**PROFESSIONAL LIABILITY LAW**
**ENGINEERING LAW and ETHICS**
**HALFMOON SEMINARS BY**
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I. Duty of Care or Standard of Care ("SOC")
   a. Introduction:
      i. Higher education and Certification lead to expectations, but the standard of care is not really different than tradespeople.
      ii. A standard based on Peers in the Community
         1. A designer owes a duty to perform their work with the degree of skill, learning and experience that ordinarily is possessed by similarly situated professionals in the community.
         2. It is not a guarantee: As stated in a case from California: "The owner is not justified in expecting infallibility, but can only expect reasonable care and competence. They purchased services, not insurance."
   b. A Quick Note on the Law:
      i. Sources of Claims: Breach of Contract: Broad freedom to set the terms, except for certain residential projects.
      ii. Professional Negligence (Tort):
         1. Breach of the Standard of Care.
         2. Many states, including Washington, do not allow negligence based construction claims to be brought outside of a contractual relationship.
         3. Oregon does allow such claims.
         4. Issue: Is there a reasonably foreseeable risk of harm?
      iii. Warranty: Normally not an issue in Design.
   c. To Whom Do You Owe the Duty:
      i. You owe a duty to your client through your contract and through tort based professional liability.
      ii. You also potentially owe a duty to other members of the construction team such as General Contractors and Subcontractors through tort based professional negligence.

iii. You owe a duty to the public through statutes, regulations, codes and ordinances.

d. Contracting to a Higher SOC.
   i. Most design contracts do not state the SOC explicitly as it is well established in case law.
   ii. If you are presented with a contract that does state a SOC, look closely because it may obligate the designer to a higher standard.
   iii. Examples:
      1. "All work will be done to the satisfaction of the owner."
         a. "All plans and specifications shall be subject to the sole satisfaction of the owner."
      2. "All work will meet the highest standards of the profession."
      3. "All services shall be performed without defect."
      4. The contract may obligate the designer to meet some specific objective criteria.
         a. "HVAC system will save X dollars per year"
         b. "Plumbing system will save Y gallons of water"
      5. "All work will confirm to all laws and regulations."
         a. Local noise ordinance;
         b. Neighborhood CC&Rs.
      6. LEED: "Project will obtain LEED Silver Status"
         a. Obtaining LEED involves significant work by both the owner and designer;
         b. Obtaining LEED may involve financial investments by the owner that the owner may be unwilling to make.";
         c. Obtaining LEED involves specific work from other contractors such as HVAC, electrical or mechanical to obtain the savings necessary to qualify.

II. Designer's Distinct Roles during Construction.
   a. Independent Designer – Plans and Specifications
   b. Project Administrator – Agent for Owner
   c. Quasi – Adjudicator – Potentially duties to both owner and GC

III. How do Claims Arise?
   a. Mistakes in Plans and Specifications

i. Seems fairly obvious. SOC dictates that the plans are accurate and constructible and can qualify for a building permit.
ii. Constructability: The issue usually isn't just can the concept be built, but can it be built for a reasonable sum.
    1. Plans without errors can become defective if the cost to build blows up the project's budget.
    2. Use of technology such as Building Information Modeling (BIM).
        a. Real World Example: Lighting software
    3. A design which involves a prolonged back and forth with the relevant building officials, can give rise to a delay claim by the owner or potentially other contractors.
iii. No assumptions and measure twice to cut once: Actual war stories.
iv. Design by others: Owner may want to use pre-bought plans and want a designer to stamp them.
    1. In Oregon, an architect or engineer cannot stamp a set of plans after a cursory review.
    2. OAR 806-010-0045 states:
        a. "(6) By signing and sealing a technical submission, the architect represents that the architect was in responsible control over the content of such technical submissions during their preparation and has applied the required professional standard of care."
        b. (7) An architect may not seal and sign, or countersign, or allow their seal or signature to be affixed to any architectural plans, drawings, documents, specifications or reports not prepared by them or under their responsible control and supervision."
    3. OAR 820-025-0020 (1) (e) is the corollary for engineers.
v. Specifications:
    1. All the following have given rise to claims:
        a. Designer specs products significantly more expensive then alternatives and will not allow less expensive alternatives.

i. Owner brings a claim for the increased cost.
ii. Subcontractor brings a claim when they based their bid on the use of less expensive alternatives.

b. Designer specs a new, innovative product that will save the owner money and lead to a more efficient design.
i. The product is too new, untested and does not work as planned. Architect is the target of claims.
ii. Actual case: "The architect relied too heavily on the manufacturer's product literature and recommended the panels without having prior experience with them, without visiting a site where they were used and without independently testing them."

c. The plans and specifications allegedly do not adequately communicate the scope and, thus, bids are inaccurate.

d. Specific specified product isn't available. Designer alleged to be to blame for resulting delay.

