



March 30, 2007

To: Member Counties

From: Michael Fleming

Re: Transfer of Court Facilities  
Insurance/Indemnification Requirements

Counties and their local Courts are in the process of negotiating agreements for the transfer of court facilities from the counties to the Administrative Office of the Courts (AOC). Part of the process of negotiating these transfer agreements is to agree on the insurance and indemnification requirements. The AOC has developed template insurance and indemnification language as a starting point in the negotiations. The purpose of this communication is to provide our analysis on the insurance and indemnification language as it relates to our insurance programs in order to assist risk managers in their evaluation and approval of these provisions.

The enclosed document includes two parts. The first is commentary provided by Jim Mullen, Senior Facilities Risk Manager for the AOC, including the template provisions and Jim's discussion on the intent of the provisions. The second part is the EIA analysis which explains how the EIA's insurance programs will respond to the various requirements.

I would like to thank Jim Mullen for his cooperation in providing his part of this analysis. It is our sincere hope that this information will help to streamline the transfer process.

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## **COMMENTARY ON RISK TRANSFER ISSUES WITHIN TRANSFER OF RESPONSIBILITY AGREEMENTS**

In most cases there are two documents required to affect a transfer of responsibility of court facilities from the County to the AOC. The first is the Transfer Agreement and the second is the Joint Occupancy Agreement (JOA). Following transfer the AOC takes over responsibility for the maintenance and any improvements and betterments of the court facilities utilizing its own resources or the resources of the County. If the resources of the County are utilized to provide maintenance services, a third agreement, a Memorandum of Understanding (MOU) is required to establish the respective terms and conditions of the maintenance services. When initiating a transfer process there are four usual scenarios that are considered:

1. Title of Court Facility transferred to the AOC
2. Responsibility of a Court Facility under Bonded Indebtedness transferred to the AOC
3. Responsibility of a Court Facility where the Superior Court occupies 100% of the building is transferred to the AOC
4. Responsibility of a Court Facility where the County and the Superior Court are joint tenants in the overall building is transferred to the AOC.

In the commentary below we have detailed the language we are using for a transfer of a jointly occupied building that is either with or without bonded indebtedness. We have also provided the language we are using for a facility management MOU. Small changes may be made due to unique circumstances of the transfer, but this commentary is made to cover a large number of usual circumstances and to allow the California State Association of Counties, Excess Insurance Authority (EIA) to plan coverage for its members that is responsive, and also to provide feedback to the AOC on areas of concern.

### **COMMENTARY:**

#### **PROPERTY INSURANCE**

Within the Transfer Agreement (Agreement) and the Joint Occupancy Agreement (JOA) the goal of the AOC is to utilize the counties' existing property insurance program to finance the risk of loss associated with direct physical loss or damage to the court facility and to satisfy the requirements of any indenture agreement associated with the bonded indebtedness. This is done to avoid duplication and conflict of insurance program terms and conditions through the following provisions that have been listed in an order to allow for readability rather than in the order they appear in the JOA.

The Transfer Agreement provides little in the way of insurance language, but rather refers to the JOA for specific insurance requirements utilizing the following language:

4.3.2 Property Insurance and Risk Allocation. Responsibility and liability for (i) damage to or destruction of the Real Property, (ii) bodily injury to or death of third parties in, on, or about the Real Property, and (iii) Disputes, are allocated as set forth in the JOA.

## **JOINT OCCUPANCY AGREEMENT**

Within the JOA there is considerable language related to risk transfer. Close review should be given to the definitions, Section 4.2 and Section 4.6, Section 6 in its entirety, Section 7 in its entirety, and Section 8 in its entirety. We have provided some commentary on each Section.

In the definition of “Property Insurance Policies” the Agreement language establishes that the county can use any of the means allowed by statute to provide for coverage. The type of coverage required is defined as being equivalent coverage to that provided in the ISO Commercial Property Insurance Policy with the Special Form endorsement, and if applicable machinery breakdown (boiler machinery) insurance. **[Throughout this commentary we have used the terms “insurance” and “insurer” to include the EIA and its coverage agreements.]**

The definition of “Property Insurance Costs” relates to those charges that can be charged back to the AOC under the terms of Section 4.2 of the JOA.

The limits of property insurance required are for the full insurable value of the court facility, with the deductible being at the discretion of the county.

If the facility being transferred is under the bonded indebtedness the property insurance language acknowledges that the terms of the indenture agreement govern the requirement for property insurance and will take precedence in any inconsistency between the JOA and the indenture agreement.

Section 4 establishes that the AOC will pay its proportionate share of the property insurance premium, and any deductible that applies to a loss. In the event the insurance coverage does not fully cover a loss then the AOC will also pay its proportionate share of any uninsured loss. Section 4 establishes the method the county is to use to receive payment for its Property Insurance Costs.

Section 6 establishes that the AOC is to be an insured on the county’s insurance contract and a joint loss payee on any loss payment. The loss payee requirement is written with the understanding that loss proceeds may first have to be placed in a segregated account in the name of the bond trustee, and may actually be used to retire the bonded indebtedness.

Section 6 establishes that the County is responsible to administer the Property Insurance Policies, and as the AOC is an insured on the county’s coverage agreement require the county’s insurer to waive its right of recovery against the AOC for any loss payable under the terms of the Property Insurance Policies.

Section 6 establishes the need for the county to provide the AOC with verification that the property insurance is in force and for the AOC to comply with the terms of the Property Insurance Policies.

Section 6 establishes that in the event of loss or damage to the facility that the county and the AOC need to meet and to determine what must be done to comply with the terms of the indenture agreement and the insurance contract, and how the proceeds of any insurance claim will be used.

