, and we also have professional liability insurance. There's also auto liability. We've never actually had a project where we had to



### RIGHT

Upland Design is a six-person firm established in 1998.

IT'S MADE MORE SENSE FOR US TO INCREASE OUR COVERAGE OVERALL RATHER THAN INCREASING IT FOR JUST ONE CLIENT.

—MICHELLE KELLY, ASLA

go get insurance just for that project. We talked about it in certain instances, but in general, it's made more sense for us to increase our coverage overall rather than increasing it for just one client, and our goal is to work with clients over and over again and in general have long-term relationships. If we're buying it for one project and suddenly we have three projects with them, it seems kind of silly. We might as well up our coverage. And because we're doing public work, because we're doing work for both the state and county, and as subconsultants for large architecture firms on multimillion-dollar projects, it really does make sense to have that little bit more coverage.

**Are there projects that pose a level of risk you won't take on?**

Maybe 10 percent of our work is working with developers, and I would say their payment structure, especially for larger projects, can be

challenging because they want to wait until construction is happening [to pay]. And so we don't want to take on too many of those projects all at one time because there is a risk that they won't get funding or the project is delayed for two years. So that's the area that we're careful with. Not that we're stepping away from it all, but that we are thoughtful about those relationships and how many projects we want on our books that have those kinds of terms.

In general, people don't think about landscape architects getting sued very often because they think of shrubs and trees, and how could you screw somebody on shrubs and trees? I think because lots of firms do very complex work that this is a part of our profession that we have to have a pretty deep knowledge of so we can continue to be in business. It's not my favorite thing to do, for sure, but if you have a decent con-

tract, it just feels better being able to give your time and efforts and energy to a project knowing you have a fair contract behind you. You know, most people are pretty reasonable. I can think of a couple of clients that have their language, and if you want to work for them, you have to sign it. And so we have gone through those with our own lawyers and asked, "Is this reasonable? Is this worth it?"

**SWA GROUP**

SAUSALITO, CALIFORNIA

**SCOTT COOPER**, COO AND CFO

**How does quality control play into your risk-management strategy?**

Along with the specific office project management concerns about risk management and insurance and legal defense, all of that, obviously one thing you should remind your readers of is that it's very, very important that they notify their insurance broker right away in the event of a claim. It doesn't have to be a formal claim, but if your insurance company doesn't know soon enough, you can be hanging out there without insurance for a specific claim. The insurance company, usually with their legal documents, has requirements to notify them very, very early on.

**What wording are you on the lookout for in non-SWA Group contracts?**

One that's actually always a big concern of ours is the indemnity and just making sure that it's proportionate. We're seeing contracts that, in their contract terms, are trying to hand over



**RIGHT**  
Chenlu Fang,  
Nyaka Matthews,  
and Trent Matthias  
of SWA Group.

SWA GROUP/BILL TATHAM





**ABOVE**  
SWA Group's Sausalito, California, office.

a disproportionate risk to the consultant. In other words, we should all be liable, certainly for our own faults, our own performance. More and more, clients with terminology require consultants to take on full defense or even be liable for things they may not be liable for, and provide full defense even if they're only partially at fault. And the more that consultants give in to these legal, what I consider unethical legal terms sometimes, the more it affects the industry, or whomever, and other clients get used to architects and landscape architects accepting these terms. And then when we negotiate, we're all kind of forced to agree to terms that are not good for the profession.

If a landscape architect is at fault even partially, even 1 percent at fault, their work is at fault for a problem, they could be 100 percent on the hook for defense and liability. And so that's the kind of insidious terminology I referred to previously.

We would insist on having proportionate liability and defense. And then I would say that we're quite careful about language relating to scope and professional standard of care. Sometimes contracts can state that the job isn't done until a client is happy. Well, that's a pretty tough standard, a pretty subjective, always-changing standard. We do that especially overseas.

**Is there a big difference in risk management between the United States and the other international offices SWA has?**

We don't quite have the same fluency with the law or understanding of the law, so if the contract itself is based on the law of that host country, we don't know the law entirely. And so the law could become a problem way down the road, so that's kind of one of those risk items out there. It's like you don't know what you don't know. Some countries are very poor in terms of paying. Some-

times it's much more difficult in other countries that may not have the same kind of cultural professionalism we have here, or even the support of the courts to make sure you get that payment. But it's more just not knowing what the terms are. They do tend to be different just in the layers of complexity that we need to sort through.

**What other blind spots do firms have in their risk management strategies? Or what should they plan for that they might not be aware of?**

I think it also includes making sure you have a disaster preparedness plan, especially for IT. With all the hacking issues out there, your data is vulnerable. I think you're wise if you have your insurance broker come in and help you survey your risk on that side. On the financial side, have your CPA come in and make sure you have financial controls in place to protect yourself from fraud or other issues that can affect you financially. I always say consider using at least those two kinds of experts, your outside accountant and your insurance broker, and maybe even your attorney, just at some point to review your whole office or company and make sure the company itself is okay. Sometimes we use these outside consultants on day-to-day things, not realizing they have knowledge to help us with the potential risk and vulnerabilities in our organization or office. ●

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