2. Good specifications should be performance based.
a. The end result should be…
b. The end result should perform in the following manner…
c. Real world example: Acoustics. Outdoor HVAC equipment must comply with the City of X noise ordinance.
d. Do not specify means and methods in the specifications except where necessary to protect yourself and in situations where a certain procedure is universally accepted as correct.

b. Consultants: Responsibility for errors
i. Background.
1. This section can be viewed from a number of perspectives.

a. An architect of record hires MEP engineer consultants;
b. An owner hires engineers such as a geotech; or
c. An engineer of record on a large project hires consultants for specific sections of the project.

2. An engineer could either be the consultant of the professional looking at the work of his or her sub consultants.

ii. Normally, consulting designers are independent contractors
1. They are responsible for their own errors.
2. However, the project architect can be liable for:
a. Negligent retention
b. Failure to adequately supervise or coordinate
c. Failure to locate and correct open and obvious errors.
3. If you hire a consultant, you must make sure that they have proper insurance
a. CGL covers worksite injury, but not design errors.
i. However, CGL policies normally cover a contractor who as part of their contract submits shop drawings and submittals. They are subject to the CGL exception for design work.
ii. But, CGL polices cover resultant damage not the subcontractor's own work or damages from delay.
b. E&O covers design errors and resultant damage.
i. One option is to encourage the owner to require that the GC ensure that any subcontractor who is performing crucial design through shop drawings have E&O coverage.

c. Submittal Review:
i. These are provided normally by Subcontractors and are the description of the materials they intend to use for their

work on the project. Normally they contain information from the manufacturer or supplier.

ii. The designer review for compliance with specifications.

iii. Value Engineering

1. Often this is the stage of the project that substitutions are proposed.
2. Often these substitutions are proposed by the subcontractor to the GC and the GC presents to the owner without consulting the designer. The substitution is then presented in the form of a submittal to the designer as fait accompli.
3. The designer must carefully review the product information to determine if the proposed substitution really does meet the specifications.
4. Real world example: HVAC exhaust fans.

d. Shop Drawing Review.

i. Shop Drawings are a clear delegation of design from a licensed designer to an unlicensed contractor.

1. When a designer stamps them, they are endorsing and adopting them from a design standpoint.

ii. Normally, both GC and designer review and stamp, but for different purposes:

1. GC reviews for:
   a. Compliance with contract documents;
   b. Field measurements;
   c. Verified materials; and
   d. General buildability.
2. Designer reviews for:
   a. Compliance with design concept;
   b. Does this proposed design from an unlicensed designer fit within the overall design so as to carry out the intended result?; and
   c. The Designer's stamp should define the scope of their review.

iii. Do not delay…

1. The expected turnaround time for both Submittals and Shop Drawings is normally short.
2. Delays can result from lengthy design review, especially in compressed building schedules.

3. Be prepare to quickly devote the time necessary for careful review at this stage in the project.
4. Make sure your stamp has a date and send with a separate transmittal document to establish a clear record.
5. Expect timely response to questions or exceptions and follow up.

e. Construction observation, inspections and site visitation.
   i. In this role, the designer is the agent of the owner with the responsibility of protecting the owner's interests.
   ii. Not all projects involve this, not all owners want to pay for this. If you are asked to perform this important task, make sure you are fairly compensated.
      1. Projects where site observation isn't in the design contract, but the architect is called and does it anyway without compensation.
      2. It is well established that if a designer takes on a task that is outside their mandate, the normal SOC applies to their work.
      3. Lack of compensation is not a defense.
   iii. Project contract with owner.
      1. Your contracts should always have a clear scope of work and a provision covering an hourly fee for any work requested outside the scope.
      2. Discuss with the owner, especially new clients, the specifics of contract administration to determine if that is something they would find valuable.
   iv. Site Observation: GC or Designer, who is Captain of the Ship?
   v. The GC normally has the contractual responsibility to ensure that the project is built in a "good and workmanlike manner, consistent with the plans and specifications.
   vi. The designer's role in performing site observation, needs to be clearly defined as to not usurp the GC's overall responsibility.
   vii. The contract needs to clearly define roles.
      1. The contract should call the task "site visits" not "site observation".
      2. It should state that the designer's site visits are:

a. Occasional and are not intended to observe the means and methods used to carry out all work; and
b. Intended to facilitate discussion, allow for questions and to determine in general if the work is progressing as planned and if the design intent and plans and specifications are being followed.