Section 6 and Section 7 establishes what is to be done should the facility not be restored with the proceeds of the property insurance.

Section 6, also provides guidance as how incidents and claims are to be reported and administered.

## **JOA PROVISIONS RELATED TO PROPERTY INSURANCE**

### **Definitions:**

**“Property Insurance Costs”** means all costs of providing the Property Insurance Policies, including premiums, deductibles, and self-insurance retention amounts under Owner’s self-insurance program.

**“Property Insurance Policies”** means one or more policies of property insurance maintained by the County that insure the Real Property against those risks covered under a form of coverage with terms and conditions as comprehensive as those in an All-Risk/Special Form property insurance policy and, when applicable, the comprehensive form of equipment breakdown insurance, with coverage amounts equal to at least the 100% Replacement Cost of the Real Property. The County’s obligation to provide the Property Insurance Policies may be satisfied, in whole or in part, by any self-insurance or deductible maintained by the County for the Real Property, or by the County’s participation in a joint powers authority established for the purpose of pooling self-insured claims. While any part of the Real Property is subject to the Bonded Indebtedness, the Property Insurance Policies will include all property insurance coverage the County is required to maintain for the Real Property under the Bonded Indebtedness Documents.

**“Property Loss”** means any loss or damage to, or destruction of, the Real Property that arises from a cause that is required to be covered under the terms of the Property Insurance Policies.

**“Property Claim”** means any claim or demand arising from or related to direct, physical loss or damage to the Real Property that is required to be covered by the Property Insurance Policies.

- 6.1 Property Insurance. Until the Bonded Indebtedness no longer encumbers any part of the Real Property: (i) the terms of the Bonded Indebtedness Documents govern the County's obligation to obtain and maintain in full force and effect the Property Insurance Policies; and (ii) any inconsistency between the terms of this JOA and the terms of the Bonded Indebtedness Documents regarding the County's obligation to insure the Real Property will be resolved in favor of the terms of the Bonded Indebtedness Documents.
- 6.1.1 Property Insurance Policies to be Maintained. The County will provide the Property Insurance Policies and maintain them in full force and effect, and will make direct payment of all Property Insurance Costs, subject to the AOC's obligation to reimburse the County's Property Insurance Costs under section 4.6 of this JOA. The County shall include by specific endorsement to each of the Property Insurance Policies, the Judicial Council of California, the Administrative Office of the Courts, and the Court, as additional insureds or covered parties, as appropriate, and joint loss payees for any Property Claim payable under the terms and conditions of the Property Insurance Policies, with the same coverage and limits as the named insured under the Property Insurance Policies.
- 6.1.2 Allocation of Risk for Property Damage Claims. While the County is providing and maintaining the Property Insurance Policies, and the AOC is paying its portion of the Property Insurance Costs under Section 4.6 of this JOA, above, the County will bear all of the risk arising from Property Damage Claims, and the County hereby waives, and will cause the providers of its Property Insurance Policies to waive, all rights of recovery against the State Parties and their applicable insurer(s) for any Property Claims payable under the terms and conditions of the Property Insurance Policies. The County will be solely and exclusively responsible to tender to the providers of its Property Insurance Policies, and to process and pursue to final resolution, any and all Property Claims, including (if covered by the Property Insurance Policies) claims for costs associated with obtaining and relocating Court operations to, alternate space while any portion of the Real Property is being repaired or replaced. The Parties acknowledge that property insurance is "no fault" insurance; therefore, if any Property Loss occurs, there are no exclusions or conditions to payment, irrespective of the acts or omissions of either Party, other than those exclusions specifically set forth in the Property Insurance Policies.
- 6.1.3 Compliance with Property Insurance Policies. While the County is providing and maintaining the Property Insurance Policies, the County will provide the AOC with verification that the Property Insurance Policies are in full force and effect and, at the request of the AOC, with copies of the Property Insurance Policies, as the Property Insurance Policies may be issued or modified from time to time. The State Parties and the County Parties will comply in all material respects with all requirements for the use of the Real Property that

are set forth in the Property Insurance Policies and that the County has provided to the AOC.

6.1.4 Property Insurance Proceeds. (Without bonded indebtedness) Upon the occurrence of any Property Loss each Party will be entitled to the applicable proceeds from the Property Insurance Policies to the extent the Property Loss is attributable to its Exclusive-Use Area or Share of the Common Area, subject to Section 7 below. If one or more Property Claim is fully and finally resolved in an amount that exceeds the total limits of all of the Property Insurance Policies, or if any Property Loss is not covered by the Property Insurance Policies through no fault of Owner, then if both Parties elect to restore or replace the damaged portions of the Real Property (“**Damaged Property**”) under section 7 below, each Party will pay the amounts that exceed the coverage of the Property Insurance Policies to the extent the Property Loss is attributable to its Exclusive-Use Area or its Share [or Parking Share/Grounds Share, as applicable] of the Common Area. By way of example only, if the total amount of the Property Claim is \$1,250,000, and if 40 percent is attributed to damage in the Court Exclusive-Use Area, 35 percent is attributed to damage in the County Exclusive-Use Area, and 25 percent is attributed to damage in the Common Area, and the amount payable under the Property Insurance Policies is \$1,000,000, then the AOC would be entitled to insurance proceeds in the amount of \$400,000 (for the damage to the Court Exclusive-Use Area), the County would be entitled to insurance proceeds of \$350,000 (for damage to the County Exclusive-Use Area), and the Parties would share the remaining \$250,000 of insurance proceeds in accordance with their respective Shares [or Parking Shares/Grounds Share, depending on the part of the Common Area damaged]. With respect to the uninsured \$250,000 portion of the Property Claim, the AOC would be responsible to pay (subject to section 7, below) \$100,000 (40 percent of \$250,000) in respect of its Exclusive-Use Area, plus an amount equal to the AOC Share [or AOC Parking Share/Grounds Share, as applicable] of the \$62,500 (25 percent of \$250,000) in respect of the Common Area, and the County would be responsible to pay (if both Parties elect to restore or replace the Damaged Property under section 7, below) the balance of the uninsured loss. The Owner will assign and deliver to the other Party all insurance proceeds owed to the other Party effective upon its receipt of those proceeds.]

