Seeking: Philosophy Major to Design Major Construction Projects

Design Professional Ethics

By William S. Thomas

Successful candidate should have a firm understanding of *The Nicomachean Ethics*, be a practitioner of ecologic humanism, and a believer in bio-centric and eco-holistic techniques. Must present an oral argument on the virtues and drawbacks of consequential morality, moral absolutism and deontology. Oh, and must be able to prepare, sign and seal plans, specifications and buildable designs for a major urban development project. Law degree a plus, but not required. Salary negotiable.

"Midway upon the journey of our life, I found myself within a forest dark…"

Thus begins Dante's *The Divine Comedy*, an epic journey through hell, purgatory and ultimately paradise.

In Canto X, we are told:

> There begin thy wonder of the mighty Architect, who loves his work so inwardly, his eye doth ever watch it.

In today's world, design professionals would be wise to take Dante at his literal words when it comes to their relationships, contractual arrangements and work product—keeping an ever-watchful eye. Navigation of the current construction landscape, much like Dante's mythical journey, is fraught with many perils. For the modern design professional, particular care should be paid to the basics of "design ethics," as the demands of the practice require a *moral* compass, as well as a slide-rule.

Perhaps, technically, the design and construction professions are the "world's oldest." Since two of the three most basic human needs are shelter and work, people on this earth have been engaged in those combined activities for at least 200,000 years. So, with such a head start over the other "professions," what have the design and construction communities done to set themselves apart in terms of policing themselves and improving their practice? The fact is that "design ethics" has lagged behind development of ethics in the other professions considerably.

This article will explore a number of issues relating to "design ethics," from new changes to AIA and NSPE "codes of ethics" to include provisions for sustainable design, to expansion of liability through the "standard of care," and ultimately suggest some contract clauses to address these issues. Design professionals and counsel must be aware that potential ethical pitfalls should be addressed head on and early on, in client education, negotiations and contract documents, so that major dilemmas are avoided.

Brief History of Design Codes of Ethics—"Hegel's Dialectic"

Nineteenth century German philosopher G.W.F. Hegel believed that progress in any

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system occurs through a "dialectical process," where competing, but diametrically opposed theories move towards a middle ground resolution. Such movement has occurred in design professional "morals." As an example, Hammurabi, ruler of Babylonia in the 17th century, BCE, enacted a "Code" consisting of 282 dictates, governing all aspects of ancient life. One of them held

> If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death. (229).

However, in an enduring nod to fairness, also held:

> If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means. (233).

Fast forward to modern times, when American design professions first began to develop formalized codes of ethics through their national professional associations. (As compared to doctors, who have been operating off of the Hippocratic Oath since circa 500 BCE). In 1946, the National Society of Professional Engineers (NSPE) released for the first time its "Canons of Ethics for Engineers and Rules of Professional Conduct." These canons later evolved into the current Code of Ethics, which was not adopted until 1964. Since they are regulated on a state level, many of these industry-wide codes merged into the regulatory framework of the states' "practice acts" and regulations. Now, every state has statutes and regulations relating to the design professions, which incorporate their own codes of ethics.

Since design professionals hold themselves out to the public in a professional capacity, several common law duties arise over and above those created in their contracts.

Modern Codes of Ethics—The Tragedy of the Commons

The "tragedy of the commons" occurs when individuals behave solely by consulting their own self-interest, and as a result, deplete a shared limited resource even when it is not in the group's long-term interest to do so. This dilemma was described by modern American ecologist Garrett Hardin in an article he authored that shares his theory's name, published in the journal *Science*, in 1968. This Commons Theory has been brought to the fore once again to support the lofty goal of "sustainable design and development."

In September 2010, members of the U.S. Green Building Council (USGBC), the organization responsible for LEED (Leadership in Energy and Environmental Design) certification of buildings in the United States, testified before Congress on the many benefits of "green construction." The purpose of the discussion and pledge made there was to provide "cost-effective, resource-efficient, high-performance, healthy and functional work environment[s]" while at the same time, promoting the ideals of global environmental preservation, through responsible design.