viii. Regardless of how well roles are defined, designers are generally held liable for failing to observe and correct open and obvious defects during site visits.
1. This liability is not exclusive, the GC and subcontractors are also liable.
2. The designer has the duty to exercise reasonable care in observing and reporting noncompliant work.
3. Example: Read your emails…

f. Payment Certification
i. The AIA contract contains 7 situations that allow the designer to withhold a payment certification.
1. Defective work not remedied;
2. 3rd party claims;
3. Failure to pay subcontractors;
4. Work cannot be finished for the unpaid contract sum;
5. Damage to the owner or contractor;
6. Delay; and
7. Failure to follow plans and specifications.

ii. All 7 can create liability to both the owner, GC and subcontractors. Liability for both withholding certification and signing certification.

iii. A word on weekly site meetings
1. In hindsight, they usually deal with generally irrelevant subjects.
2. Often they are a missed opportunity to address issues before they become critical and give rise to claims.
3. Encourage frank discussion of what is on people's minds
4. Keep accurate notes, record them and send out complete meeting minutes.
5. Keep the owner informed and involved.

g. Certifications
    i. Substantial Completion
        1. Process generally:
            a. GC initiates;
            b. Punch list;
                i. GC and owner draft
                ii. Designer visits and certifies it is accurate
            c. Punch list work is completed;
            d. Designer approves final payment certification that pays out retainage; and
            e. Designer issues Certification of Substantial Completion.
        2. Under AIA contract, the Certification triggers the running of the Statute of Limitation and Repose (time limits for filing claims)
            a. Failure to issue has been held to toll the time limits
        3. Certificate of Substantial Completion triggers
            a. End of Liquidated Damages
            b. Beginning of Warranties
    ii. Special Inspections
        1. Building authority delegates their inspection responsibility to a licensed designer, many times an engineer.
        2. Commonly used in earthwork projects or heavy, complex cement pours. Civil work generally.
        3. The designer of record performed field visits and at the completion of the project sends a letter to the building authority certifying that the project has been performed pursuant to the plans and specifications.
        4. Tips:
            a. Make sure your visits are regular and that important work has not been covered up.
            b. Identify crucial work that needs to be inspected and, in writing, inform the contractors to notify designer if such work is completed ahead of the next visit.
            c. File your field reports along with the certification letter.

IV. Defenses to Claims

a. First, know that the most careful, diligent designer may end up with a claim against them due to circumstances beyond their control.

b. Contractual Provisions:

   i. Have a clear, detailed scope of work and document in writing any changes to the scope.

   ii. Make sure you have pricing that covers all the work you are asked to perform.

      1. If possible, consider front loading the payments or avoid back loading them. This helps avoid the owner who stops paying the architect and then brings a claim to try and negotiate down the remaining contract sums.

   iii. Make sure the contract clearly states that your review of submittals, shop drawings, change orders and pay apps are for a general compliance with design intent and plans and specifications.

   iv. Site visits:

      1. Call them site visits, not observation.
      2. Your contract should state that the owner acknowledges that he or she could hire a construction observer who would be on site full time and has chosen not to do so.
      3. The owner acknowledges that your site visits will be periodic and are not intended to allow you to observe all construction activities.
         a. The site visits are intended to allow the designer to track the flow of the project, answer questions and, generally, to view conditions.
      4. The site visits are not intended to allow the designer to certify the means and methods used, but to allow the designer to determine if work is consistent with the plans and specifications.
      5. Take lots of pictures on your site visits. They can be valuable to show work that was covered up between visits. However, if they show issues that need to be addressed, address them.

v. Prevailing Party Attorney Fees:
    1. Opinions vary on this, but my opinion is that your contract should not have a prevailing party attorney fee provision.
        a. Without the provision, each side would have to pay their own attorney if a claim is made.
    2. The chances of your client making a claim against you under the contract are greater than you making a claim.
    3. If you perform work and are not paid, you can lien the project. The lien attaches to the property and is a powerful tool as most lenders require the owner to bond off the lien. In addition, you can collect attorney fees, if you prevail, under the lien statute.
    4. Finally, if your client files a claim against you and you have E&O coverage, in most cases, your defense fees will be paid by your carrier, subject to your deductible.
    5. Attorney fees exposure can drive a claim and are actually an incentive for more claims.
    6. In Oregon, if you make an offer of compromise, you have to account for the attorney fees incurred to the date of your offer. In many cases, the attorney fees end up being more than the amount of the claim.
    7. One way attorney fee provisions in Oregon are by statute made reciprocal.
        a. Example: In the event of non-payment by owner, designer collects fees for bringing an action to recover payment.
        b. You now have a reciprocal attorney clause.

vi. Limitation of Liability Clauses (LOL)
    1. Normally these clauses limit the liability of a designer for claims to a set monetary amount, sometimes the amount of the fee.
    2. They are allowed in Oregon in commercial projects.
    3. An LOL clause could be upheld in a residential setting with a sophisticated client, where the clause is negotiated and where it is conspicuous and clear and not hidden in the contract.

