Integrated Practice: Process or Product

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Is Integrated Project Delivery a form of design-build—gathering architects and engineers into the traditional builder's sphere of legal responsibility to deliver a product? Or is it the reverse—a process that brings the builder into the Architect's professional responsibility to exert a Standard of Care and operate in the interest of the Owner?

A look back at some of the legal history of our industry will help illuminate this question.

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A defect-free building

Most buildings in Early America were built by craftsmen. Only a few men assumed the role of a full-time architect before the mid 19th century.[1] Builders, typically masons or carpenters, called themselves architects.

Early American tradesmen were required by common law to produce "workmanlike" results. As loose groups formed under the leadership

[1] Notable examples are: Charles Bulfinch (1763-1844), Richard Morris Hunt (1827-1895) and Benjamin Henry Latrobe (1764 1820) .

of entrepreneurial craftsmen to build a building for a price, 19th century judges made the logical assumption that a builder architect should guarantee the work to be correct.

In Ohio in 1834, an Owner hired a "mechanic" to design and build a house. The chimney flues smoked and the house had to be rebuilt. The court stated that the law required the "mechanic" to build in a workmanlike manner.[2] In another case in 1841, a builder who had designed and built a defective sawmill explained that he had done the work "to the best of his knowledge, skill, and ability."[3]

The court said:

> *"…when a party contracts to do a certain piece of work in his "trade", he is presumed to be both able and willing to do it in a workmanlike manner…the very offer to do the work, presupposes capacity. To say that a builder, after the destruction of the materials, and the expenditure of his employer's means, should be permitted to shield himself from damages, upon the ground that he only contracted to the best of his knowledge, skill, and ability, and that he is not responsible if the work is not done in a workmanlike manner, would be a fraud which the law will not countenance."*

Professionalism and the Standard of Care

But when the craftsman/builder/architect moved out of the mud and rain, obtained degrees from universities, established associations like the AIA, obtained licensing and sought professional status, a new concept, the Standard of Care, emerged.

As the number of Architects grew in the 19th century, they sought and obtained the status of other professions: law and medicine. They argued that to err is human and their responsibility should not be perfection but instead their work should meet the standard of their peers. Although circumstances, jurisdictions and the predilection of judges differed, most courts agreed that an architect did not guarantee perfect plans, a perfect building or perfect supervision that would deliver a defect-free project.

Both principles were analyzed and clearly stated by the end of the 19th century.

[2] Somerby v. Tappan

[3] Manuel v. Campbell

In a famous New York case,[4] in 1888, a three-judge panel, reviewing a previous decision, stated that an architect when overseeing construction is:

> *…bound only to exercise reasonable care, and to use reasonable powers of observation and detection in the supervision of the structure. He might direct during one of his site visits that portions of the plumbing work be packed in wool, but he would not be required, upon his next visit to the building, to tear apart any brick work that might by then have covered the pipes in order to see whether his directions had been attended to. An architect is no more a mere overseer or foreman or watchman than he is a guarantor of a flawless building."*

However, "Hubert" gave new emphasis to the Architect's responsibility to stay abreast of emerging technology—a responsibility that is on steroids as we enter the 21st century. The justice who first heard the case emphasized that the reasonable skill and knowledge required of an architect should include design documents which incorporate technical learning reflecting:

> *"…new conveniences such as steam heating that becomes the customary means of securing the comfort of the unpretentious citizen. The architect is expected, as a professional, to keep himself abreast of such developments, and as a professional he is not permitted to avoid liability for ignorance of new technology by throwing the responsibility of any errors committed upon the contractor or the owner."*

The words *"would not be permitted to avoid liability for ignorance of new technology"* are galvanizing in light of the technologies that present themselves to Architects in the 21st century—an abundance of technical knowledge light years beyond the ability of a single person to absorb. And it is not only the technology of construction but the technology of collaborative design that must be understood.