6.1.4 Property Insurance Proceeds. (With bonded indebtedness) While the Real Property is subject to the Bonded Indebtedness, this section 6.1.4 will apply, and section 7 of this JOA will be of no force or effect. When the Real Property is no longer subject to the Bonded Indebtedness, this section 6.1.4 will be of no further force or affect whatsoever, and section 7 of this JOA will govern and control.]

6.1.4.1 Property Insurance Proceeds (With bonded Indebtedness) Upon the occurrence of any Property Loss, the Parties will promptly meet and confer, in good faith, to determine how the proceeds of the Property Insurance Policies arising from the Property Claim will be allocated and used, and what notice will be given by the County or the Corporation to the Trustee under the Bonded Indebtedness Documents concerning those insurance proceeds. The AOC will have the right to meaningful participation with the County in deciding whether to restore or replace the damaged parts of the Real Property (“**Damaged Property**”). The meeting will be held, in person or by telephone, by no later than 30 days before the date that the County must give notice to the Trustee under Section XXX of the Bonded Indebtedness Documents. In no event will the proceeds of the Property Insurance Policies be allocated or used in a manner that results in a breach or default under the Bonded Indebtedness Documents. The County must continue to make all payments and perform all obligations under the Bonded Indebtedness Documents until the Bonded Indebtedness has been fully repaid and satisfied, notwithstanding any Property Loss.

6.1.4.2 Decision Not to Restore or Replace. (With bonded indebtedness) If, as a result of the meeting described in section 4.3.3.5 above, the Parties decide that the insurance proceeds arising from the Property Claim will not be used to restore or replace the Damaged Property, and if any of the Non-Ownning Party’s Exclusive-Use Area is uninhabitable as a result of the Property Loss, then the Owner will compensate the Non-Ownning Party for its Equity rights in the uninhabitable part of the Non-Ownning Party’s Exclusive Use Area.. The compensation to be paid to the Non-Ownning Party will be determined in the manner described in Section 5.3 of this JOA. To the extent covered by the Property Insurance Policies, the Non-Ownning Party will be entitled to that portion of the proceeds of from the Property Claim that are directly related to compensation for the Non-Ownning Party’s relocation costs arising from Property Loss. If the Non-Ownning Party will no longer occupy the Building due to Property Loss that the Parties decide not to restore or replace, then when the Non-Ownning Party has been compensated for its Equity rights under this section 6.1.5, the Parties will terminate this JOA by signing a Termination Agreement and recording it in the County Recorder’s Office.

**[SECTION 7.1 AND 7.1.1 ARE ONLY INCLUDED IF THE REAL PROPERTY IS SUBJECT TO BONDED INDEBTEDNESS, AND ALTERNATE SECTION 6.1.4.1 AND 6.1.4.2 ARE USED]**

## 7.0 DAMAGE AND DESTRUCTION

7.1 Property Loss After Bonded Indebtedness Satisfied. While the Real Property is subject to the Bonded Indebtedness, the terms of section 6.1.4 of this JOA govern in respect of any Property Loss, and this section 7 is of no force or effect. When the Real Property is no longer subject to the Bonded

Indebtedness, this section 7 will govern and apply in respect of any Property Loss or Property Claim, and section 6.1.4 of this JOA will be of no further force or effect whatsoever, except only as to any Property Loss or Property Claim that occurred or commenced while the Real Property was subject to the Bonded Indebtedness.

- 7.1.1 Allocation of Property Insurance Proceeds. In the event of a Property Loss, each Party will be entitled to the proceeds payable under the Property Insurance Policies to the extent the Property Loss is attributable to its Exclusive-Use Area or its Share of the Common Area. If one or more Property Claims is fully and finally resolved in an amount that exceeds the total amount payable under all of the Property Insurance Policies, or if any Property Loss is not covered by the Property Insurance Policies through no fault of the Owner, then if both Parties elect to restore or replace the Damaged Property, each Party will pay the amounts that exceed the coverage of the Property Insurance Policies to the extent the Property Loss is attributable to its Exclusive-Use Area or its Share of the Common Area. By way of example only, if the total amount of the Property Claim is \$1,250,000, and if 40 percent is attributed to damage in the Court Exclusive-Use Area, 35 percent is attributed to damage in the County Exclusive-Use Area, and 25 percent is attributed to damage in the Common Area, and the total amount payable under the Property Insurance Policies is \$1,000,000, then the AOC would be entitled to insurance proceeds in the amount of \$400,000 (for the damage to the Court Exclusive-Use Area), the County would be entitled to insurance proceeds of \$350,000 (for damage to the County Exclusive-Use Area), and the Parties would share the remaining \$250,000 of insurance proceeds in accordance with their respective Shares. With respect to the uninsured \$250,000 portion of the Property Claim, the AOC would be responsible to pay \$100,000 (40 percent of \$250,000) in respect of its Exclusive-Use Area, plus an amount equal to the AOC Share of the \$62,500 (25 percent of \$250,000) in respect of the Common Area, and the County would be responsible to pay (if both Parties elect to restore or replace the Damaged Property) the balance of the uninsured loss. The Owner will assign and deliver to the Non-Owning Party all insurance proceeds owed to the Non-Owning Party effective upon its receipt of those proceeds.
- 7.2 Damage or Destruction Event. If, due to Property Loss, the Real Property cannot be occupied by one or both Parties, each Party will be solely responsible to arrange for its own relocation to and occupancy of alternate space. Promptly after a Property Loss, the Parties will comply with the provisions of section 6 and if applicable 7.1, and as promptly as possible, but in no event later than 180 days after a Property Loss, each Party will notify the other in writing (“Restoration Election Notice”) whether it wishes to restore or replace the Damaged Property.
- 7.3 Both Parties Elect to Restore or Replace. If both Parties elect to restore or replace the Damaged Property, the Parties will cooperate in good faith to