As a part of this environmentalism movement, the American Institute of Architects (AIA) Board added a new canon to the AIA Code of Ethics imploring architects to be environmentally responsible. Additionally, AIA Form Document B101-2007, the standard form contract between an owner and architect, includes language requiring architects to discuss environmentally responsible design approaches with their clients. The new AIA Code of Ethics provision reads

> Canon VI—Obligations to the Environment
>
> Members should promote sustainable design and development principles in their professional activities.
>
> E.S. 6.1 Sustainable Design: In performing design work, Members should be environmentally responsible and advocate sustainable building and site design.
>
> E.S. 6.2 Sustainable Development: In performing professional services, Members should advocate the design, construction, and operation of sustainable buildings and communities.
>
> E.S. 6.3 Sustainable Practices: Members should use sustainable practices within their firms and professional organizations, and they should encourage their clients to do the same.

Since they are only "ethical standards," they are merely goals for AIA members, as opposed to ethical "rules," for violation of which an AIA member could be disciplined. However, at some point, as discussed below, these ethical standards will become melded into the "standard of care," and eventually expert witnesses will be offering the opinions that they were violated in a certain instance.

Further, the new Owner-Architect Agreement AIA-B101 (2007 Ed.) includes contract requirements for sustainable design. Sections 3.2.3 and 3.2.5.1 require the architect, during the schematic design phase, and as part of basic services, to discuss the feasibility of incorporating environmentally responsible design approaches into the project and consider them in completing the design.

> §3.2.3 The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.
>
> §3.2.5.1 The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner's program, schedule, and budget for the Cost of the Work. The Owner may obtain other environmentally responsible design services under Article 4.

These contract obligations can of course also form the basis of a standard of care argument against a non-complying architect with much more authority, as they are contract requirements. For projects need-

ing LEED certification, the AIA promulgated a separate form document, B214 (2007 edition), summarizing LEED certification services, including submission of certification documentation to the owner at various intervals of the project, a pre-design workshop with the owner, the owner's consultants, and the architect's consultants. This document imposes much heightened duties upon the architect, which also raises the bar on the standard of care.

Not to be outdone, the National Society of Professional Engineers (NSPE) promulgated its own revisions to its Code of Ethics for Engineers in July 2007, which now requires

1. Engineers shall at all times strive to serve the public interest.
   Engineers are encouraged to adhere to the principles of sustainable development in order to protect the environment for future generations.

"Sustainable development" was defined in a footnote as "the challenge of meeting human needs for natural resources, industrial products, energy, food, transportation, shelter, and effective waste management while conserving and protecting environmental quality and the natural resource base essential for future development."

These changes in the codes of ethics of the two preeminent professional trade organizations for design professionals are a definite sign of things to come. No doubt it will lead to a totally changed understanding of what is expected of designers into the future, and form the basis of a new standard of care.

Origins of Design Professional Duties—Derrida's Deconstruction

Modern day Algerian-born philosopher Jacques Derrida, in addition to being the inspiration behind "deconstructivism" architecture, also propounded an idea that the self-referential and elusive nature of language renders texts inherently self-contradictory. Welcome to the realm of construction contracts. Contracts between a design professional and his or her client may give rise to duties owed by the design professional over and above those set out in the document, including duties to non-contracting, third parties. Duties arise by virtue of the "professional status" of designers. Since design professionals hold themselves out to the public in a professional capacity, several common law duties arise over and above those created in their contracts. As an example, design professionals imply in their contracts for services that they possess the ordinary level of professional learning, skill and experience; that they will use reasonable care and diligence exercising their skill to accomplish the purpose for which they are employed; and that they will use their best judgment in exerting their skill. *Chapel v. Clark*, 76 N.W. 62; 117 Mich. 638 (Mich. 1898).

In *Board of Educ. of Community Consol. Sch. Dist. No. 54 v. Del Bianco and Assoc., Inc.*, 372 N.E.2d 953; 57 Ill. App. 3d 302 (Ill. App. Ct. 1978), in spite of clearly defined contract duties, the court noted they were

> not the only obligations which [the design professional] was required to perform. Not all of the duties growing out of a contract must have been expressly stipulated for: many duties arise ex large out of the relation created by the contract. Consequently, we find that [the design professional] had the implied obligation to specify the use of reasonably good materials, to perform its work in a reasonably workmanlike manner, and in such a way as reasonably to satisfy such requirements as it had notice the work was required to meet.

