DEALING WITH NATURAL DISASTERS
Here Comes The Flood (Of Legal Issues)

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The Potentially Catastrophic Design Error
And the Ethical Response

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Possible Life Safety Issue
Possible Life Safety Issue

• An engineer has designed a unique and innovative roof for a building that has been constructed.

• The engineer decided to use an intricate design with pitches and slopes such that there would be tiered roofs.

• Unfortunately, the engineer realized only after the fact that he did not consider certain snow and wind load points on the interlocking roofs, and therefore, his analysis of the dead loads was, in the engineer’s opinion, incomplete.

• The snow and wind loading on this roof structure is very unique due to the tiered design.
Engineer/Attorney
What should the engineer do?
Who should he call?
Engineer/Attorney


A design professional’s duties may extend to several stakeholders, even without contractual privity, where safety is at risk. Such stakeholders may include contractors that rely upon the design, the public, developers, and people that have legal interest in property.
Example of a statute of repose: Florida: Any action founded upon the design, planning, or construction of improvements to real property must be commenced within ten (10) years following the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect or licensed contractor and his or her employer, whichever date is latest. F.S.A. § 95.11(3)(c).
Does the attorney’s advice change?
Engineer/Owner
The engineer did some more homework and is becoming increasingly confident that, in a rare situation, the design is insufficient and susceptible to snow and wind loads.

But, due to the unique and innovative design, the engineer is still unsure.

The engineer is having sleepless nights.

The engineer called the carrier and, following the advice of his attorney, decided to have a meeting with the owner.
Engineer
Owner
Owner
What should the engineer do during the interim period?
Would it be good advice for the attorney to ask the engineer to prepare calculations for the attorney to review?
Engineer/Owner


An engineer that is designing an equalization tank in a municipal wastewater treatment plant advises the town’s sewer commissioner that it may be necessary to make the treatment room explosion-proof based upon the National Fire Protection Association code. The sewer commissioner “reacts angrily to the prospect of additional cost and delay of the project,” and the county fire official advises that the room is already explosion-proof. Despite the fire official’s statement, the engineer surveyed the treatment room and noted that several pieces of electrical equipment “show no signs of having been made explosion-proof. Ultimately, more than half of the ASCE members in attendance determined that the engineer “should investigate the matter further, consulting the NFPA code and possibly involving a more experienced third party to inspect the treatment plant to provide input. If the room is not in compliance, [the engineer] should develop various solutions. This extra work should be billed to the project regardless of the effect on the project’s budget.”
Engineer/Attorney
Engineer/Attorney

- The engineer decided to call his attorney because he is becoming increasingly concerned that the design could fail during the time it takes to do the peer review?
What should be the attorney’s advice?
A year after construction was completed on the Citigroup Center, the structural engineer, William LeMessurier recalculated the wind loads on the building, which included quartering winds that had not been considered in his original design. LeMessurier’s recalculation revealed that with a quartering wind, the wind loads increased by 40% and the overall loading at all construction joints increased by 160%. Thus, in certain severe, but possible wind conditions, the building could collapse. LeMessurier advised the architect, the client, and the city engineer, and agreed to repair the building over the next few months. The NSPE Board of Ethical Review concluded that it was not ethical for LeMessurier to comply with the client’s and the architect’s desire for secrecy or for the city engineer to maintain secrecy.
Engineer/Attorney
The peer reviewer finished his report and has determined that the innovative design is not susceptible to the snow and wind loads that the engineer is concerned about.
Engineer
Owner
What should the attorney’s advice be?
Who should the attorney recommend that the engineer tell?
Engineer/Attorney

Ethics Decision: NSPE Board of Ethical Review Case No. 13-11, https://www.nspe.org/sites/default/files/BER%20Case%20No%2013-11-FINAL.pdf:

An audibility test of the fire alarm inside of occupied residential units showed the alarm could not be heard within all the residential units, which was a violation of the local fire code. The engineer informed of the client of the audibility test results and code violation. Later, the client informed the engineer that the financing for the project had fallen through and the renovations would be delayed. As a result, the problems with the fire alarm system would not be immediately addressed but would have to wait until a later time when financing was available. The NSPE Board of Ethics held that if the engineer determined the risk is imminent, “he should immediately advise the client that appropriate steps must be taken to protect the occupants of the building from the risks associated with the fire code violation.” Then, if the client does not address these issues, the engineer would be obligated to report the violation to code enforcement officials.
Engineer/Attorney
Engineer/Attorney

- We’re changing the facts.
- The peer reviewer finished the report and determined that the engineer’s concerns are well-founded.
- A one in 75 year event would create a strong risk to life safety by collapse.
Owner
Attorney
Engineer
Attorney
Engineer
What should the attorney do?
What is the attorney’s ethical obligation?
Engineer/Attorney

- We’re changing the facts again.
- The peer reviewer determined that the roof could collapse any day.
- The engineer disagrees, and thinks that the roof probably will not collapse for another year.
Owner, Peer Reviewer and Engineer
What should the attorney do?
Engineer/Attorney