The Standard of Care concept doesn't establish a metric to define an acceptable tolerance for defects. It addresses process. It is a legal term defined in most jurisdictions as:

> *"that same level of care employed by reasonably prudent professionals practicing in the same field in the same area."*

[4] Hubert v. Aitken

Standard of Care does not speak to the notion of defect-free buildings. Rather it is the recognition under common liability law that professionals (doctors, lawyers and architects) are in the business of exercising learned judgment, based on experience with a body of knowledge, and upon situations and decisions not totally knowable or under their exclusive control. For instance, a doctor may use the best known treatment and still lose a patient. Likewise, an architect may specify the correct soils tests, hire good geo-technical and structural consultants and the ground may still heave and displace the foundation. If the architect can show "that same level of care employed by reasonably prudent professionals practicing in the same field in the same area" he or she may avoid responsibility for the cost of the repair. The concept is that professionals are to be held accountable for process, not results.

The Standard of Care is not intended to protect professionals by establishing a threshold of error, allowing minimal defects. Rather it is recognition that because buildings are so complex and unique, design professionals cannot guarantee defect-free buildings. A professional design does not require that every element of construction, down to the location and length of each nail, be specified in the design documents. Such details are often best left to the skill and discretion of the builder, whose expertise is found in converting a design to the physical conditions of the real world. Buildings, unlike automobiles, are not mass-produced products that present an opportunity to eliminate flaws in subsequent editions. Therefore, architects and engineers, when designing a unique structure, are not subject to product liability laws. Instead the law places a duty to follow a process based on a body of knowledge and experience. And that process constantly evolves as knowledge grows.

But the basic concept of a professional that is not expected to be perfect remains. In the words of a twentieth century court,[5] architects:

> *" deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. In such circumstances, certainty as to the exact result to be obtained by relying on an architect's plans or supervision is impossible, and perfection is to be neither anticipated nor expected."*

[5] City of Mounds View v. Walijarvi (1978)

The Spearin Decision

Meanwhile, contractors sought the protection of the law to deliver what the plans and specifications called for even if the result did not suit the Owner's purpose.

Early in the 20th century, the United State Supreme Court held that since a builder agrees to build according to plans and specifications furnished by the Owner (and it can't be shown that the contractor knew that the plans and specifications would produce a defect) the contractor is not responsible for the consequences of defects in the plans and specifications. [6]

The owner's Responsibility

If a builder builds a flawed design as defined in the plans and if the architect could demonstrate that he or she had used the "*care employed by reasonably prudent professionals practicing in the same field in the same area.*" the owner is left with the cost of correction. Even though there is a mistake, the AE is not liable, the builder is not liable and the owner must pay.

Initially, all risk on a building project lies with the owner. A risk not allocated to professionals or builders remains with the owner. Try as they might, owners cannot allocate all risk for building defects or unanticipated conditions to others. Given the inherent common law limitations on liability for both builders and AEs, the owner must assume liability for defects occurring under the Standard of Care concept and the Spearin doctrine. A wise owner will know that we don't live in a perfect world and will have contingencies to protect against the unpredictable.

In most IPD projects, there is a pool of money that recognizes this reality. It is used to pay for the mistakes of the members (just as the contingency in standard cost-reimbursable CM-at-Risk contracts may be used for mistakes). It may also be used for economic efficiency–it may be cheaper for the owner to not pay for a near perfect design when the cost of proceeding with a sufficiently complete design yields sufficient savings to cover any extra costs the builder may incur in overcoming missing design information. If unused, the contingency may be returned to the owner or shared. That motivates everyone to participate in checking everyone else's work.

Traditionally, as recognized under law, builders have not been seen as professionals since the craft of building is not assumed to include the

[6] United States v. Spearin (1918)

level of uncertainty that architects face (a 19th century assumption that has proved increasingly incorrect in the 21st century). The traditional attitude of society (no longer valid) has been that Architects are responsible for defining the best construction technology. Therefore, if a contractor builds a building exactly as designed and it leaks, it is not fair to hold the contractor liable. However, in the real world, on an almost daily basis, builders see errors in the plans and work out solutions with the architect. One pundit[7] said, "The dirtiest trick a contractor can play on an architect is to build a building exactly as designed!"

As our industry has developed, manufacturers and trade contractors often know more about component design than do architects and engineers. So, when there is a problem, owners not knowing who to sue, usually sue everybody involved, including subs.