restore or replace the Damaged Property, with each Party contributing the proceeds it receives under the Property Insurance Policies and otherwise paying its portion of the cost to restore or replace the Damaged Property, as set forth in section 6.1.4 or 7.1, above. If the Parties restore or replace the Damaged Property in a way that results in a change to the Parties' Shares or their Equity rights, the Parties will each pay the costs and expense to restore or replace the Damaged Property according to their newly-determined Shares or Equity rights.

7.4 Only One Party Elects to Restore or Replace. If, based on the Restoration Election Notices, only one Party elects to restore or replace the Damaged Property, then within 30 days after the Parties' Restoration Election Notices are given, the Parties must meet and confer in good faith to determine how to proceed with respect to (i) the Damaged Property; (ii) the proceeds of the Property Insurance Policies, if any, to which each Party is entitled under section 6.1.4 or 7.1, above, and (iii) compensation for the Equity rights of either Party in the Real Property, if applicable. If the Parties cannot agree on those matters, they will proceed as set forth in section 11 of this JOA. Until the Parties have reached a final agreement concerning how the foregoing issues will be resolved, both Parties must deposit into a trust account, with the trust division of a mutually-acceptable bank, all insurance proceeds resulting from direct physical damage to the Real Property that they receive from the Property Insurance Policies in respect of the Property Loss, as determined under section 6.1.4 or 7.1, above. Those insurance proceeds will be retained in the trust account and will be disbursed only upon instructions to the trustee, signed by both Parties, which are consistent with the Parties' final resolution of those issues.

7.5 Neither Party Elects to Restore or Replace. If neither Party elects to restore or replace the Damaged Property, then both Parties will retain the proceeds of the Property Insurance Policies to which they are entitled under section 6.1.4 or 7.1. If any of the Non-Owning Party's Exclusive-Use Area is uninhabitable as a result of the Property Loss, then the Owner will compensate the Non-Owning Party for its Equity rights in the uninhabitable part of the Non-Owning Party's Exclusive-Use Area, determined in the manner described in section 6.1.4 or 7.1 of this JOA, except that all insurance proceeds resulting from direct physical damage to the Real Property the Non-Owning Party has received, or will receive, from final resolution of any Property Claims made in respect of the Damaged Property will be deducted from the Equity rights compensation paid by the Owner to the Non-Owning Party for its Equity rights in the uninhabitable parts of its Exclusive-Use Area. To the extent covered by the Property Insurance Policies the Non-Owning Party will be entitled to any compensation for any relocation costs arising from Property Loss. If the Non-Owning Party will no longer occupy the Building due to Property Loss that neither Party elects to restore or replace, then when the Non-Owning Party has been compensated for its Equity rights under this

section 7.5, the Parties will terminate this JOA by signing a Termination Agreement and recording it in the County Recorder's Office.

## **LIABILITY CLAIMS AND INSURANCE**

The Transfer Agreement (Agreement) is silent on the need for either party to maintain any form of liability insurance. Rather, the Agreement requires both the AOC and the County to be responsible for the cost of any claim or lawsuit that results from their respective actions.

The AOC administers all liability claims against any judicial branch entity (the Judicial Council, the AOC, and the individual county superior courts) and their employees through its Office of General Counsel Litigation Management Unit. The AOC absorbs both the cost of indemnity and the cost of the claims and litigation management without any allocation of costs to the individual court systems. This coverage is provided pursuant to Judicial Administration Rules 10.201 and 10.202.

**As a result of the AOC's current responsibility under the Judicial Administration Rules the Agreement has defined a number of terms that are important. An AOC Claim would be those claims and lawsuits that are currently being administered by the AOC under the provisions of Rule 10.201 and 10.202.**

An Indemnified Loss would be a claim or lawsuit for which either the County or the AOC has agreed to assume responsibility and administer to conclusion.

A Liability Claim is intended to define a claim or lawsuit related to the facility, as opposed to an AOC Claim, for which either the County or the AOC would assume responsibility and administer to conclusion.

**Section 8.1 establishes that the AOC will indemnify the County for the negligent actions of the AOC.**

**Section 8.2 is a reciprocal indemnity from the County to the AOC.**

Section 8.3 establishes the requirement that the responsible party (either the County or the AOC) manage the claim or lawsuit to conclusion, but the Section does contain a cooperation clause.

## **JOA PROVISIONS RELATED TO LIABILITY**

Definitions:

**"AOC Claim"** means any demand, complaint, cause of action, or claim related to the period on and after the Effective Date, alleging or arising from acts, errors, omissions, or negligence of the Court in the administration and performance of judicial operations in

the Court Facility (e.g., allegations of civil rights violations made by a third party against a Court employee).