4. The best clauses are tied to the cost of insurance.
    a. The clause states that the designer has reduced its normal fee in exchange for the LOL and the reduced exposure to claims.

c. ORS 31.300
    i. In order to file a complaint against a design professional, the claimant must certify in their pleading:
        1. That they have consulted with a design professional with similar credentials and that that expert is willing to testify that the design professional's conduct fell below the SOC.
        2. Operation and effect of that statute.

d. Beyond your contract, your best defense is written communication, timely decisions and follow up.
    i. Never rely on verbal communication. Back it up with a confirming email or at least make a clear note of what was said.
    ii. Detailed meeting minutes can also record conversations and project decisions.
    iii. Do not let decisions sit. The longer an RFI sits without response, the greater changes for delay and complication down the road.
    iv. Don't let others procrastinate on decisions. Keep a clear record of unresolved issues and action items. Every action item should have an ETA or deadline.

V. Damages In Design Claims
    a. Regardless of the legal theory, design damages boil down to a few concepts that must be established in order for the damages to be awarded.
    b. In addition to proving that the damages are reasonable and were actually incurred, a claimant must prove:
        i. That the damages were a reasonably foreseeable result of the breach of the SOC; and
        ii. That there is a causal link between the breach and the damage.
    c. What is reasonable foreseeability?
        i. Is there a predicable if/then relationship?
    d. Causal Connection:
        i. But for the breach would the cost have been incurred?
    e. Damage Scenarios: Assume the following: In order for an owner to have the building it wants and needs, there must be a certain

widget in place. The architect designs the building without the widget. The GC bids the cost of the project without the widget.

i. During construction, the designer realizes he or she forgot the widget and adds it. Subcontractor places it and the building is complete.
    1. The designer is not liable for the cost of the widget.
    2. The owner needed the widget; if it had been in the original plans he or she would have paid for it; and no extra cost was incurred to add it.

ii. Now assume the absence of the widget isn't discovered until after completion. The subcontractor must re-deploy to the site, bring in a crane to lift the widget to its location, and remove a wall panel to install it.
    1. The designer isn't liable for the cost of placing it, but is liable for the re-deployment, the crane cost, removal and reinstallation of the panel and any loss of use to the building.

iii. Assume the widget costs 10% of the overall project cost.
    1. The owner could not afford to pay for the project costing 110% of the budgeted cost and would have either walked away or scaled the project back.
    2. The designer is now liable for 100% of the cost of installing the widget. The cost of the widget, installation of the widget and any resultant damages.

iv. Assume the designer was paid to produce a construction cost estimate and budget for the project.
    1. The designer is now liable for 100% of the cost as a breach of his or her duty to produce an accurate cost estimate.

f. Direct vs consequential or incidental damages in the context of a delay claim by a subcontractor:

i. Direct costs are those that are foreseeable as a consequence of the breach.
    1. Examples: The cost of the labor he had to pay while his workers waited around on the job, rental expenses for equipment at the site, overtime paid to catch up with the schedule.
    2. Side note: Under AIA: Overhead and profit for a termination for convenience.

ii. Consequential damages are defined as those that are not normally foreseeable.
    1. Side note: In a contract case (not the subcontractor delay scenario), consequential damages can be recoverable if the claimant can prove they were in the contemplation of the parties when they formed the contract.
    2. Examples:
        a. The profit the sub could have made on a job he would have bid but for the delay;
        b. The cost of his plane tickets to Hawaii for the vacation he wanted to take once this project was complete; and
        c. The profit he would have made on the sale of his house when he couldn't get it ready to list due to the delay and by the time he did, prices had dropped.

g. Waiver of Consequential Damages
    i. AIA standard design contract contains a mutual waiver.
    ii. If you negotiate such a waiver, make sure states: "The parties to this agreement mutually waive consequential damages for any claim asserted regardless of legal theory, including, but not limited to, claims for breach of contract, negligence or breach of warranty.