

Greening the Standard of Care: Evolving Legal Standards of Practice for the Architect in a Sustainable World

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OVERVIEW

THE TASK OF DELIVERING GREEN OR SUSTAINABLE BUILDINGS requires the coordination of many parties in the chain of asset management and construction. Arguably, one of the more important figures in this process, particularly for new buildings and in the perception of the public at large, is the architect. Owners and developers commonly look first to architects for help with realizing their building plans. Even more important, they look to architects for counsel on designing their building projects to get the desired functional and performance outcomes. The American Institute of Architects (AIA) has recently taken up the idea of sustainable building as a signal attribute of the future of the architectural profession.¹ Surprisingly, this new position poses a disturbing new relationship between the architect and the client, which may have far-reaching consequences.

Like any professional, an architect is simply an educator. Indeed, no architect actually makes design decisions for a client. Instead, the architect merely educates clients so that they can make intelligent choices. That education defines the architect's obligations to the client, obligations commonly referred to as "the standard of care." The architect has a duty to use ordinary care in meeting that standard. The architect who does so will, in theory, avoid liability.

Although contracts and codes often benchmark the architect's duty, the profession itself actually sets the standard

of care. Though the actual language will vary, standard jury instructions in most states define the standard of care as "doing that which the average similarly situated professional would do, or not doing that which the average similarly situated professional would not do." In a judicial proceeding, that standard is typically established through expert testimony—an architect whose testimony reflects and benchmarks the architect's level of obligation. The architect's conduct is measured against that benchmark. Where the conduct falls short, malpractice has occurred.

About the Author



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Since the day-to-day practices of the profession establish the standard of care, the profession itself changes the standard of care as the architect's commonly accepted practices and competencies change. Such changes have always occurred, usually on an incremental basis. However, with the onset of sustainable or "green" design, the standard of care has begun a dramatic upward push. Today's architect must acknowledge that change and the attendant risk, if he or she is to continue providing clients with appropriate services in the sustainable world.

THE ARCHITECT/CLIENT RELATIONSHIP

In addition to the educational element, the architect/client relationship is one of trust. All but the most experienced clients find the design and construction process bewildering. Contracts, forms, approvals and paperwork are complex and extensive. Even the language is different. Simply put, the client hires the architect to assist him or her in negotiating the process and obtaining a final acceptable result. The client has a right to rely on the advice the architect renders, and expects to do so. Ultimately, if the client forms reasonable expectations regarding the architect's services, the law will likely recognize and enforce those expectations.

While the architect often views the project from an aesthetic perspective, he or she must also recognize that nearly all clients view the project from a financial perspective. Many clients simply don't care about the architect's aesthetic "adventure." Although many clients do have aesthetic tastes and some pursue social goals in their projects (for example, some clients will pursue sustainable ends simply because "it is the right thing to do"—but even then, within some overall financial constraint), most clients are interested in three things, each of which directly affects their bottom line. First, what will the building look like? Second, when will the project be completed? Finally and most important, what will it cost?

To manage risk, one must first appreciate risk. To manage the evolving risk associated with sustainable design, the architect must understand that simple economics motivates many clients. If it costs more, the owner will generally expect that there must be some added value; since sustainable projects cost more (virtually all objective evidence supports that conclusion), they must be providing some additional tangible or intangible benefits to the client/owner.

THE ONSET OF GREEN OR SUSTAINABLE DESIGN

For decades the design and construction industries effec-

tively ignored the long-term energy impacts of their buildings. The blame can properly be shared by the architectural profession and owners, and was consistent with "pre-green" views on energy costs. Since energy was relatively cheap compared with the cost of design features that maximized energy conservation, the economics drove design away from concepts that now are termed sustainable.