**“Indemnified Loss”** means all claims, demands, liabilities, damages, attorney fees, costs, expenses, and losses as to which either Party is obligated to indemnify the other Party under this Agreement or the Closing Documents.

**“Liability Claim”** means any demand, complaint, cause of action, or claim alleging (1) bodily injury to or death of third parties (excluding any employees of State Parties or County Parties acting within the scope of their employment as such) in, on, or about the Real Property, and (2) damage to or destruction of personal property of a third party (other than personal property of a County Party or a State Party) in, on, or about the Real Property, but excludes all AOC Claims.

6.2.1 Incident Reports. The Managing Party will maintain copies of any Incident reports that it prepares for a period of five years, and at the request of the Contributing Party, the Managing Party will provide the Contributing Party with a complete copy of, or reasonable access to, those Incident reports.

6.2.2 Party Responsible for Claims. If either Party receives any demand, complaint, notice, document, or information alleging the existence or occurrence of any incident, event, circumstance, or occurrence in, on, or about the Real Property (“**Incident**”) that is or could result in any Property Claim or Liability Claim (each, a “**Claim**”, and together, “**Claims**”) or an AOC Claim, or if a Party otherwise becomes aware that an Incident has occurred, that Party will make best efforts to promptly notify the other Party of that Incident. Following that notice, the Parties will work together, diligently and in good faith, to determine which of them bears responsibility for the loss or injury alleged, and whether either Party is entitled to indemnification by the other in respect of the Incident under sections 8.1 and 8.2 of this Agreement. If the Parties are not able to so agree, then they will resolve those matters under section 11 of this JOA.

8.1 Indemnification Obligation of State Parties. The State Parties will and do indemnify, defend, and hold harmless the County Parties, with counsel reasonably acceptable to the County Parties, from and against all Indemnified Loss arising from (1) all AOC Claims, and (2) Liability Claims where and to the extent that the Liability Claims result from the willful misconduct or negligent acts, errors, or omissions of a State Party.

8.2 Indemnification Obligation of County Parties. The County Parties will and do indemnify, defend, and hold harmless the State Parties, with counsel reasonably acceptable to the State Parties, from and against all Indemnified Loss arising from Liability Claims where and to the extent that the Liability Claims result from the willful misconduct or negligent acts, errors, or omissions of a County Party.

- 8.3 Indemnified Party's Participation. The indemnifying Party must manage and be entirely responsible to handle and resolve all Liability Claims for which it is responsible under sections 8.1 or 8.2, as applicable. The indemnified Party may elect, but is not required, to retain its own attorney, at the indemnified Party's sole expense, to participate in the litigation, settlement negotiations, or other dispute resolution procedures for any Liability Claim as to which it is the indemnified Party. If the indemnified Party elects to retain its own attorney to participate in the litigation, settlement negotiations, or other dispute resolution procedures for a Liability Claim, the indemnifying Party will cooperate with the indemnified Party, and the attorney retained by the indemnified Party.
- 8.4 Effect of Indemnification Rights. The rights of a Party to be indemnified under sections 8.1 or 8.2 cannot be deemed or construed to limit or diminish the obligation of the Indemnified Party to perform its duties at Law or under any agreement between the County Parties and the State Parties.

## **Memorandum of Understanding (MOU) County Services in a Court Exclusive Work Area**

As indicated at the beginning of this commentary there are situations where the County will continue to provide facility management services to the AOC after a court facility has transferred. The most common examples are for court facilities in rural and small communities, historic court houses, and buildings where security is of special importance.

### **COMMENTARY:**

The AOC is viewing these agreements much like a typical property management agreement and is taking the approach that the county should maintain the general liability coverage for the building, add the AOC and the superior court as additional covered parties, and indemnify the AOC and the court for claims arising from the negligent acts of the county. In addition, these MOU agreements most often involve buildings that are owned by the County and the County retains occupancy of a majority of the square footage of the building.

Section 2.1 establishes that the county can use any of the means allowed by statute to provide for coverage.

Section 2.2 established the need for the county to maintain workers compensation coverage.

Section 2.3 established the need to maintain CGL coverage.

Section 2.5 establishes the general terms and conditions. The waiver of subrogation is the trickiest part in that we are only asking for a waiver to the extent that there is coverage for the AOC and the court under the county's coverage agreement. If the AOC or the court is negligent and causes injury, then we would not expect a waiver. We have been negotiating this section on a case by case basis, and at the request of the EIA are considering modifying this section to eliminate the waiver provision.

Section 2.6 establishes the requirements placed on county contractors providing some or all of the services required under the terms of the MOU.

Section 5 is the indemnity agreement, which establishes that the County is only to indemnify the AOC and the court for its negligent acts.

### Insurance

2.1. County's Insurance Programs. The County may provide for all or any portion of its obligations under Section 2 of this MOU by commercial insurance, an authorized program of self-insurance, or participation in a joint power authority established for the purpose to pool self-insured claims. County must

notify AOC of any material changes to its insurance or self-insurance programs from what existed on the effective date of the Transfer Agreement.

