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Article

Using new tech and tools: considerations to balance the risk with the potential reward

Colleen Palmer • March 04, 2025

It’s an exciting era of rapidly developing technology and tools available to design professionals, but prudence requires careful deliberation and strategy before these technologies are embraced as part of design professional firms’ practice and procedures. Regardless of any increased efficiency that artificial intelligence (“AI”) or any other technology may provide, design professionals cannot rely on the output of any tool to the exclusion of their professional judgment. Indeed, such tools must be considered a supplement to, not a substitute for, professional judgment. This article explores risk management considerations when using innovative technology.

Let’s start at the beginning:

Fundamentally, design professionals have an obligation to meet the professional standard of care. The definition of the standard of care is constant: a design professional’s performance must be consistent with the degree of skill and care ordinarily exercised by reasonably prudent professionals performing similar services at the same time, in the same locality, under the same or similar circumstances. However, the manner in which the reasonably prudent professional performs those services evolves with emerging risks combined with changes in technology, techniques, building materials, societal norms and expectations.

The standard is a snapshot in time. Professional practices that may have been consistent with the standard of care 50 years ago, may not meet the standard of care today. For example, for many years, the use of asbestos in residential construction was common practice because of its insulation capabilities, strength and fire-resistant properties. Now, using asbestos is prohibited and to do so would be a breach of standard of care because we know exposure to friable asbestos contributes to

diseases such as lung cancer, asbestosis and mesothelioma.

We recognize that design professionals do not perform in a vacuum and client objectives impact design professionals' decisions. Time and money are of primary importance, and clients expect design professionals to meet the project schedule and perform within the budget, even if those goals are unrealistic. To keep clients' goals in line with the standard of care, a robust risk management program must include effective client communication and detailed project documentation.

Client communication should be frequent and constructive and can be broken down into three prongs:

1. **Inform:** In a claim situation, a common client argument is that the client relied on the design professional as an "expert" and, therefore, the design professional should have told the client if there was a potential problem and, moreover, should have been able to prevent the problem. While this argument is usually a tactic, design professionals often are more knowledgeable than clients regarding applicable laws, codes, technology, historical weather information, and innovations, so design professionals should discuss known or common issues, practices, limitations, and challenges with the client especially at the programmatic stage of the project. Design professionals must communicate with purpose and may need to involve additional staff to analyze issues and present possible solutions to clients, depending on the complexity of the project.
2. **Educate:** Educating goes hand in hand with informing clients, but design professionals ought to spend more time and effort on client communication if they deem a particular client or project as risky in the "go / no-go" risk management project analysis. Design professionals should dedicate senior staff on these projects and designate a point person with strong interpersonal and communication skills who has the fortitude to effectively speak with clients in potentially difficult situations.
3. **Manage expectations:** Claims are made against design professionals for a host of reasons, but the nucleus of all claims is that client expectations are not met. The more effort and attention design professionals invest to inform and educate clients, the more likely design professionals can manage client expectations, deal with issues as they arise, and deliver a successful project that is claims-free.

There may be colliding concepts when clients want design professionals to utilize new technology. It may be true that a project would be better able to withstand adverse weather events, or better able to prevent a bad actor from entering a building with the intent of gun violence, or achieve superior air circulation if cutting-edge technology is used. However, clients need to understand that use of new technology and techniques may radically increase the budget for the project and may conflict with other client goals (e.g. designing for insulation efficiency likely conflicts with designing for air circulation to achieve "safe air" as a result of COVID health concerns). In addition, design professionals must manage client expectations that use of new technology inherently has risk and the design professional does not guarantee a specific

result, regardless of the means and methods the design professional employs. In short: design professionals should make it abundantly clear that use of new technology does not mean design professionals' performance will be perfect and some amount of errors and omissions are expected on all projects.

Timely documentation is arguably as important as communication practices. Design professionals may expend significant effort to inform, educate and manage client expectations and still be sued. A well-documented project file is critical in a claim situation to avoid the dreaded "he-said, she-said" debacle. A common refrain among attorneys is: "If it's not in writing, it didn't happen." Meeting minutes, summaries of phone calls, and memorialization of client decisions (especially those that are inconsistent with design professionals' opinion as to how to proceed) are valuable to mount a defense that the design professional performed consistent with the standard of care. An important caveat is that documenting disagreement with a client decision is not a valid excuse for design professionals proceeding in a manner that is reasonably known to violate applicable laws, codes, regulations or the standard of care. Further, one-sided documentation prepared by design professionals that is not fully executed by both parties is not binding on clients.

The elephant in the room: artificial intelligence:

In January 2024 Beazley hosted a risk management webinar attended by 500 design professionals, where we discussed professional liability risks associated with using artificial intelligence. When we polled the audience about their use of AI, we learned that 90% had no staff training or procedures in place to use AI when performing professional services. About half of the attendees "maybe" planned to use AI in the next 1-2 years once they understood the risks, while a quarter said they will use AI and a quarter said they will not use AI in that time frame. These polls illustrate that it is critical for design professionals to understand the risks associated with using AI and to implement firm training and procedures when, and if, they decide to use AI in their practice.