Today, the economics of energy (including the added weight given to long-term considerations) is driving owners toward design options for sustainable performance outcomes. This is not to say, however, that the economic benefits are clear-cut. Although the client may decide to incorporate sustainable features into a project for a variety of reasons, such features still cost money, and in virtually every case, some additional money (how much more is very project-specific, but the core fact that sustainability costs money really isn't in dispute). While it may be possible to do a sustainable project that as an overall budget proposition costs the same as a similar non-sustainable project, it is then necessary to fund the sustainable features through cost reductions in other areas of the project scope. The absolute bottom line is simply that sustainable features cost some money. The architect's advice is implicated in the decision to proceed with those features. This is especially true when the sustainable options require a life-cycle analysis to ascertain return on investment or environmental benefits. Consistent with the recent developments in sustainable design thinking, the architect actually becomes an advocate for those options and features. Where the client adopts those options and features and spends some incremental amount, the client expects to receive a reasonable return. If the law determines that these normal business expectations are reasonable for a client to hold, the architect will be called to answer if those expectations fail to materialize.

A common example involves the task of roof selection: in the interests of being "green," an architect specifies a light-colored single-ply membrane roof material without a long-term track record. The material must be replaced every 10 years. By contrast, use evidence suggests that an environmentally unfriendly coal tar pitch alternative will last 30 years. At the end of 60 years, the second coal tar pitch roof is just nearing the end of its life while the sixth single-ply roof is coming to the end of its life. In addition to the recurring cost of replacement, which approach results in less energy consumption and environmental impact when one factors in the installation of two roofs

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versus six? If the architect's environmental or green concerns trump the client's economic interests, a lack of candor on the part of the architect may prove problematic. The difficulty with advocating, as every attorney knows, is the temptation to omit negative facts or to shade the facts in an effort to convince.

RECENT DEVELOPMENTS IN "SUSTAINABLE" THINKING

The AIA has thrust itself into the forefront of the sustainable design debate. With more than 83,000 practitioners among its members, the AIA represents a large percentage of the practicing architectural profession and plays a leadership role in establishing the standard of care. The standard of care applies to all practitioners whether or not they are AIA members. Several recent developments implemented by the AIA have had a direct and immediate impact on the standard of care.

As noted above, contracts can be a source of the architect's duty. The most recent iteration of the AIA documents is no exception. Looking at AIA B101-2007, the standard form of contract between architect and owner, sustainable duties are immediately apparent. That document provides, in pertinent part:

3.2.5.2 The architect *shall* consider environmentally responsible design alternatives such as material choices and building orientation, together with other considerations based on program and aesthetics that are consistent with the Owner's program, schedule and budget for Cost of the Work. (Emphasis added)

Thus under the AIA contract, for the very *first* time, the architect is actually required to consider and evaluate green or sustainable design alternatives as part of the base services.

The AIA Canons of Ethics create and impose similar duties, taken one step further. Under the modern Canons, the architect now actually has duties running to the environment. In that regard, Canon IV - Obligations to the Environment, specifically provides:

Members should *promote* sustainable design . . .

E.S.6.1 Sustainable Design: In performing design work, members should be environmentally responsible and *advocate* sustainable building and site design.

E.S.6.2 Sustainable Development: In performing professional services, members should *advocate* the design, construction and operation of sustainable

buildings and communities.

E.S.6.3 Sustainable Practices: Members should use sustainable practices within their firms and professional organizations, and they should *encourage* their clients to do the same. (Emphasis added)

Aside from the novel idea that the architect has professional duties running to someone other than his or her client, the current Canons reflect a more fundamental shift. Rather than simply educating the client as necessary to place the client in a position to make an informed choice, the architect is now expected to "*promote*," "*advocate*" and "*encourage*" a "sustainable" course (although the Canons leave to the imagination exactly how "sustainable" might be defined). Indeed, the architect must actually become an advocate for that undefined "sustainable" result. Since responsibility and liability are inextricably linked, where the architect is responsible for advocating a particular design approach, the architect certainly will be liable in the event that an advocated design approach does not achieve the desired result.