- 2.2 Workers' Compensation Insurance. The County must maintain and keep in force workers' compensation insurance or similar insurance for its employees who are employed in connection with the performance of County's obligations under this MOU. That insurance must comply with applicable State statutes and contain Employer's Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) per occurrence. The insurance must also comply with all applicable federal and State withholding tax, Social Security, unemployment, and other Laws existing or enacted in the future for the benefit of, affecting, or respecting the employment of such County employees.
- 2.3 Liability Insurance. The County must maintain and keep in force during the term of this MOU commercial general liability insurance with limits of liability of not less than One Million Dollars (\$1,000,000) per occurrence and if subject to an annual aggregate limit of liability, such aggregate limit of liability shall be for an amount of not less than Five Million Dollars (\$5,000,000). The liability insurance may be issued in one or more policies by insurers acceptable to AOC and shall include without limitation coverage for the following:
- (i) Bodily injury and property damage liability, including personal injury liability and products and completed operations coverage, insuring the County's performance of services under the terms of this MOU; of services in the Court Exclusive Use Area; and
  - (ii) Bodily injury and property damage liability for County's liability resulting from the assumption, if any, of its liabilities under any contract related to the County's performance under the terms of this MOU.
  - (iii) Damages resulting from personal injury or advertising injury resulting from the County's performance, pursuant to the terms of this MOU, of Services in the Court Exclusive use Area
- 2.4 Automobile Liability. The County must maintain and keep in force during the term of this MOU automobile liability insurance with limits of liability of not less than One Million Dollars (\$1,000,000) combined single limit per occurrence with respect to owned, non-owned, hired or leased vehicles assigned to or used in connection the County's performance, pursuant to the terms of this MOU, of Services in or to the Court Exclusive Area.
- 2.5 General. The County shall provide verification of coverage from insurers that are satisfactory to the AOC as evidence that the coverage required under this Section 2 is in force. Such verifications of coverage shall identify this MOU and shall contain a written provision requiring not less than thirty (30) days'

prior written notice will be provided to AOC of cancellation, non-renewal, or material change in coverage of said insurance contracts. The AOC reserves the right to request and receive copies of any of the above insurance contracts and/or endorsements. If the County provides the required insurance through commercial insurance companies, such insurers shall have an A.M. Best rating of at least equal to, or better than an "A:-VII" and be authorized to do business in California. Only as it relates to the County's performance, pursuant to the terms of this MOU, of Services in or to Court Exclusive Use Area the insurance contract required under Section 2.3 shall be endorsed to include the AOC and the Court, as well as their agents, officials, and employees as additional insureds, or covered parties, as appropriate, shall stipulate that the coverage afforded shall be primary insurance, and any insurance, self-insurance or risk retention programs maintained by the AOC will be excess and non-contributory to the insurance required by Section 2.3., and that the insurer providing the coverage required under the Section 2.3 shall waive all rights of recovery against the AOC and the Court.

2.6 Contractors Insurance. To the extent that County contracts with third parties (other than with each other) for any provision of Services, goods, or supplies of any nature whatsoever in or to the Court Exclusive Use Area, then County shall require that such third-party contractors, all levels of subcontractors, and their respective employees, consultants, and representatives: (a) obtain not less than the insurance required of County under this Section 2; (b) name AOC and the Court as additional insureds; (c) provide a waiver of subrogation in favor of the AOC, the Court and County; (d) provide to AOC, the Court, and County a 30-day notice of cancellation or material change in any insurance policy coverage required hereunder; and (e) promptly deliver to AOC, the Court, and County written evidence that all insurance coverage required by this Section 2.6 is in place and complies with the requirements hereof. However, this provision does not preclude the County's ability to require any third-party contractor to provide additional limits of liability and insurance coverage which are usual and customary to their type of business or exposures arising from the work being performed. Notwithstanding the foregoing, third-party contractors engaged by County need only carry general liability insurance with limits of liability of not less than One Million Dollars (\$1,000,000) per occurrence or Two Million Dollars (\$2,000,000) in the aggregate.

## 5. Indemnification

County shall, and hereby does, protect, defend, indemnify and hold harmless Council, AOC and the Court, and their officers, agents, and employees (collectively "Indemnitees") from and against any and all loss, cost, damage, expense, and liability of any and every kind or nature, including without limitation, attorney fees and court costs (herein "Claims") arising from or in any way connected with the performance or nonperformance by County of its obligations under this MOU except to the extent that such claims arise out of or relates to the negligence or willful misconduct of the

Indemnitees. County will be relieved of its obligations to protect, defend, indemnify and hold harmless Indemnitees upon County receiving a judgment of no liability and being dismissed from a case by a court of competent jurisdiction for the alleged acts or omissions which gave rise to the Claim. In the event any legal action(s) or any other proceeding(s) may be brought against the Indemnitees by reason of any such Claims, County, upon written notice from AOC, shall promptly defend Indemnitees at County's sole cost and expense. The foregoing indemnity shall survive the termination of this MOU.

In addition, County agrees to indemnify and hold Indemnitees harmless from any acts, errors, omissions of any nature whatsoever arising out of or from each of their respective contractual arrangements with their third-party vendors, contractors, and all tiers of subcontractors, their employees, consultants, agents, or representatives. County shall require its third party vendors, contractors, and all tiers of subcontractors who provide goods or services of any nature whatsoever for the care, maintenance, or repair of the Court Facility to indemnify and hold harmless the Indemnitees





## **TRANSFER OF COURT FACILITIES Impact on Insurance Requirements CSAC EIA Analysis, March 30, 2007**

In accordance with SB1732 (Escutia; Chpt 1082, Statutes of 2002), Counties and the Administrative Office of the Courts (AOC) are negotiating the transfer of responsibility for providing and maintaining court facilities from the counties to the courts. Once the transfer is completed, the counties' financial obligation to the AOC will be fixed in the county facilities payment (CFP). This CFP amount includes historic costs of insurance.

The vehicle for these transfers is a Transfer Agreement, the terms of which are being negotiated on a case by case basis at the local level. Each of these transfer agreements, or the associated Joint Occupancy Agreement (JOA) will contain certain insurance requirements. CSAC EIA staff and AOC Risk Management staff have attempted to identify the normal, most common scenarios and highlight the corresponding insurance requirements. The purpose of this paper is to document these scenarios and explain how the CSAC EIA's insurance programs will respond to the insurance requirements.

