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How to Stay Out of Court...Part II

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How to Stay Out of Court and Why You Should - Part II



by David E. Boelzner, Esq.

In this space last time I related a horror story in which a designer had exercised quite reasonable diligence, including engaging a world-renowned expert to provide process design for the project, yet still got hauled into court and mauled there when the jury disregarded legal fault in favor of risk reallocation. I now offer my thoughts on the implications of this jury behavior and some suggestions about how to stay out of a jury's misguided clutches.

So What?

Given the function of juries to inject the values of society into the legal system, what is wrong with juries doing what seems "fair" even if it means disregarding the niceties of legal reasoning? First, it introduces duplicity into our system. When juries confine their analyses to the validity of the injury irrespective of fault, they are in effect serving as a cost allocation mechanism rather than an adjudicator of rights. The justice system reduces essentially to an insurance regime not unlike workers compensation, under which injured workers are compensated (or not) based solely upon whether the injury is legitimate and actually job-related.

Workers compensation programs, however, are overt and have the sanction of the political process after at least some deliberation and evaluation of costs versus benefits. When juries function in this way, it is a secret game, a pretense.

This has a practical consequence in loss of predictability. Most lawsuits are not tried to verdict but are settled through compromise. Our courts do not have the capacity to hear all cases filed. The system depends upon courts resolving a proportion of cases on principles that can then be understood and explained by counsel to other clients in resolving similar disputes short of litigation to verdict.

The basis of compromise in a case is its value, which is determined by the lawyers' best estimation of what the likely verdict range is. When some juries disregard fault in the analysis and some do not, the lawyers cannot predict a verdict range. This wild card makes estimation of success even more difficult than it inherently is, and renders the collective experience of lawyers ineffective. (We lawyers *can* have some redeeming social value if permitted to do so.) Not only because of the burden on the court system but also to prevent economic waste, society has a concrete interest in enabling lawyers to predict results accurately enough to counsel their clients in good faith to settle cases. When the jury trial becomes a lottery, there is more incentive for ó or less to lose by ó going to verdict.

One Specialized Problem

Owners and contractors, the designer's usual adversaries, do not enjoy the automatic sympathy accorded a physically-injured person, but design defendants suffer a different prejudice. The official yardstick for an architect's or engineer's conduct is that of a reasonable professional in the same or similar circumstances. Under the law in most jurisdictions this means the designer need not be

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perfect; he may make mistakes as long as he performs reasonably overall. The problem is that when a design case gets tried, the only issues raised are those the plaintiff is complaining about, and the inquiry usually reduces to whether a reasonable professional would have made *this particular mistake*. Because the focus is solely on *mistakes*, the answer is all too often foreordained.

In a design case, then, this phenomenon tends to reinforce what I have postulated above, the jury's natural impulse to focus on injury and misapply or ignore altogether questions of fault. Though cases can certainly be won, the outlook for the design professional is often bleak. The lesson: whenever possible, *stay out of court*.

Easier Said Than Done

As I confessed in the last installment, there is no surefire solution. I offer a few suggestions to reduce your chances of being sued successfully.

Do quality work and bid accordingly. This is important and should go without saying. Tempting as it sometimes is to woo clients with bargain basement fees, cutting corners is painting a target on yourself. The point I want to make here is that this precaution, though essential, is not enough; it is merely the starting point.

Be careful what you promise. Don't warrant suitability or imply particular performance of the facility or the perfection of plans. Guarantee nothing except performance of your work in accordance with the professional standard of care. Explain to the client who wants you to certify work "to the highest professional standard" or similar phrases that the courts could impose through such language liability beyond what your fee structure permits, and beyond even what a reasonable owner (i.e., one not in the crucible of litigation) would expect you to absorb. If the owner insists, think twice or even thrice about undertaking the project.

Appear to do quality work. Some of us toil quietly and shrink from trumpeting our virtues, but clients need to know and appreciate the value of the services you provide and the diligence with which you approach a project. It is particularly important to make a paper (or electronic) record of communication with the client. It is *crucial* to document disclosure of important choices made or options rejected upon the client's decision. Clients happily defer to the professional's judgment until they get to court; then those judgment calls are dissected by the 20-20 hindsight of experts hired to find fault.

Another category of essential client hand-holding is responding to any concern the client raises. If your client questions something, however foolish the concern, try to give a thoughtful response and *document it*. Assume these silly issues could become the basis of a lawsuit; they often do.

Retain only essential documents. The *verso* of careful documentation to protect yourself is systematic purging of documents that could be harmful. The point here is not to hide perfidy but to recognize that design often involves judgment, rejection of one option over another. Project memos and e-mails suggesting or recommending alternatives that were not ultimately adopted, or sketches depicting other options, can be potent ammunition in the hands of a lawyer arguing for the design road not taken. The best practice is to document the reason for choosing one option over another, with notice to the owner if the issue is a significant one; at the very least, discard the in-progress "thinking on paper" once the design is final. The penchant of design professionals for squirreling away old drafts and sketches must be resisted. And as Bill Gates himself has learned, e-mail is discoverable in litigation and can be painful.

These measures must be balanced against the costs of complying with them and they will not inoculate the designer against litigation. One can hope only to reduce the severity of the affliction.

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