

## ***CE News* “Risky Business” No. 20**

I picked up my car from the repair shop a few days ago and checked over the bill. I noticed a charge of \$15 for “disposal of contaminated materials.”

“What kind of contaminated materials?” I asked the cashier. “That’s for the proper disposal of rags that have been contaminated with oil,” she said. “Oh,” I replied. “Well, I’m glad to support an organization that supports the environment,” and I paid, in the name of, if not for, a good cause.

Which brings me to the subject of this column, that being, Get smart. When life hands you lemons, make lemonade; e.g., got a harsh new environmental regulation to deal with? Get smart. It’s not a new element of overhead; it’s an opportunity to turn compliance into profit.

You’re not running an auto repair shop, of course, so what does this have to do with you? Plenty, if you’ve been around long enough to hear the civil engineer’s lament, “Things are so much more complex than they used to be.”

As it so happens, “used to be” ended in 1957. That’s when a New York appellate court decided *Inman v Binghamton Housing Authority*, ruling that, thenceforth, design professionals owed a duty of care not only to their clients, but to third parties as well, an outlook now common in just about all states. What does it mean? Among other things, that you need to consider how a client’s decisions could affect others, because “My client made me do it” is not a valid excuse should you damage a third party. “Because you’re the professional,” a judge would likely rule, “you should have told the client, ‘I can’t do that.’” Are your clients aware of that? Do they understand that your first allegiance is to the public? That your responsibility may require extra study or simulation to help preserve and protect public health, safety, and welfare, thereby making problems – for you and your client – less likely?

Owing a duty of care to third parties was largely responsible for design professionals' need to acquire a means for compensating those they injured. Professional liability insurance (PLI) companies were quick to offer a solution. But PLI is limited. Do your clients understand that? Do they recognize that the claims-made nature of PLI makes it almost impossible for you to guarantee that you will have the same coverage or even any worthwhile coverage should a claim be made two or three years from now? Do they understand the cost of the coverage, or do you just lump it in with overhead and let it go at that? (One engineer I know pays about 5% of fee income for PLI and routinely charges clients 5% of his fee as a *direct* project cost. He tells his clients why (dirty rags, more or less), and almost all pay without hesitation. His clients know...and understand.)

And what about such complexities as the economic loss doctrine, which holds that, to recover purely economic losses (e.g., delay damages) from a professional, a plaintiff can sue only on the theory of breach of contract, meaning that only a client can sue to recover purely economic damages? Just about all states used to abide by the economic loss doctrine. Today, fewer and fewer do, making the relationship between the design professional and contractors particularly critical. An owner client can do much to make that particular situation better, and many would do so if only they were informed. Have you informed them? Do you even know what to inform them about?

What about the vast array of other regulations you must abide by, such as those imposed by the various agencies that fund, help fund, or otherwise affect your project from a technical viewpoint? And what about the array of regulations that affect your practice, from human resources (EEOC, FMLA, ADA, et al.) to financial reporting, accounting, and taxation? And don't forget the impact of information technology, which has already changed practice profoundly, and continues to do so.

"So much more complex than it used to be"? That's not even the half of it! But you have to deal with it, a fact clients could readily understand – and appreciate – if only you would take the time to explain it to them. And if you do, chances are they would have

few qualms about paying whatever reasonable sum you impose to do it well, thus to make a risky business far less troublesome to live with.

They're your rags. Deal with them! Wisely.