The following examples and statements of our position are intended to be general in nature. There are always exceptions and unique circumstance that will have to be dealt with differently than what is suggested here, and everything is negotiable.

There are two basic ways that transfers will take place, 1) an outright transfer of ownership (title) of the court facility; or 2) a transfer of responsibility where title remains with the county. In situations where title changes from county to court, there should not be any insurance/indemnification language to be concerned about from a risk management standpoint in the Transfer Agreement. Keep in mind, however, that the county may still occupy space under a lease agreement in the transferred court building. Risk Management should view the resulting JOA in the same way as any other lease agreement – generally speaking, the county would be responsible for its own personal property in the building, but not the real property. The rest of this paper will deal with situations in which responsibility transfers without a title transfer.

Attached is an analysis from AOC Risk Management on the insurance and indemnification requirements. Template language for pertinent provisions is cited. This CSAC EIA analysis is based upon the template language provided by the AOC, so counties relying on this analysis should be certain that the language in their transfer agreements matches this template language. [The AOC has pointed out that the specific language has undergone numerous iterations as negotiations have evolved with counties, but that the intent of the language has been consistent.]

**I. Transfer of Responsibility under bonded indebtedness, shared occupancy, and where the county is the building manager.**

In such a circumstance there would be three agreements:

1. A transfer agreement that would contain only a brief reference to insurance that would refer to the Joint Occupancy Agreement;
2. A Joint Occupancy Agreement that would contain very specific insurance and indemnity language; and
3. A facility management MOU between the AOC and the County.

The AOC has developed a template for insurance requirements as a starting point for negotiations on a building by building basis. The same template applies to the following three situations:

1. **The court facility is under bonded indebtedness.** If there are outstanding bonds on the facility in question, then title can not transfer until the bonds are paid off. The bond/debt documents contain legal requirements related to insurance that take precedence over the transfer agreement.
2. **The court facility is occupied by both the court and the county.** This is the most common scenario. In this instance, the Court and the County will continue as joint occupants of the building, with both having responsibility for its own business personal property, both being responsible for its own negligence involving liability claims or lawsuits, and the AOC relying on the County to insure the building for both direct physical damage and extra expense for the temporary cost of relocation.
3. **The county agrees to provide building management services.** This situation normally arises where the court is in a rural location, or where the county is the dominant occupant in the facility or where there is a unique concern such as security. The county transfers responsibility (fixing its CFP obligation), but agrees to continue to be responsible for the operation/maintenance of the facility.

The following are general comments and statements, please remember that there are always exceptions and everything is negotiable on a case by case basis.

**Property Insurance: AOC Requirements and CSAC EIA Position**

- The AOC template requires the county to insure the real property (definition of "Property Insurance Policies"). Since in most cases, the County still holds title to the building, it is not only appropriate, but also desirable for the County to continue to insure the real property. (Even in cases where title transfers to the AOC, there is still an insurable interest created by the requirement in the transfer Agreement for the county to provide the real property insurance coverage, so this is permissible under the CSAC EIA Property Program.) The AOC requires coverage to be as broad as an All-Risk/Special Form property policy with 100% replacement cost. The CSAC EIA property program meets these requirements.

- There is no requirement or intent for the county to cover the personal property of the courts (by omission in the definition of “Property Insurance Policies”). Each party is responsible to cover their own contents.
- The AOC template requires the AOC (et al) to be named insured and also shown as a joint loss payee (section 4.3.3.1). This can be accomplished through the CSAC EIA Property Program via request from the county to Alliant on a case by case basis.
- The AOC intends to reimburse the county for its proportionate share of property insurance costs based upon the percent of square footage the AOC occupies. Property insurance costs include the premium and deductible or self-insured retention. If the county has a standard allocation formula for departments, it is recommended that the counties negotiate to include everything normally included under the allocation formula (which may also include administrative overhead). Section 6.1.4 and Section 7 address this issue at length and should be carefully reviewed for both buildings under bonded indebtedness and when there is no bond debt involved.
- The AOC template requires that the AOC receive a waiver of subrogation endorsement on the Property insurance (section 6.1.2). This can be accomplished through the CSAC EIA Property Program via request from the county to Alliant on a case by case basis. (By having the AOC as named insured, the county is already precluded from subrogating against the AOC, so the waiver endorsement is probably just window dressing).
- The AOC template requires the County to pay for relocation expenses, but only if covered under the property insurance (section 6.1.2). By naming the AOC as a named insured and based upon the requirement to pay for relocation expenses, an insurable interest is created. The CSAC EIA Property Program will cover these relocation expenses under the terms and conditions of the “Extra Expense” coverage in the policies. No special notification is necessary for this coverage.
- The county must provide to the AOC verification of property insurance coverage (section 6.1.3). This can be accomplished via request to Alliant to provide a certificate of coverage to the AOC on a case by case basis.
- The AOC template language requires cooperation with the AOC on how insurance proceeds are spent in the event of a property claim (section 6.1.4 and section 7). As a named insured under the property policy, the AOC will have this right and the CSAC EIA Property Program will work with both the county and the AOC in cooperation.
- The AOC template language requires the county to continue to make bond debt payments even in the event of a loss (section 6.1.4.1). The CSAC EIA Property Program offers optional coverage under the “Rental Income” provisions of the policy that will make the payments on behalf of the county during the period of time that the building is uninhabitable due to a covered loss. To effect this coverage, the county must schedule the value of the bond payments under Rental Income. (The cost of this additional coverage should be payable by the AOC under the definition of Property Insurance Costs and section 4.2 of the JOA.)