Modern design professionals are only expected to deliver plans and specifications prepared with a *reasonable* degree of technical skill. Absent a special agreement, the design professional does not imply or guarantee a perfect result. *Sams v. Kendall Constr. Co.*, 499 So. 2d 370, 373 (La. Ct. App. 1986). This "standard of care" is determined by the degree of skill and care ordinarily employed by like professionals under similar conditions and circumstances.

Imposition of Liability—The Categorical Imperative

Eighteenth century German philosopher Immanuel Kant, in his "categorical imperative," forces us to judge every action as if it were universal law. This is the ground trodden by the modern day expert witness, who can say, in no uncertain terms, that the design professional either met or failed to live up to the "standard of care." Similar to doctors, lawyers and accountants, the law imposes upon design professionals the duty to exercise a reasonable degree of skill and care when performing their function. A professional act or service is one arising out of a vocation, calling, occupation or employment involving specialized knowledge, labor or skill that is predominantly mental or intellectual rather than physical or manual, and includes architects and engineers. *Overland Constructors, Inc. v. Millard School District*, 369 N.W.2d 69, 75; 220 Neb. 220 (Neb. 1985).

Mere references to code, statutory or regulatory provisions should not establish negligence liability on their own.

Some litigants and their experts seek to impose a duty, and therefore liability, on design professionals by virtue of the above codes of ethics, state licensing acts and regulations. Cases and courts are split on whether this is completely permissible. In *Vonasek v. Hirsch & Stevens, Inc.*, 65 Wis. 2d 1; 221 N.W.2d 815 (Wis. 1974), the plaintiff/general contractor sought to impose liability on the defendant/architect for an alleged violation of the Wisconsin Administrative Code requiring specific design parameters with regard to structural steel construction. The plaintiff argued that the code section, which was not violated in letter, established a common law duty of care and cited *Swaney v. Peden Steel Co.*, 259 N.C. 531; 131 S.E.2d 601 (N.C. 1963), wherein the court held an architect liable for the design of a truss which was so unusual, that none of the testifying experts had ever seen anything like it. In such a case, the design created a latent defect that imposed a duty to instruct the contractor about the proper method of construction. Rejecting application of *Swaney*, the court held no duty existed since the contractor was an experienced steel installer with sufficient experience to know the project's danger.

Business Men's Assurance Co. of America v. Graham, 891 S.W.2d 438 (Mo. Ct.

App. 1994), involved a civil negligence case where the plaintiff alleged, and the trial court instructed the jury, that violation of the Missouri Architect, Professional Engineer and Land Surveyor Licensing Act, Mo. Rev. Stat. §327, regarding an engineer's personal seal, constituted negligence per se. Plaintiffs argued an engineer's statutory duty to the "public at large" per the licensing act, also extended to specific contracting parties. Plaintiff alleged it was negligence per se for the engineer to approve negligently prepared plans and shop drawings by affixing his professional seal to these documents. The statute, which requires the engineer to affix his personal seal to any document prepared, reads

> He shall affix the seal to all plans, specifications, estimates, plats, reports, surveys, and other documents or instruments prepared by him, or under his direction, and he shall be held personally responsible for the contents of all such documents.

The court noted the purpose of the licensing statute and professional seal was to protect members of the public. Furthermore, the statute has its own enforcement provisions that include censure and revocation of the professional's license. Since the nature of the licensing statute was to insure that professionals display and maintain a certain standard of competence, it was held *not* to provide a private cause of action for negligence per se.

The lesson of *BMA* is that parties occasionally offer testimony of experts referencing codes of practice or ethics, or other statutory or regulatory provisions, as the "standard of care." Courts may find a duty arising from such provisions where they are designed to protect a class of individuals, and the plaintiff is a member of that class. However, mere references to code, statutory or regulatory provisions should not establish negligence liability on their own.

For example, in an attempt to defeat summary judgment, the plaintiff in *Thusius v. E.G. Hintz and Sons, Inc.*, 297 Wis. 2d 584; 724 N.W.2d 703 (Wis. App. 2006), offered an expert affidavit criticizing the flooring design where an accident occurred, calling it "negligent design," citing safety provisions of the state administrative code. The court agreed that the administrative code can create a duty, and violation of the code's provision can be negligence per se, however, the portions cited by the plaintiff's expert were inapplicable because they incorporated guidelines under the Americans with Disabilities Act, and the plaintiff did not argue that she belonged to the protected class of disabled individuals. *See also Hurst v. Sandy*, 329 S.C. 471; 494 S.E.2d 847 (S.C. App. 1997) (holding that a state statute licensing statute governing registration of engineers and land surveyors failed to set forth standard of care for purposes of a negligence per se claim since "[t]he essential purpose of Chapter 22 is the regulation of the practice of a profession, rather than the imposition of civil liability to private individuals.").

