OPINION

An evolving obligation

Court rulings, technology, and project structures spotlight need for design firms to renew focus on standard of care.

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GUEST SPEAKER

Design professionals have historically been guided by the principles of their industry standard of care with respect to all their projects and activities. However, while the concept is steadfast, its interpretation and application may be evolving as a result of recent court rulings, changes in project structure and the implementation of new technology.

Essentially, the standard of care for an engineer or architect is to act reasonably and prudently when performing professional services so as to guard against a loss to the project owner or harm to another arising from the performance of professional services.

A California appeals court decision (*Beacon Residential Community Association vs. Skidmore, Owings & Merrill L.L.P. et al*) recently upheld by the state Supreme Court shows the extent of duty architects and engineers may owe other parties. The case involved code-compliant insulated windows and ventilation specified by the architects that were not installed by the contractor. As a result, the condominium units could not be occupied for sustained periods.

The court determined that the principal architect of a project (in this case, a condominium development) owes a duty not just to the party with which it has privity of contract – but also to others who it is "reasonably foreseeable" could suffer harm as a result of the architect's services. In effect, if the design firm can reasonably foresee certain parties – the individual purchasers of condominium units in this case – suffering harm, then it has a duty to guard against that harm.

Unfortunately, the court did not address how an architect could realistically protect the condominium owners against the loss they suffered as a result of less insulated windows, when the architect could not force the contractor to install the originally specified windows.

For architects and engineers, managing risk goes well beyond negotiating fair and reasonable contract terms and having adequate insurance. It also involves considering project types, possible parties who could potentially suffer loss as a result of the services, as well as evolving technology and changes in project delivery methods.

There have been increasing attempts to use clauses in contract language that increase the standard of care to that of a fiduciary. Design firms and their legal and risk advisors fully recognize that such clauses must be negotiated out of the contract or agreement. Courts will always default to the traditional standard of care, unless the architect or engineer agrees in its contract to be held to a higher duty.

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Meanwhile, there has been some erosion of the economic loss doctrine. That doctrine holds that you cannot pursue another for a purely economic loss you suffered as a result of the other party's breach of contract or negligence unless you have a direct contract with that party. Increasingly, contractors have been successful in recovering from engineers and architects with whom they did not contract on the basis of "negligent misrepresentation."

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Many years ago, the firm I was part of took on this entire array of services for a healthcare provider to build what they termed a "doc-in-a-box," which they planned to replicate. We provided a turnkey service, managing everything from site development and entitlements, through design and construction, right up to supplies in the drawers like Band-Aids and rubber gloves. Why not? The healthcare provider had never done this before, had no expertise in-house and no desire to staff up.

With so much change in the way services are being offered (the healthcare industry, data centers and other critical facilities are good examples), I believe the opportunity to enter the program management field is strong. Select your path carefully, research the process being used today to go from concept through the lifecycle of the use of the facility, and design a service offering that will achieve a better, more creative and cost-effective design solution *because* the process is being managed by an architect or engineer, rather than a dispassionate program manager.

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For example, a design firm that produces designs or drawings for a contractor to build "represents" they can be used for construction. If information is missing or the plans deficient, some courts have ruled the architect or engineer owes a duty to the contractor with whom they did not have a contract – on the basis that the design firm negligently misrepresented the plans were suitable to use for construction.

Design firms need to consider who might reasonably suffer a loss and protect them – in addition to protecting the client – from suffering a loss.

Changing technology also has implications for standard of care. As more engineering and architectural firms embrace building information technology, an architect or engineer might be judged reasonable or prudent on the basis of whether they followed the same practices as their peers in utilizing BIM.

Public-private partnerships and the increased use of design-build project delivery don't change the standard of care. Yet, they may have increased risk for the design professional. PPPs involve design, construction, ownership and operation of public infrastructure, such as toll roads, bridges, water and wastewater treatment plants.

The prime in a PPP generally will establish an operating entity to run the completed project for a period of years under contract to the governmental agency. The prime could suffer harm in lost revenue, profits, and higher than expected costs if the design professional's services are deficient.

A design builder may not be able to seek more money under its contract with a client for conditions discovered during construction that the designer did not take into account earlier. A design firm must recognize the risk its design-builder client faces and insist on a schedule that allows designs and drawings to reach an extensive level of completion before the design builder submits its bid.

Finally, greater project collaboration is increasingly necessary to manage project risks and changing project delivery methods. Ask yourself: "Is it better to obtain the most favorable contract language, supported by the best possible professional liability insurance – which pays for the best attorney to (hopefully) get me out of the claim that happens due to a loss on the project? Or is it better for the loss not to have happened in the first place?"

If all parties in a project share the goal of a successful project and collaborate, their chances of not having a loss improve. The construction contractor can provide input and suggestions to the design firm as the design is being developed. The design firm can serve a valuable role during site observation, providing advice on design intent as well as catching issues not in compliance with the original design.

In today's environment, effective project risk management involves all phases of a project – contract negotiation, team selection, cooperation/collaboration – and acting reasonably and prudently on behalf of those who could reasonably be expected to suffer harm. By taking this approach, design firms should be able to navigate potential risks from evolving interpretations of standard of care.

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