For example, the architect who takes the AIA documents' admonishment to "advocate" for sustainable design and sustainable products to heart and recommends to the owner an HVAC system based on a heat pump package that draws on a geothermal or water source. Unfortunately, the projections regarding the temperatures at which the geothermal or water source run are erroneous and the actual temperatures are warmer than projected. As a consequence, the system is less efficient and unable to maintain comfort on 10 percent of the warmest days in the summer. Tenants are angry and withholding rent. Vacant space remains vacant. The owner is faced with a complete retrofit of the HVAC system in order to resolve the problem at substantial expense. The owner looks to the design professional to correct the problem. While it may seem like a good idea, geothermal-based energy sources are unpredictable. If the architect does not clearly and sufficiently indicate the positives and negatives of the HVAC options, the client will be looking to the architect to make him or her whole. Becoming an advocate for many types of sustainable approaches may cause the design professional to overlook the messy reality for the sake of being a good advocate.

The prudent architect should also consider an additional implication of his or her duties relative to professional ethics. Under the law in most states, an architect may render truthful and ethical advice to his or her client, free

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from any concerns over liability to third parties. In more than a few instances, codes of ethics promulgated by various professional societies have been used as a basis for the conclusion that specific advice rendered by a professional was not “ethical.” Where the advice is not truthful and ethical, the privilege protecting against third-party liability does not apply and the architect is open to claims by third parties.

For example, an architect may know full well that there is conflicting or contradictory evidence for the use of a certain product or system, but demurs at providing the owner with this full disclosure of the current state of the evidence. Instead he advocates and encourages by providing only positive and glowing reports of the product or system under consideration. The architect has now become an advocate, not a professional. This puts the architect in a sticky position: is he an advocate first and professional second, or vice versa?

While the interplay between advocacy, truth and ethics may not seem significant, on closer examination it is apparent that they are indeed aligned concepts. While the architect who simply evaluates options and educates a client so that client can make an intelligent choice is likely rendering truthful and ethical advice, is the architect who takes an additional step and actually advocates for a particular result also doing so? Can an architect advocate for a particular approach only if he or she actually knows that approach is in the client’s best interests—even though that approach might be in the interests of the planet or the greater public good? Where the architect actually becomes an advocate, is the resultant advice a product of truth and ethics or is it a product of advocacy? If the advice is a product of advocacy, the legal privilege and its attendant defense are lost. On its surface, the AIA definitions of “ethical” and “advocacy” now appear to be, at least to a degree, interchangeable. Consistent with the overall educational purpose behind the architect’s approach, does the architect now have a duty to inform the client that his or her “sustainable” advice may not be what is in the best interests of that particular client, but may be in part the product of sustainable advocacy? Unfortunately, these questions are not academic and esoteric. To the contrary, this principle has been the source of at least a few recent claims against architects. These are largely unresolved issues to be sure. What stands between current reality and the answers to those questions is likely substantial and expensive litigation.

To be sure, a number of owners will accept sustainable options for the simple reason that they are indeed in the interests of the planet or the greater public good. However, the architect’s traditional role has not included taking advocacy positions in favor of those results, and the law has developed accordingly. Therefore, an architect who does become an advocate would be well advised to make certain that the client is well-educated as to his or her role, and understands fully that advice given is given from an advocacy perspective instead of a simply advisory perspective. As with any advice given by any professional, placing the client in a position to intelligently evaluate the advice is the key. Approaching the rendering of professional services as an advocate instead of an educator elevates concern exponentially.

The march toward sustainability goes beyond contracts and ethics. In addition, AIA promulgates policy statements that guide and shape its decision-making on evolving issues. Those policies include specific statements on sustainability:

“The creation and operation of the built environment requires an investment of the earth’s resources. Architects must be environmentally responsible and *advocate* for the sustainable use of those resources.

