Interview with Ralph Stephenson, P.E.
re. construction liability

Q: The major subject of the May issue of CAM Magazine is construction liability. Would you tell me about your feelings regarding this?

I think the place to start is the assumption of risk, because liability results from risk. The question always becomes one of "where is the risk best placed?" Then, you have other conclusions on that of "where is the risk morally placed?" and "where is the risk ethically placed?" and "where is the risk placed from a standard practice or from the state-the-art?" and "where today do we assume the risk will be placed?"

In our business, it always seems that if people approach the solution correctly...from a catholic viewpoint...that all four of these will coincide. The organization most deserving of carrying the risk, those who are morally obligated, those who are ethically obligated and those who are obligated by a standard of performance, in the ideal society, those four areas would coincide.

Frankly, that's how I start out on any kind of an anaylsis of this type. Unfortunately, where the conflict comes is in the assumption these factors. When you take a look at the construction industry which is dominated by technical people...at least it used to be...you will find that the major obligation of any contractor, architect, engineer or planner is in the protection of the health, welfare and safety of the

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public--that's the prime charge we have relative to our licensing.

When you look at an attorney's obligations, you'll find there's a different hierarchy; the attorney's hierarchy deals, I believe, number one with the protection of his client, number two - an obligation to his employer and number three - an obligation to his peers. Health, welfare and safety of public do not enter into their consideration.

This is one of the reasons why often there are conflicts between people in design and construction and people in law. Since the attorney usually has to pursue the liability the liability problem, it's quite obvious that at some point...in fact at many points...there's going to conflict along the way.

So I always like to see liability assigned as a mutually agreed upon obligation and then I like to see liability assumed by measuring the influencing criteria.

Q: To what degree is this happening today?

Well, there implications where courts, arbitration laws and mediation chambers are called into play--this is where there was disagreement about how clearly liability was spelled out.

The second step does suppose that we have all four criteria and they are intellectually understood; then you move to the pragmatic contractual arrangement. Here, again, is a major source of concern because today, for example, I have a list of 40 projects that are active and of those 40, 15 are serious trouble. Of those 15 projects...and I can take almost any one at random...let me describe one.

I'm looking at one right now which was a major historical renovation in a midwestern city, and that job was running extremely well until January, when the owner decided that the cash flow on the job was not working. Therefore, he requested that the contractor literally close down his operation for about three months until he got his second round of financing in order. Now that was not something contemplated in the contract, so the question becomes "when is the contractor entitled to claim an extra amount of money?" Now, let's suppose, the contractor feels he is, and the owner says, "That's fine. What do you think this cost you?"

So far so good; there's the proper assumption--ethically, morally, standards of practice-wise, and in terms of the ability to handle the risk. So far we're in total agreement. But the owner looks at the figure that the contractor gives him and say, "But that's impossible. How in the world can you ever tell me that it's going to cost $300,000 to shut this job down for four months or for three months. That's impossible. I'm not going to pay that."

So now we have the classic confrontation, because at this point liability raises its ugly head, who is liable for that money? At that point in time, we have not only a claim in place --because a contractor says that's what it will cost--but a contested claim. Do you see the progression here?

Now this is basically on these 15 troubled jobs exactly what has happened on most of them.

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And now we look at the cause of the contested claim--the disagreement over the liability. In today's marketplace, what I find most often is that it's inept, incompentent, poorly prepared or totally inadequate front-end work, which deals with acquisition of the property, clearance of easements including clearance of assessments on the property, and proper zoning--which deals with encumbrances of real estate relative to reversionary rights or things of this type.

From that point, it moves on to inadequate programming of the job, which means definition of what the nature of the job is and what the physical characteristics are. And from there it moves into preparation of the contract documents, which oftentimes today are done totally inadequately, not necessarily because of incompetence on the part of the designers--they quite frequently are the result of inadequate fees, not enough money on the part of the A/E to allow for quality assurance, which in essence means checking the drawings, and the desire by the owner to save money during that design period.

So what happens is that you have a project, although you may be fully pleased with the design of it...it's concept and you may be fully desirous of going ahead with it and you may have what you consider enough financing in place, only to find out, that through inadequate up-front research before construction starts, that the job is totally unfeasible.

When that happens and a contractor has been retained, then you're in real trouble, because a contractor normally is not an agent of the owner, he is a contracting party. Whereas, an A/E

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or a non-liable or liable construction manager oftentimes becomes an agent for the owner.

Q: If that were to change, the contractor would have to start assuming some of the liability.?

And that's one reason why design/build reemerged back in the middle or late 1800s. 1900's It had be a very common form of practice all the way up until the Industrial Revolution, that was the way buildings were built. Then there was design revolution during the Industrial Revolution because of the fact that now technology allowed us to use systems that could be drawn or simulated or models from which hard-money costs could be provided.

