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## *Key Considerations for the Use of Peer Reviews in Construction*



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A peer review can be an important tool in assisting owners and design professionals to complete construction projects on time and on budget, while limiting the number of requests for information and change orders seen on a project. Typically, a peer review is performed by an independent design firm with expertise in a particular discipline to identify errors or omissions in a design or to remedy a troublesome detail or component of the design.<sup>1</sup> With the growing number of complex construction projects in the United States, the number of peer reviews being performed on construction projects continues to increase.

In fact, cities such as Miami,<sup>2</sup> New York City,<sup>3</sup> and San Francisco<sup>4</sup> have each implemented mandatory peer review programs for structural engineering submissions. Similarly, the city of Chicago has implemented an optional peer review program for structural engineering submissions.<sup>5</sup> The purpose behind these structural peer review programs is to streamline the permit process and to reduce the time and resources being expended by the building departments for the respective cities. In addition to structural peer reviews, building departments and state agencies have implemented peer reviews of other disciplines on a project-by-project basis when needed. For example, in *Nestle Waters N.A., Inc. v. Town of Fryeburg*,<sup>6</sup> the town's planning board conducted an independent peer review to determine whether the project presented major traffic concerns.

Similarly, private owners continue to retain design professionals to perform peer reviews of state-of-the-art structural, mechanical, and architectural systems on a multitude of projects, including green projects,<sup>7</sup> medical facilities, performing arts centers, and high-rise towers. Due to project complexity and the use of numerous consultants, poorly coordinated construction documents are a prevalent risk factor for owners on major projects.<sup>8</sup> For

example, one study estimates that typical construction drawings include five potential coordination errors per design drawing.<sup>9</sup>

### **I. Timing Is Everything: When to Engage the Peer Reviewer**

While owners typically include between two and five percent of the total cost of construction in a construction budget as a contingency to address cost overruns stemming from design and coordination issues, having the design reviewed by other competent industry professionals prior to construction provides a direct benefit to all interested parties. In most cases, the benefit derived from retaining peer reviewers by catching errors or omissions early on likely exceeds their associated cost to the project.

Timely retention of a peer review firm has a direct impact on the success of a project. If the peer review firm commences its services early in the design process, many conflicts will likely be identified early and corrected. A study performed by the General Services Administration, in conjunction with the University of Colorado at Boulder and Peter Associates, analyzed twenty-two construction projects and found that "companies and organizations can strategically improve projects by conducting peer reviews early in the construction process."<sup>10</sup>

In *Swire P. Holdings, Inc. v. Zurich Insurance Co.*, the owner and developer retained the services of an independent peer reviewer after being notified by the building department that the owner's structural engineer was being investigated in connection with noncompliance in a number of the structural engineer's designs for other projects.<sup>11</sup> Upon the peer reviewer's retention, the firm performed a peer review of the structural engineer's design, which revealed "numerous errors and omissions in the project that had to be corrected."<sup>12</sup> In *Swire*, the owner attempted to recoup nearly \$4.5 million arising from the corrective costs necessitated by the peer review from a builder's risk policy.<sup>13</sup> To the owner's detriment, the policy excluded damages arising from design defects.<sup>14</sup> If the owner had retained the peer reviewer during the project's design phase, the design defects may have been identified and corrected, thereby reducing the potential cost and expenses paid directly by the owner. In this situation, the owner's only recourse was to file a claim against the design professional, which will be subject to applicable statutes, insurance coverage, and contractual language.

While the philosophy of better late than never arguably applies in the context of a peer review, when the peer reviewer is

retained at an advanced stage of the project, such as during the construction documents phase, conflicts in the design drawings already may exist and changes at a late stage in the project may require substantial redesign services or rebidding to contractors. Further, if the peer review firm is retained during construction, any deficiencies or design errors and omissions that are identified at this stage may result in costs to correct the work that are exponentially greater than the cost had they been identified early in the design stage because components within the built work may need to be demolished in order to correct the deficiency.

## II. Liability Implications for Peer Review Firms

A peer review benefits the owner as well as the primary design professional by serving as verification that a project's design was prepared with the ordinary and reasonable skill of other architects or engineers in the community—i.e., the standard of care.<sup>15</sup> It is axiomatic that the services performed by design professionals are not required to be perfect and are judged against the competence level of similar professionals in the surrounding area.<sup>16</sup> Similar to the services of a project's primary design professional, the peer reviewer's services also must comply with the standard of care.