Architects need to accept responsibility for their role in creating the built environment and, consequently, we must alter our profession’s actions and *encourage* our clients and the entire design and construction industry to join with us to change the course of the planet’s future.” (Emphasis added)

Yet again, the policy statements reflect the view that the architect is expected to encourage and advocate for the undefined “sustainable” result.

Finally, in order to make certain that its members are fully cognizant regarding the extent of the shift to sustainability, continuing education requirements have changed to include a “sustainable” obligation. Prior to 2008, an architect was required to complete continuing education credits on an annual basis to maintain AIA membership. Starting in 2008, that continuing education must include at least four hours in “sustainable” design. Although the term “sustainable” remains undefined, consistent with its views that “sustainability” is a welfare issue, the AIA will count “sustainable” credits against a member’s annual continuing education requirements for health, safety and welfare, a status traditionally reserved for courses on life safety, building codes and regulations.

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It is apparent that the AIA has a “sustainable” agenda. It is not yet clear where this agenda may lead, but it seems that the AIA intends to use all opportunities available to it as a professional association to push the envelope in its efforts to lead the way. It is certain however that the approach engenders an advocacy role for the architect, beyond the traditional advocacy that may occur in favor of a particular aesthetic decision.

THE LEED®-ACCREDITED PROFESSIONAL

In addition to the practice changes pushed onto the architect by external forces, many architects intentionally elevate the demands placed upon them by their own professional actions. In this regard, the effect of the U. S. Green Building Council’s (USGBC) Leadership in Energy and Environmental Design (LEED) accreditation must be considered. Since every action creates a reaction, there can be no doubt that securing LEED accreditation changes the complexion of architectural practice.

To have an honest discussion on this subject, one must first question the traditional motivations often proffered for seeking LEED accreditation. When the question is put to most architects as to why they sought LEED accreditation, the typical answer is something to the effect that LEED accreditation makes them better able to address the intricacies inherent in sustainable practice. While that may well be a portion of the motivation, it isn’t a complete answer.

Most architects spend the time, trouble and expense of securing LEED accreditation for one simple reason: to instill in clients and prospective clients the notion that the architect is capable of performing sustainable design—more capable of doing so than the similar but non-LEED accredited architect. Viewed in that context, the process of accreditation is sometimes undertaken for a reason not often discussed or admitted—the same basic reason that motivates most conduct in the business world—financial gain. By becoming LEED-accredited, the architect seeks to enhance his or her competitive position in the market, plain and simple. At a minimum, the architect must recognize that even if he or she holds a “non-economic” motivation, in the mind of the client, the LEED accreditation carries with it the perception that the accredited architect embodies a higher level of competence in “sustainable” design than the non-accredited architect. At least the client will make just such an argument if and when a problem arises.

Irrespective of the motives behind LEED accreditation, there can be no doubt that mere accreditation itself will

heighten the expectations of most clients. *Heightened expectations must either be met with heightened performance, or unmet expectations will result.* Unmet expectations are at the core of almost every client management problem.

THE EVOLVING STANDARD OF CARE

Can there really be any doubt the architect is now a “green” or “sustainable” expert? At a minimum, the contracts say so, the ethical guidelines say so, the public policy statements say so, and LEED accreditation implies it is so. Doesn’t a client who actually believes the architect is a “green” or “sustainable” expert hold a reasonable expectation to that effect? Indeed, the client generally pays more to incorporate sustainable features into a project on the expectation those features will pay back in the form of increased performance over time. If the architect is serving as an educator, the client’s decision to “go green” may be only that—the client’s decision. However, if the architect is “encouraging” or “advocating” for the incorporation of green features, his or her advice is implicated in the design decision. In that instance, the possibility that the architect can avoid the effect of the client’s unmet expectations is low.