There are undoubtedly numerous potential advantages to using AI yet to be realized, but we must proceed cautiously. Two significant risks design professionals must manage are: 1. maintaining the confidentiality of client information as required under the applicable professional services agreement, and 2. avoiding infringement of intellectual property rights.

Confidentiality issues:

Most professional services agreements require design professionals to maintain the confidentiality of clients' information. To avoid a breach of contract allegation, it is generally best to clarify that design professionals are permitted to disclose information that is in the public domain, if disclosure is required by law, or if disclosure is reasonably necessary for the defense of any suit or claim.

These narrow exceptions to the confidentiality obligation are likely insufficient when it comes to using project-generated information on AI platforms. If design professionals download any project-generated

information to an AI platform, there is a significant risk of breaching contractual confidentiality obligations. Contracts often broadly define confidential client information to not only include all information provided by clients, but also all work product created by design professionals and their subconsultants. Further, confidentiality provisions often require design professionals to return all confidential information to clients upon demand or completion of the project and certify such return or destruction. These obligations may preclude downloading project documents to a public or firm-managed private AI platform.

Intellectual property issues:

There are two sides of the risk coin related to infringing intellectual property rights: 1. using information from AI platforms, and 2. downloading information to AI platforms. If design professionals pull and use information from public AI, design professionals are in danger of infringing intellectual property rights of another firm by using such information.

Copyright protection is automatic from the moment an original work of authorship is created and registration with the U.S. Copyright Office is not necessary for the protection to attach. Formal copyright registration is required to bring an infringement claim, but copyright owners can overcome this hurdle because they are allowed to register if they discover a third party is using their work product. Design professionals ought to consult with counsel to research whether use of specific information obtained from public AI platforms would violate intellectual property rights since this is a complex area of law.

On the other side of the coin, is the risk that design professionals violate clients' intellectual property rights by downloading their own professional work product to AI platforms. Clients often contractually require design professionals to transfer copyright of all professional work product to clients. From a risk management perspective, we recommend against transferring copyright to clients. Relinquishing copyright grants extremely broad rights to clients and potentially subjects design professionals to significant risks. Copyright transfer allows clients to reuse the work product on other projects at clients' sole discretion, without having to pay design professionals for such reuse, and could subject design professionals to professional liability exposure on those future projects, even though design professionals were not involved. In the AI context, the broad transfer of copyright arguably prohibits downloading work product to an AI platform, yet another compelling reason to maintain copyright of professional work product.

How to manage the risk:

We recommend that firms establish a committee to focus on the risks associated with using new technologies. This team should implement a formal, written policy detailing the permissible and impermissible uses of new technology, meet regularly to review, modify and update it and educate all staff regarding the policy and procedures. The committee may consider the following when establishing a policy:

1. Establish an application process: design professionals should apply

to the committee in writing for authorization to use AI, including downloading or uploading to an AI platform, and all decisions should be logged;

2. Reinforce QA/QC: use of AI is not a substitute for the firms' QA/QC regimen. Ultimately, any deliverable should go through the same vigorous review process regardless of the tools used to prepare it;

3. Make sure everyone is trained: establish onboarding training for new employees and refresher training for all regarding firm procedures and updates to the policy; and

4. Boost mentoring efforts: enhance mentoring to ensure junior staff have solid training for tasks that AI may eliminate from the firm.

As suggested by the foregoing commentary, it is critical to keep track of contractual confidentiality obligations and transfer of copyright of work product. More generally, pay close attention to contract language that requires or prohibits the use of AI. We do not recommend proactively stating whether design professionals will or will not use AI as a tool on a project, and design professionals should push back on attempts by clients to dictate the means and methods used in the design process.

As always, good contracting practices are paramount. The contract should include appropriate standard of care language, and any indemnity obligation should be limited to the extent damages are caused by the design professionals' negligent performance of services, not based on whether AI or other innovation was or wasn't utilized. Design professionals should reject warranties of services and guarantees that the project will achieve any particular result.

If the client insists that the firm utilize new technology in its practice, design professionals should discuss the use of an express disclaimer with their legal counsel, ideally something like the following would be considered: "Client understands that use of innovative technology, equipment, materials or systems, including artificial intelligence (collectively "Innovation"), inherently involves some risk given the novelty of innovation. Professional shall exercise reasonable professional efforts when utilizing Innovation, including its decision to use or not use Innovation, but makes no express or implied guarantee or warranty with respect to the services rendered, including that the use of Innovation will achieve any particular result or savings."

Conclusion:

We've just scratched the surface of how innovative technology may be used by design professionals. Design professionals need proceed carefully so the use of technology ultimately enhances the quality of the deliverable without significantly increasing the professional liability risk.

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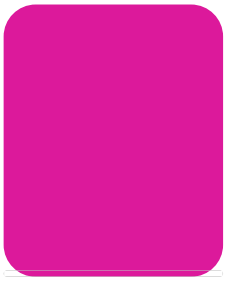

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