Centralizing responsibility for results has been a driver for design-build and Bridging. But in many cases, the owner, in spite of lack of contractual privity in a design-build project, can sue the architect directly because of an implied duty based on professional licensure.

IPD: a process or a product?

It is yet to be seen if the courts consider IPD to be a design-build process, obligated to deliver a defect-free building, or a professional service expected to provide judgment, wisdom and experience. Since owners are applying the IPD label to many forms of project delivery and are inventing their own contracts terms the decisions will tip one way in some cases, another way in others. It's unclear how Spearin and the Standard of Care concepts will work with IPD contracts. Certainly, there will be a variety of IPD agreements that will shade decisions differently.

It is possible that a trade contractor under contract to an IPD Core Team[8] would be able to use Spearin concepts and claim successfully that the IPD Core Team had an implied warranty that the plans and specs were correct.

However, if a CM working under a multi-party IDP contract held the trade contracts the CM would be unlikely to derive protection under Spearin since the CM had a duty to evaluate the design as it developed.

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[7] Attributed to Jack Hartray, FAIA, a well-respected Chicago architect.

[8] Whether incorporated, a JV or simply under contract to the CM working under a multi-party contract

However, assume that the CM and the AE form an IPD Core Team that is an LLC or a joint venture or operates under a multi-party contract, and assume that the subcontractors are under contract to the IPD Core Team. If there is a flaw in the design, does the IPD Core Team have a duty to deliver a defect-free building or do they operate under a Standard of Care. Are they delivering a product or a service?

If the agreement implies the delivery of a product, the AE may owe a traditional Standard of Care to the IPD Team, but the IPD Team may commit to delivery of a defect-free building. However, if liability for project problems is shared among the Members, the AE will share its proportion of the liability for a defect and so will share financial exposure for their mistakes anyway.

A key benefit to the IPD process is that this sharing of responsibilities can be defined among the parties by the project participants, thereby establishing at project inception the expectations and Standard of Care each of the team members owes to the other.

The owner is usually a part of the IPD team and can participate in crafting this agreement that spells out the duties of the IPD Core Team Members to one another. So the question becomes what does the IPD enterprise agree to deliver—a defect-free building, or a building of a quality which meets the Standard or Care (or some higher level defined by the IPD agreement itself)?

This collaborative design effort, at the heart of the IPD concept, blurs the line of demarcation between the multiple authors of the design. Since the CM and key subcontractors participate in the development of the design documents, they are unlikely to have any protection under Spearin. Indeed, since the owner is intimately involved in the process and influences many decisions, the owner also assume some ownership in the design.

Undoubtedly some owners and their lawyers will fashion agreements with integrated teams that include fixed prices, GMPs and defined results. Based on the specific language in the agreement such a contract may be interpreted as a design-build agreement to deliver a defect-free product. But certainly others will fashion agreements that define the process and professional responsibilities, and the IPD team will be expected to deliver a Standard of Care.[9] And there will be substantial gray areas for the courts to deliberate.

[9] Already, Standard of Care clauses are appearing in IPD contracts.

However, both AEs and CMs argue that the driving ethos of IPD is professional and that the AE and the CM may both owe the owner a Standard of Care—but not perfection. If history is a guide, that's a likely outcome. CMs appear to be repeating the evolution to professional status that characterized the emergence of architects. Consider this:

- In the mid 19th century, architects separated from the physical act of construction, formed associations (such as the AIA), were hired on the basis of qualifications rather than price, obtained licensing and by the end of the century the "Standard of Care" concept was in place, firmly cementing the role of architects as professionals with professional, not product responsibility.
- In the late 20th century, construction managers separated from the physical act of construction, formed associations (CMAA), were hired on the basis of qualifications rather than price and at least one state requires CCM certification to assume the title of "Construction Manager." And a "Standard of Care" clause is surfacing in some IPD contracts.

History appears to be repeating itself.

However, even with a Standard of Care applied to the agreement between the IPD Team and the owner, it is likely that the standard will be very high. Since BIM models can be reviewed by the extended project team the team will be expected to do so. And since physical conflicts can be discovered by clash detection routines, that will be expected as well. So it is likely that if a Standard of Care becomes part of an IPD contract with an owner, the standard will approach "defect-free" anyway.