Experts will opine and courts may determine that certain ethics provisions are evidence of the standard of care. In such cases, the expert witness will be allowed to testify regarding ethical provisions as evidence of the existence of a duty, but not that a violation of them constitutes negligence per se. For example, the court in *Monroe Prop. Co. v. Pearson*, 2004 ML 508; 2004 Mont. Dist. LEXIS 1775 (Mont. Dist. 2004), allowed the plaintiff's expert to testify regarding the American Institute of Architects Code of Ethics, although the expert was not permitted to imply that a violation constituted negligence per se on the part of the defendant architect. The court noted

> While violation of a statute may be classed as negligence per se, violation of other regulations is not generally classed as negligence per se. More precisely on point, absent specific statutory incorporation, the provisions of a national code are only evidence of negligence, not conclusive proof thereof.

Cited by the *Monroe* court was the decision in *Woodbridge Care LLC v. Englebrecht & Griffin Architects, P.C.*, 1997 Conn. Super. LEXIS 828 (Conn. Super. Ct. 1997). In that case, plaintiff asserted the canons of the American Institute of Architects provided basis for a civil cause of action. Defendant argued that they were only a source of disciplinary sanction. The court noted that the AIA Code of Ethics, like the Rules of Professional Conduct for attorneys, states that its provisions are meant to constitute standards for imposition of disciplinary standards within the profession: calling them "broad principles of conduct" and "goals toward which members should aspire in professional performance and behavior." The court concluded that while violation of the AIA Code of Ethics may subject an architect or a firm to disciplinary sanctions by the profession, the code does not create a cause of action upon which a civil remedy may be based, and granted summary judgment.

Certain steps can be taken in contract provisions to protect designers from the inevitable expansion of liability to come.

Practice Pointers—Hume's Problem of Induction

Seventeenth century Scottish philosopher David Hume questioned whether inductive reasoning could be a predictor of future outcomes. He observed that we often reason that what has been observed in the past will hold true in the future. Much like Plutarch's observation about Greek philosopher Heraclitus's comment that "we never step into the same river, it is always changing," so too are the rules of the game for designers. But certain steps can be taken in contract provisions to protect designers from the inevitable expansion of liability to come.

"No Right to Insist"

All too often, designers face the argument, usually at trial, that they did not "insist" that the owner engage in a certain course of conduct, or that the designer should have "walked off the job" if the owner would not comply with its recommendations. While no doubt there are ethical provisions requiring a designer to notify the authorities if his or her judgment is overridden and safety is compromised, (NSPE Code of Ethics: II. Rules of Practice: 1. Engineers shall hold paramount the safety, health, and welfare of the public. a. If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify

their employer or client and such other authority as may be appropriate.); (AIA Code of Ethics and Professional Conduct: Canon II: Rule 2.105: If, in the course of their work on a project, the Members become aware of a decision taken by their employer or client which violates any law or regulation and which will, in the Members' judgment, materially affect adversely the safety to the public of the finished project, the Members shall: (a) advise their employer or client against the decision, (b) refuse to consent to the decision, and (c) report the decision to the local building inspector or other public official charged with the enforcement of the applicable laws and regulations, unless the Members are able to cause the matter to be satisfactorily resolved by other means.), the issue usually involves the owner's failure to follow some less critical design decision which leads to a claim.

To address this issue, and the number of other minor decisions that may get made along the way, the designers should include language in their agreements that the design professional has no "right to insist," such as:

> Owner acknowledges and understands that Architect has no right or ability to insist, demand or order that Owner or Contractor comply with its interpretations of the plans, specifications and Construction Documents.

If "green design" is not what the owner wants, then it should be specifically addressed in the contract, and specifically excluded as within the scope of services. This way, there is no question down the road that it was not a part of the services to be rendered.