- If the county and AOC agree not to rebuild/replace the building in the event of a covered loss, the AOC will have certain equity rights related to the cost to relocate court operations (sections 6.1.4.2 and 7.5). The CSAC EIA Property Program will cooperate with the allocation of insurance proceeds as previously stated; however, in the event that the county chooses not to rebuild, then the claim will be paid on the basis of actual cash value (includes a reduction for depreciation) instead of the normal replacement cost valuation. We believe this language is acceptable since it indicates that the allocation of insurance proceeds is subject to the extent of coverage under the property policies.

### Third Party Liability: AOC Requirements and CSAC EIA Position

- The AOC template includes mutual hold-harmless provisions related to willful misconduct, negligent acts and errors and omissions (sections 8.1 and 8.2). There are no insurance requirements per se; however, the CSAC EIA's excess liability programs (GL1 or GL2) will generally cover most exposures arising out to premises liability in excess of the member county's self-insured retention.

## **II. Facility Management by the County in a Court Exclusive Area following a Transfer of Responsibility for a Jointly Occupied Building.**

The AOC has developed a template Memorandum of Understanding (MOU) for insurance requirements as a starting point for negotiations on a building by building basis. The same template applies to the following two situations:

1. **A jointly occupied building.** In these situations the county retains title and is normally the majority occupant in the facility with the courts occupying less than 50% of the space.
2. **County provides facility management in a building 100% occupied by the courts.** Even though responsibility transfers to the AOC and the county is not an occupant in the building, the county agrees to continue to provide facility maintenance services for a fee.

The following are general comments and statements, please remember that there are always exceptions and everything is negotiable on a case by case basis.

### Property Insurance: AOC Requirements and CSAC EIA Position

- There are no requirements related to Property Insurance. Since the County will generally retain title to the facility, the county should continue to list the location on the county's property schedule along with the personal property, if any, owned by the county.

### Third Party Liability and Workers' Compensation: AOC Requirements and CSAC EIA Position

- The AOC template provides that the county can meet its obligations through any combination of insurance, self-insurance, or pooling (section 2.1). All CSAC EIA Programs will qualify including GL1, GL2, and Excess and Primary WC Programs.
- The AOC template provides that the county must maintain WC coverage and Employers' Liability (EL) limits of \$1 million per person per accident (section 2.2). The WC requirement is satisfied through a combination of self-insurance and pooling in the CSAC EIA's PWC and/or EWC Programs. The EL requirement should be negotiated by the county to be expressed on a per occurrence basis. EL coverage of \$5 million per occurrence is included in the CSAC EIA's EWC Program. (The AOC is working to align its template language with the EIA limits of liability).
- The AOC template requires commercial general liability coverage of \$1 million per occurrence and not less than \$5 million in the aggregate (section 2.3). Coverage must include bodily injury (BI), property damage (PD) liability, personal injury, products and completed operations, and the BI and PD must include liability assumed by the transfer agreement. The CSAC EIA's liability programs (GL1 and GL2) meet all of these requirements. Limits in GL1 and GL2 are provided per occurrence. There is an aggregate for products and completed operations for the full limit of coverage.
- The AOC template requires automobile liability coverage be maintained by the county with no less than \$1 million limit (section 2.4). This equivalent coverage is included in CSAC EIA's excess liability programs (GL1 or GL2).
- The AOC template, section 2.5, requires evidence of coverage with not less than 30 days notice of cancellation. The AOC may request and receive a copy of the county's coverage document(s). As respects services provided by the county in a court exclusive use area, the county must also include the AOC as additional insured stipulating that coverage is primary and non-contributory and provide a waiver of subrogation. If commercial insurance is utilized, there must be an A.M. Best rating of A- VII or better and be authorized to do business in California. The CSAC EIA liability programs (GL1 or GL2) can comply with all of these requirements, subject to approval of the waiver of subrogation endorsement. Upon request to Alliant, the GL1 or GL2 programs will issue a certificate, additional insured endorsement including the specified language, and provide a copy of the coverage document, if requested. For issuance of a waiver of subrogation endorsement, CSAC EIA staff approval is required for the GL1 Program and GL2 Committee approval is required for the GL2 Program. CSAC EIA recommends removal of this wording, if possible, due to the administrative approval concerns. The waiver is unnecessary if the AOC is an additional insured since we can not subrogate against an insured (named or additional). The GL1 and GL2 programs are not considered commercial insurance, so the Best rating requirement does not apply. (The AOC is working to delete the waiver of recovery provision).

- The county is obligated to require any third party contractor working in the court exclusive use area to comply with the same provisions as the county is required (i.e. certificate, additional insured, waiver of subrogation, etc.) (Section 2.6). This provision does not directly affect the CSAC EIA insurance programs.
- There is a strict one-way indemnification provision in favor of the AOC except for the negligence or willful misconduct of the AOC. In addition, the county is required to hold the AOC harmless with respect to the county's contractual arrangements with third parties (section 5). CSAC EIA would prefer to see a mutual hold harmless agreement; however, coverage under the GL1 or GL2 programs will not conflict with this provision. (This exception has been communicated to the AOC and is under consideration).

While sometimes difficult to understand, the insurance and indemnification requirements are a necessary part of the transfer process. The AOC is staffed by professional risk managers available to discuss unique circumstances and to work to develop alternative terms and conditions that accommodate each situation. The purpose of this memorandum is to provide basic answers to the most frequently asked questions concerning the transfer agreements.