It is of course impossible to define the effect the onset of green or sustainable design is having on the standard of care. Attempts at clarification will no doubt come during the course of litigation arising from these unmet expectations. However, as the profession accelerates its acceptance and dissemination of green advocacy as a linchpin of practice and architectural education, there can be little doubt that the demands on architects are increasing. Professional enthusiasm may, in fact, be increasing the risks for both the architectural profession and the clients it serves.

MANAGING THE RISK

With all of the cautionary discussion, what is the architect to do? Most owners have been driven by cost considerations. Where those cost considerations were once limited to initial costs, energy prices dictate the savvy owner should place a higher emphasis on long-term operational costs. The architect who refuses to accommodate will find either a shrinking client base or substantial unmanaged risk. Ignoring the new realities of energy costs affecting their clients is not a viable option if the architect wishes to remain in business and competitive. Managing the risk is the only viable option. However, one cannot manage the risk unless one appreciates the risk.

The evolving nature of the standard of care has always placed upon the architect the duty to adapt his or her practice to the changing demands of the profession. The onset of sustainable or green design is really no different, with one major exception. Where changes in the standard of care are typically slow and incremental, changes driven by sustainable design are occurring at a much faster pace.

Thus, the architect's response should be similar to what it has been historically. Educate the client, don't advocate to a client unless it is fully transparent as advocacy, and remember that a client expects to be given objective counsel. Document the process and the decisions. Make certain the client has realistic expectations relative to what the architect can likely deliver. Don't over-promise. Make certain marketing materials and statements are consistent with capabilities. Understand the products you recommend or specify, along with any manufacturer's warranties. Be cautious of new materials that lack a track record. Question the manufacturer's specifications and prototype testing results. Don't make representations regarding products or performance that could be considered a warranty. In short, do all of the things the architect would normally and should normally do on any project.

Comprehensive risk management demands a comprehensive review of all aspects of a business. Common and often overlooked risk concerns for architects pursuing or touting green design include marketing materials and Web sites. Often, a Web site is created and posted with information by in-house staff or marketing companies with little understanding of the risk issues associated with its content. The Internet is replete with Web sites for architectural firms with language that promises potential clients actual reductions in energy consumption. That language has a habit of reappearing at the most inopportune time—such as when a client who believes he or she didn't actually receive the promised energy benefits in exchange for the higher cost of the design and the construction of his or her project begins to formulate a claim. The seemingly innocent statements on the Web site now become evidence. Even worse for the architect, if the representations rise to the level of fraud or misrepresenta-

tion, the architect will likely find that coverage is excluded under most A/E malpractice insurance policies.

CONCLUSION

Sustainable or green design doesn't add anything new to the fundamental legal theories of liability or techniques of risk management for architects and their clients. However, it does reduce the traditional margin for error the design profession has historically enjoyed. Working within a narrower margin with a client who has heightened and possibly elevated expectations, the architect must become and remain even more vigilant.

The ultimate advice to architects is to not avoid engaging in projects that include green or sustainable design concepts. Given the current public clamor for green design, and given current energy cost trends, it is unlikely that any architectural office could remain competitive rejecting that work in its entirety. As a result, the architect's risk-management sensitivity will be tested as adherence to traditional risk reduction and avoidance mechanisms becomes central to negotiating this evolving practice area.

The advice to owners, on the other hand, must be to pay particular attention to the fact that architects may be presenting building project options as advocates for sustainability. This will often mean that social welfare concerns having little or nothing to do with the economics of an owner's building project will be the basis of recommendations made by the architect or LEED consultant. There is certainly nothing wrong with an owner pursuing more general social welfare goals for a building project, but this should be done knowingly and with full information.

In sum, everyone should know what everyone else is doing and why. Anything less is nothing short of an invitation to disaster. ■

ENDNOTES

1. See generally, http://www.aia.org/SiteObjects/files/sustain_ps.pdf, last accessed on Sept. 6, 2008. The engagement of the national AIA and all its local chapters is too vast to itemize, but it should be noted that the interest in "green" at this massive scale is less than five years old.