Ownership and Subsequent Reuse of Documents

With the advent of computers and computer drafting software, comes growing concern about unauthorized use and duplication of design professional work product. In an age where every member of the project team has the means to exchange documents electronically, the process of copying becomes easier and easier. Owners requesting CAD copies of all the drawings after completion of the project further compounds this problem.

This trend raises concerns about liability of the design professional for subsequent use of his or her drawings. Concern over public safety, liability for the designer and copyright all intermingle to further complicate the already cloudy picture. State licensing laws provide some relief for the design professional looking to limit exposure and liability. These laws combined with early contract negotiation can prevent the unauthorized reuse of construction documents, or at least limit the liability of the design professional who falls victim to the copycat client.

The AIA form documents set the designer as the default "owner" of any documents created from his or her efforts on a project. However, many times, in either modifications to the AIA documents, or in custom contracts, owners and design/builders assume ownership of the designer's work product. If the designer is unable to retain ownership of documents in contract negotiations, then steps need to be taken to address the many liability concerns that arise when someone else becomes the owner of their designs.

The best way to handle this situation is to retain control over and ownership of your drawings after completion of the project. Have a contract provision that acknowledges the drawings are merely the instrument of a professional service. Make sure the agreement specifically states that the design professional shall not take any responsibility for unauthorized reuse of the documents after completion of construction. Also, make sure the agreement contains an indemnity provision should the drawings be reused and should problems arise.

If we assume that a party other than the designer will be the ultimate owner of the documents, several additional steps should be taken to protect the designer from possible future liabilities. First, in the current economic climate, the design professional should primarily be concerned about getting paid for his or her efforts, and avoiding a termination and claim for damages, while losing all leverage because he or she does not own his or her design. Provisions should be included in the contract to prevent the designer from being obliged to "turn over" the plans unless and until he or she is paid in full for services rendered, to whatever point the demand is made for the documents. Second, permission should be required for any subsequent "reuse" of the documents, and even if received, the owner of the documents should fully defend, indemnify and hold harmless the original designer for any subsequent reuse.

Further, as a "subsequent" designer, you will want to seek clarity as to the use that can be put to the old designer's documents, as you could yourself be treading on a potential ethical violation. These same hold harmless provisions should be used by subsequent designers. (See AIA Code: Rule 4.102. Members shall not sign or seal drawings, specifications, reports, or other professional work for which they do not have responsible control.); (NSPE Code: 9. Engineers shall give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.)

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As a "subsequent designer," on the receiving end of a set of documents prepared by another designer, get some understanding of the prior contractual relationship. Of primary concern would be any copyright, trademark or other common law rights maintained by the original designer, if any. Unauthorized reuse of the documents could expose the subsequent designer to liability to the original designer. If there was an assumption of the risk of reuse of the documents by the owner, if there are problems, the owner may only have the "subsequent designer" to hold responsible. This can be addressed in the contract as well, with the owner providing some representation of the accuracy or completeness of the documents.

Of more particular concern is the exact "use" that can be made of another designer's work product by a subsequent designer. A licensed professional can only place his

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or her signature and seal on a set of documents prepared by him or her, or prepared under his or her direct personal supervision. This is to assure that someone takes professional and personal responsibility for the contents of the documents. It may just be that you will have to re-do all the work anyway.

Conclusion—Return to Plato's Cave

Now that we have seen the light, what will happen when we crawl back into the dark cave where shadows dance on the wall? We know that duties of design professionals arise from various sources, including contractual terms, the common law, statutes and regulations, or the canons and "codes of ethics" of the various professional associations. Of particular concern is expanding liability through expert witnesses ever growing the notion of what is included in the "standard of care."

Opinions by the courts vary greatly with respect to the source of duties owed by the design professional. Some courts appear to allow experts to testify about duties owed by design professionals and others as if the question of duty is a fact issue. Contractual agreements often set forth the precise duties owed by the parties to the contract and yet courts permit experts or even juries to expand the duties owed based upon "implied duties" and expanded standards. As a result, the allocation of risk defined by the contract documents gets re-allocated by the court or jury.

With that as the backdrop, and given our society's concerns about the environment and "green construction," great care should be used to clearly and unambiguously set out the obligations of the design professional in the contract, and great pains should be taken to educate clients of design services about the inherent limitations of their work. With this effort, designers can get back to creating and stay away from "philosophizing" as much as possible. FD