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Partners?

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The term is bandied about liberally in the construction arena, but is there really such a thing as "partnering"? During both the pre-project flirtation and the early optimistic stages, there is often mention of the owner and designer "partnering" to achieve the project's realization. The lovefest may even continue through bid and early construction. Conventional wisdom holds that the more in tune the parties are, the smoother the project is likely to proceed. Previously in this space I have myself endorsed something very like this in discussing lessons learned as a result of litigation. Stay in close and frequent communication with your client, I have urged engineers and architects. Understand and deliver what the client wants and thereby reduce the risk of later recriminations and disputes over the propriety of the design.

I continue to believe this is sound advice. But there are two phenomena that complicate the matter and, unfortunately, preclude the full relationship of trust and shared interest implied by the term "partnering."

New Sheriff In Town!

Construction projects, especially large ones, take a long time to complete, often a matter of years. By the end of the project the owner may not be the same owner who worked so closely with the designer to realize a joint vision. Consider a case in point: engineer designs a plant expansion, combining leading edge technology and creative use of existing facilities to increase capacity at a relatively modest cost. The engineer bases the design on the documented actual performance of the existing plant *as the client currently operates* it. By the end of construction, however, there is a new sheriff in town. The owner's representatives who were *simpatico* with the engineer are now tying fishing lures and entertaining grandchildren, and the new regime has a different operating philosophy that reduces capacity. Will the engineer now face a lawsuit alleging improper design? I don't need to tell you the answer to that one. Will the suit have any plausibility? Alas, experts can always be found who are willing to second-guess and criticize under oath with 20/20 hindsight, of course, the decisions of the original designer. There are many reputable experts who testify legitimately in cases of malpractice, but there are also vampire bats, which thrive on the blood of those who do original work.

Sometimes the impression that there is a single sheriff on a project is merely an illusion. Those who have done work for churches or civic bodies know this. The building committee will have a prominent voice or two and the designer will naturally heed the salient opinions, but when the criticisms later begin to ferment, those voices will be strangely silent.

Save Me From Myself!

The other phenomenon that sabotages true "partnering" arises from a perfectly legitimate contention: the owner engages a professional designer because the designer possesses special expertise the owner lacks and should be able to rely on. Even where the owner is aware of and approves every significant design decision, the designer may later face a claim that the features the owner once happily embraced for their aesthetic, functional or financial benefits should never have been

recommended by a prudent designer. "You were the expert!" will be the battle cry, and the vampire bat will opine that no reasonable professional would have permitted an owner to agree to such inept design.

As I've said, the attack is grounded in truth. Engineers and architects do have the duty, because of their special knowledge and skill, to advise a client against choices inconsistent with acceptable design. But how broad is this duty? When there are several acceptable engineering choices and the owner opts for one, will the engineer later be hauled into court because it wasn't the "best" choice, or because another engineer would have done it differently? All too often, yes.

While a few calculating owners seek from the outset to shift all possible risk to their designers, and architects and engineers do occasionally commit genuine malpractice, the great majority of projects are undertaken and executed in good faith, with diligence and high hopes on both sides. It is when problems arise that the romance often deteriorates into an unseemly custody brawl, with the fight being over who can *avoid* ending up with the troubled child.

Defenses

How does the conscientious professional win both the job and the confidence of the owner but at the same time guard against later attack? It isn't easy or entirely possible. The best single rule is not to forget, ever, that designer and owner, however friendly, are not really partners. While the designer must faithfully serve his client, the interests of the parties are not fully congruent. The same hand that is patting you on the back today is also, perhaps only incidentally, locating the soft spots vulnerable to the knife later.

Awareness of this sad fact dictates the same cardinal rules of self-protection you already know. Get a good contract with a clear definition of work scope and responsibility. Communicate frequently with your client, both to ascertain his desires and to transmit your ideas and reasoning. Above all in this regard, be alert to areas where judgment is exercised in selecting among design options and document your choices and the reasons for them. If there are alternatives, inform the owner and explain their virtues and drawbacks. Obtain client approval where feasible.

Lawyers and insurance carriers can serve as convenient scapegoats "my blasted lawyers insist" is a good lubricant to relieve any friction caused by these protective measures. In truth, such prophylactics are in everyone's interest, because no party is served by adhering to the illusion of true partnership. On a project of any great magnitude for the designer, it would not be wasteful to include as part of the project team a devil's advocate, a sort of reverse ombudsman charged with (1) identifying design decisions vulnerable to second guessing and (2) chastening project personnel to make the necessary protective record.

Cases where designers have devoted their absolute best efforts for a client and nevertheless end up in the sausage grinder of litigation make me despair of my profession. These cases are often not really about justice but about extortion based on the gullibility and technical ignorance of juries, not about whether the designer performed badly but about whether lawyers can make it look like he did. But this is the lamentable reality of our litigious age. Guard your flank and keep your insurance premiums paid up.

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