

COVID's Impact on the Designer's Standard of Care

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In the last issue of *PE*, this column discussed some of the typical contract provisions that may be affected by the COVID-19 pandemic. This article focuses on COVID's impact to the common law as it affects the design professional's standard of care. First, a primer on this indistinct concept.

What is the design professional's standard of care?

The professional standard of care is the yardstick by which architects, engineers, and other licensed design professionals' conduct is measured. It is a floating standard of behavior that considers the fact that design professionals typically get only one shot at a project's design. The law does not require perfection, and thus the judgments that such professionals make during the course of a project's design will be measured against the reasonableness of those decisions in the context of their profession and locale. This benchmark may be distinguished from the strict liability standards of the manufacturing industry, in which companies that mass produce goods have ample opportunity to correct their mistakes during production.

How do we measure the professional standard of care?

In most jurisdictions, the equation for determining the professional standard of care is *whether the designer exercised that skill, care, and judgment of reasonable, similarly situated design professionals providing similar services under the same or similar circumstances in the same time and place*. Defining the standard requires expert testimony, frequently offered by outside experts who have similar practices in the community. A "hired gun" of sorts will testify what other designers do in the same or similar

situations. Having established the baseline standard, the testifying expert will then explain how the designer, whose conduct is now under a microscope, either complied or failed to adhere to this standard.

In most cases, both sides of the issue will present conflicting testimony as to both the standard and its adherence. It is then up to the trier of fact (a judge, jury, or arbitrator) to decide who to believe and whether the designer on trial conformed to the selected benchmark.

How might COVID change the standard of care?

Prior to March 2020, we had a fairly good idea as to the proper standard of practice of engineers who design building systems where humans interact. Inasmuch as COVID has changed the way we live, work, and play, it has likewise altered that design paradigm. As we learn how to work remotely or implement social distancing in the office, the workplace of tomorrow will most certainly look and feel different in a post-COVID environment. Health and safety standards will demand it.

Some of the initial pandemic-inspired design adaptations involve a building's HVAC system. To address the need for improved air filtration, technologies that were once considered state of the art, such as high efficiency particulate air (HEPA) filtration and ultraviolet germicidal irradiation (UVGI), are now more commonplace. In fact, the CDC has created its own set of recommendations for making these and other improvements to new and existing HVAC systems.

Space needs are likewise changing. Workspaces are now being designed to account for more permanent social distancing using physical separation, directional signage, and staggered shift patterns. De-densification strategies are being used to account for workers who are now more comfortable working from home. Use of wider corridors, reconfigurable partitions and keyless/touchless entries are



being integrated into designs that previously were only seen in *Star Trek*.

How will this impact the design professional's future engagements?

Although the current pandemic has not yet run its course, the World Health Organization has advised that there will be future pandemics and that the time between potential pandemics is becoming shorter. As these future risks unfold, it is possible that designers will be expected to embrace the types of strategies discussed above, and that, in the event that an outbreak of illness in the workplace, potential claimants may question whether designers went far enough to mitigate the associated health risks.

It remains to be seen whether the standard of care will be understood to include addressing these types of risks in the future. Could, for example, a design professional be found to have acted negligently by failing to advise an owner to incorporate UVGI equipment into its HVAC system? Does it make a difference that prominent organizations like the Centers for Disease Control and Prevention and WHO are urging caution and adaptation?

Future tribunals will need to wrestle with how, if at all, these evolving technologies factor into the professional standard of care and the engineer's conduct, and the ultimate answers across jurisdictions are difficult to predict. For the moment, engineers would be best advised to address these considerations in their engagement letters and during the project's design development, and to document their efforts to bring these options to owners' attention.

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