Ethics Opinion: California Legal Ethics Opinion 1981-58:
In this case the attorneys were not permitted to disclose to third parties the content of a report from an engineer retained by the lawyers stating that a structure on the property owned by the client did not comply with the Uniform Building Code and may not survive an earthquake. The Committee did not consider that the lawyers were ‘satisfied beyond a substantial doubt’ that there was an immediate, substantial risk to the public unless the disclosure was made.
Engineer/Attorney

- We’re changing the facts again.
- If peer reviewer and engineer agree that the threat to life safety is imminent.
Peer Reviewer and Engineer
Does the attorney have permission to tell?
Is the attorney required to tell?
Who can/should the attorney disclose to?
ABA Rule 1.6:
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   (1) to prevent reasonably certain death or substantial bodily harm
Engineer/Attorney

California Rule of Professional Conduct 3-100(B): “A member [of the bar] may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”
Life Service Issue
Life Service Issue

● Assume that the engineer has investigated and the design error no longer creates a risk to life safety, but, instead, the risk is that the service life of the roof will be decreased: a snow event or wind event could lead to roof buckling and leaking.

● There are 50 tenants in the building.
Does the engineer have a different duty under these circumstances?
Is there an independent duty when there is a potential for life service problems?
Is there a different duty where the design error is clearly a code violation?
Life Service Issue

Ethics Article: The Lessons of Katrina: ASCE (Jul. 1, 2015), http://www.asce.org/question-of-ethics-articles/july-2015/: Canon 1(a) “implies more than a mere abstract awareness of the engineer’s duty to the public; it requires the engineer to be untiringly vigilant in preserving the interests of the men, women, and children whose lives may be affected by the engineer’s actions.”

Also, the duty to hold paramount the public welfare means “taking steps to address any threat to the public the engineer perceives in rendering his or her services. In cases in which responsible parties fail to act even when advised of the threat, the engineer may have to go further and disclose the matter in a public forum or report it to authorities.”
Ethics Decision: See NSPE Board of Ethical review Case Number 09-4. https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/2009/BER%20Case%202009-4-APPROVED.pdf:

The duty to disclose a code violation having no bearing on public safety may be more compelling in the case of a government contract. For example, a company may be deemed to be engaging in government contractor fraud by knowingly employing an unauthorized substitution in violation of the contract. Where an engineer is aware of such substitution, he or she should contact the appropriate contracting officials to seek a contract change, or where no action is taken, report the conduct to the appropriate governmental authorities.
What if the risk is very remote: one in one million chance of a leak. Should the attorney tell the engineer that he does not need to disclose?
What if a peer reviewer determines that the risk is not so remote, but the engineer disagrees?
Does that change anything?
Potential Damage to Neighbor’s Property
Potential Damage to Neighbor’s Property

- An architect is designing the unique tiered roof and realizes that the design risks that a neighbor’s property could flood in certain snowmelt conditions.
Can the neighbor sue the architect for negligence and trespass if flooding occurs?
What is the architect’s duty to disclose the issue to the neighbor before construction?
Potential Damage to Neighbor’s Property

AIA rule 3:201 “[a] Member shall not render professional services if the Member’s professional judgment could be affected by responsibility to another project or person . . . unless all those who rely on the Member’s judgment consent after full disclosure.” The commentary to the rule clarifies that this rule encompasses conflicts between the architect and others who may be affected by the architect’s professional decision.
Potential Damage to Neighbor’s Property

Potential Damage to Neighbor’s Property

- An architect submitted a Zoning Board application to elevate a house with a significant quantity of additional fill, proposing to raise the property’s grade above a neighbor’s property. While the application was pending, the regrading of the lot began, and the architect saw the fill in place. AIA’s holding: architect violated Rule 3.201: “To read into Rule 3.201 a requirement that an architect notify everyone who might be adversely affected by design decisions would be to demand the impossible. However, in the circumstances presented by this ethics case, the immediate neighbors . . . were directly affected by the design put forward by the Respondent to such extent that she had an obligation to them under this rule. Her design required adding a very significant quantity of fill to create a large “plinth” upon which the new house and associated garages and drives would be placed, a design approach that could have affected neighboring property in multiple ways.”
Peer Reviewer Discovers Unrelated Problem
Peer Reviewer Discovers Unrelated Problem

- Catastrophe! A snow/wind event has led to roof collapse, leaks, and damage to the neighbor’s property.

- In the ensuing lawsuits, the owner hired the peer reviewer as an expert.

- During the peer reviewer’s investigation, the peer reviewer finds that the building has an extensive mold problem.
Peer Reviewer
Owner
What should the peer reviewer do?
Peer Reviewer Discovers Unrelated Problem


A city contracted with an architectural firm to review a water garden’s existing conditions and determine whether the water garden complied with the ADA. The architect visually inspected the water garden and submitted a conditions survey to the city, but the city did not retain the firm to design or implement any changes. Subsequently, four people improperly entered the water gardens and died. The Texas Court of Appeals held that the architects owed no duty to the public because the architects’ “duty depends on the contract they entered into with the City, and because there is no evidence that the contract required ... [the architects] to report or make safe any hazards detected.”
End of Presentation