That then led to competitive bidding which in turn led to what we call the traditional project delivery system. And because that did not work well, in the the middle '50s we began to move back toward non-traditional project delivery systems, which dealt with centering total responsibilities in the domain of the building parties rather than the designing parties. That's what's caused many conflicts. People can't look at it unemotionally or rationally; quite frequently they get very upset about the fact that we don't use competitive bidding well enough or we don't use our design teams well enough...but there are good reasons for all of that.

So what I see today in terms of liability is first of all is proper assignment of risk; second, accepting a set of assumptions that deal with how that risk is to be spread around on the project team; three, absolute impeccable attention to the

front-end work, which deals with land acquisition, clearance of all encumbrances, the programming and design of the project, and a proper preparation and acceptance of documents contractually that reflect the assumptions in the first two steps--the assignment of risk and the proper preparation of the job for construction.

Q: And this all takes place long before the first piece of earth is turned?

Absolutely, in fact the old wheeze is here that money is fully committed during the front-end period, during the acquisition of real estate and the programming and design of the job; it is only spent during construction. If people would just realize that, I even feel embarrased saying it because it's so trite.

Q: That means that anything that money could possibly be spent for, such as a close down of the project for a while, would have to be considered.

Absolutely. And the owner always ends up paying for it. Some of the exceptions are firms, I won't name them, but there are organizations that have operated in Detroit primarily from out of town--normally we don't have any local companies who really hammer away at our specialty contractors. CAM, of course, is built primarily out of specialty contractors, vendors and suppliers. So we find that the local prime contractors normally are pretty good. It's these out of town people that really and truly hurt the industry. In their own communities they can't afford to do this, because they there are local. We find invariably that hurting organizations are those that are in and

out of a geographic location. The reason there is that they'll try to assign a risk based on whoever they can stick it with. That of course is very very dangerous. I don't work with clients like that. If I find a client is doing that...it takes a little while to find that out...if I find that out, I don't work with them anymore.

Q: That sounds to me like it could land you in court.

Well, it does quite frequently. In fact I'm on a job right now where one of my good clients has tried to stick two of his subs with some liability they don't deserve to have. And I am faced right now with a reasonably heavy ethical decision that I am having trouble making. Namely, do I help to collect what it is my client wants to collect, as opposed to bailing out of the thing. But if you have certain obligations and hierachies that you have firmly fixed in your mind, that helps a great deal.

I think Dean Clement Freund at the University of Detroit gave me the best advice I've ever had...I don't know if you know Dean Freund or knew him...He was dean of engineering at the University of Detroit for a long time. When I was President of the junior section of ESD back in 1950, he was my advisor because he was President of the Engineering Society of Detroit then. And I asked him once, "How do you assign priority?" That's when he gave me a three-level priority list. The first obligation of an engineer/architect and planner is to public health, welfare and safety, our second obligation is to our client or employer, and our third obligation is to our peers.

Then, there's another set of precepts in terms of liability ...again it goes back to standards of practice...that was a pamphlet written by William Wickenden many years ago called A Professional Guide to Young Engineers. It was published by the Engineers Council for Professional Development. I think it's out of print now. But in that document he outlines some guidelines for performance. Now the thing is, using these guidelines we had very little troubles and in essence doing some of the things I spoke of earlier. We didn't have the kind of liability problems that we have today. It was when we started moving away from them that we really began having problems.

So what a lot of the items in your articles will deal with is now that we are here pragmatically, what is the standard of performance that dictates where the risk is to be placed. Once you've set the philosophy that I have talked about here, at that point you can move into today's world and say, "Here's where we are and what is it we can do about this?"

One of my major suggestions, in terms of the things I know about, is that first of all we do a far better job as owners and users up front. That's where it all starts. If that work up front is done properly, you will minimize the liability during the construction period. And that deals with everything from polution control on through to selection of a structural system. They are all liable-prone.

Q: How can you get around to doing a better job with the owner or user?

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I think the owner merely has to accept some principles that deal with properly preparing for the construction process.

I use three handouts in my work that apply here--number one is called Characteristics of a Claim-Pone Job and in that I identify about 20 or 25 characteristics of a construction project that will allow you...even before you ever see the design work completed...to know whether it's going to be a claim-prone job or not.

The second document is called Ten Common Causes of Contested Claims, in which I outline the ten generally considered most common causes of why trouble begins on a job. Namely, what is the nature of the claim.

And the third document Construction Retentions, Collections and Final Payment. And those three documents I use as handouts in my teaching all the time.

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