

Observation/Inspection Liability

Forget the Pleadings, Read the Court's Opinion

by Steven G. Shapiro

In their article "Absolute or Absolution?, Observations, Inspections, and the Contractor's Warranty" [www.aia.org/aiarchitect/thisweek06/0804/0804bp_risk.cfm], James B. Atkins, FAIA, and Grant A. Simpson, FAIA, examine the obligations of the architect to examine and inspect their design work as it is being completed by contractors. The article describes the traditional obligation of the architect and cites the possible legal liability risks when the architect fails to properly observe or inspect the work.

In arguing against a trend that would hold architects to a heightened standard of care—in essence, that by observing the contractor's work, the architect assumes responsibility similar to that of the contractor and becomes a warrantor of the work—the authors rightly point to provisions of the AIA form of contract documents and to passages in *The Architect's Handbook of Professional Practice*. To support their contention that such a trend exists, however, the authors offer support that can often be misleading: selected provisions of claims made by plaintiffs in lawsuits and Merriam-Webster-dictionary definitions of important legal terms.

The article is indeed an important cautionary tale to the architectural community about potential legal exposure as it illustrates the overlapping roles and tension between the owner, architect, and contractor in design, construction, and contract administration. We would all agree that design and construction are extraordinarily

complex matters and that the threat of legal action and legal liability is a dominant peril of the building industry community. I would hasten to add further that there is no blanket authority that "the contractor is solely responsible for conformance of the work with the contract documents." Architects must keep that in mind when managing risks and liabilities.

AIA documents only apply if they are used

Some of the greatest value to the AIA contract documents is that they incorporate current law and reflect a general consensus within the building industry. The AIA contract documents, however, are not intractable mandates. They are model forms of agreement and are subject to negotiation and revision by the parties. The documents are routinely modified to meet the expectations and business terms agreed among the parties.

The Architect's Handbook, for its part, is a detailed guide for architects that combines sensible advice with current statutes and case law. Again, however, the parties to a particular contract agreement have the ability to negotiate and navigate these areas. The options for navigating perceived impediments are many.

Pay heed to rulings, not pleadings

Another caveat I would offer is not to put too much credence in court pleadings. In their article, Simpson and Atkins present excerpts of court pleadings that "are filled with allegations of absolute responsibility on the part of the architect." As most lawyers will concur, the courts are famous—

perhaps notorious—for not being able to prevent spurious claims by disgruntled plaintiffs. Litigators are schooled in techniques of making outrageous claims to bait opposing counsel and are expert in drafting pleadings that can terrorize the defendant.

Fortunately, it is the reasoning of court rulings and the evolution of these rulings, not the pleadings and not the dictionary, that control and provide guidance for future transactions. Instead of focusing on passages from legal complaints, one is better advised to study the reasoning from the final opinion of the courts. At issue is whether the judge or jury, after considering the evidence in a case, ruled in favor of the architect or owner.

Back up negotiation with teamwork

Architects can negotiate to manage legal liability in their practice, including risks associated with inspecting and examining the work of contractors. Five of these include:

- Declining to bid on a proposal with unacceptable risks of liability
- Increasing the fee for contract administration work that presents increased exposure
- Negotiating with the owner to modify the contracts based upon the terms of the engagement
- Creating a joint cooperation agreement with the contractors
- Engaging independent inspector for portions of the project, such as waterproofing and mechanical systems.

Perhaps most intriguing, the joint cooperation agreement allows contrac-

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tors and architects to work in tandem in the event of an alleged deficiency problem. Instead of immediately placing blame on the other, the parties initially work together to:

- Identify the problem
- Analyze if the problem is significant
- Seek to determine if the cause of the problem is design, construction, or a combination
- Determine solutions to solve the problem.

Instead of an adversarial relationship, the parties can initially collaborate and create a roadmap to solve an issue.

The challenges and risks to architects for observation and inspection are daunting, but also manageable. The reader should be encouraged to read beyond the AIA contract document provisions, *Architect's Handbook of Professional Practice*, pleadings, and the dictionary. There is room for educated decisions that can be made based upon skilled negotiation and understanding the state of the law.

Reference:

Steven G. Shapiro, an allied member of the AIA and former commercial real estate development attorney, is an adjunct professor at the University of Maryland and a project manager at a large general contractor. He can be reached at stevengshapiro@aol.com.

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