### A. Legislation Designed to Protect Peer Reviewers

Given the importance of a peer review and the potential liability that could result from a peer reviewer's failure to detect an error coupled with the nominal sum that many peer reviewers are paid for their services, states such as Kansas<sup>17</sup> and Missouri<sup>18</sup> have enacted legislation to protect peer reviewers from liability arising out of their peer review services. The Kansas statute, for example, renders the peer reviewer immune from civil liability if it acted in good faith and without malice and its actions are reasonably related to the peer review process.<sup>19</sup>

In March 2017, the National Society of Professional Engineers (NSPE) adopted a proposed Model Peer Review Statute.<sup>20</sup> The purpose of the Model Statute is to protect engineers participating in peer reviews and post-project review processes.<sup>21</sup> The NSPE stated that peer reviews

lead to improved practices [and] will also inherently benefit the public health, safety, and welfare. Well-crafted peer review legislation which includes appropriate safeguards can help to limit the liability and risk exposure for both engineers and engineering firms that employ peer reviewers as well as those engineers who actually perform the peer reviews and post-project reviews.<sup>22</sup>

### B. Other Contractual Considerations to Protect Peer Reviewers

In states that have not yet adopted peer review legislation, a peer reviewer can take steps to limit its potential risk contractually by incorporating certain provisions within its professional service agreement. These provisions include, but are not limited to, (a) incorporating a limitation of liability, such as a provision limiting liability to fees earned; (b) mutually waiving consequential damages; (c) eliminating personal liability;<sup>23</sup> and (d) limiting the scope of work to specific elements being "peer reviewed."

The EJCDC offers a template agreement for the provision of peer review services. The E-581, Agreement among the Owner, Design Engineer, and Peer Reviewers for Peer Review of Design, includes a waiver of claims by the engineer of record against the peer reviewer and an indemnification commitment by the owner on behalf of the peer reviewer, in an effort to "induce potential reviewers to participate and to encourage an independent and candid review."<sup>24</sup>

### C. A Peer Reviewer's Potential Liability to Third-Parties

A key consideration for a peer review firm should include whether it could face potential liability to a third party with whom it is not in privity for negligently performing a peer review. Massachusetts has specifically addressed this issue. In *Meridian at Windchime, Inc. v. Earth Tech, Inc.*,<sup>25</sup> an engineering firm contracted with a town to perform a peer review of a residential development. A series of construction issues arose and the contractor commenced an action against the peer review firm sounding in negligence. The Appeals Court of Massachusetts found that absent a contractual relationship, a peer review firm that is in privity of contract with a town does not owe a duty of care to a third-party developer or contractor unless that third party reasonably relied on the peer reviewer's services and the peer reviewer was aware of this reliance.

Specifically, the *Meridian* court found that the contractor could not have reasonably relied on the peer reviewer's services because (1) the contract between the peer reviewer and the town specifically provided that the peer review firm did not bear responsibility for the contractor's means and methods of construction; (2) the peer review firm informed the developer in writing at the commencement of the project that it would not be responsible if the contractor deviated from the approved subdivision plans; and (3) the developer hired its own project engineer, yet it chose to rely on the peer review firm in lieu of relying on the advice of its own engineer.

## III. The Role of the Peer Reviewer During the Project and Beyond

Given the somewhat unique role of a peer reviewer, firms performing peer review services face the prospect of transitioning their services from a design professional responsible for reviewing the primary professional's designs for code compliance and safety issues,<sup>26</sup> to the role of an expert witness in the event issues arise with the primary professional's design services.

**The peer reviewer's work product performed prior to any litigation, including its conversations and written materials, are likely discoverable in future litigation as factual testimony rather than expert materials.**

This was the precise situation in *School Board of Broward County v. Pierce Goodwin Alexander & Linville*, where a school board undertook an extensive multiphase renovation to an existing high school.<sup>27</sup> In light of the project size and complexity, the

school board also retained “ongoing services of a peer reviewer to monitor and offer a second opinion of the design plans.”<sup>28</sup> The court recognized that in addition to reviewing the primary professional’s services, the peer reviewer was also the arbiter if “disputes regarding interpretation of the building codes arose” during the project.<sup>29</sup> During the initial phase of the designer’s performance, the peer reviewer identified certain code compliance issues with the designer’s plans and repeatedly notified the designer of the deficiencies.<sup>30</sup> Relying on the peer reviewer’s work product, the school board later asserted claims against the primary professional for certain errors and omissions that allegedly arose from the identified code compliance issues.

Peer reviewers may be retained in certain situations as nontestifying experts. Federal Rule 26(a)(2)(B) recognizes the existence of this type of “hybrid witness” who is “employed in some capacity, but not specifically for the purpose of giving expert testimony.”<sup>31</sup> While an owner’s goal may be to engage the peer reviewer as a nontestifying expert pursuant to local rules, the peer reviewer still may be obligated to appear for a deposition or testify during trial due to his/her factual knowledge or involvement in the underlying project. Additionally, firms or individuals with no connection to the facts of the underlying project who are retained solely for the purpose of litigation must comply with the state or federal disclosure requirements.<sup>32</sup> The party designating the expert or in control of the witness “bear[s] the burden of demonstrating that their designated expert is not one retained or specially employed to provide expert testimony in the case, and not one whose duties as an employee of the party regularly involve giving expert testimony.”<sup>33</sup>

Because most states require expert testimony to establish that a design professional or contractor deviated from the applicable standard of care, some find it economical to engage the peer reviewer as the owner’s expert rather than retaining an additional consultant.<sup>34</sup> However, consideration must be given to the discoverability of documents prepared by a peer reviewer also serving as an expert witness. For example, the peer reviewer’s work product performed prior to any litigation, including its conversations and written materials, are likely discoverable in future litigation as factual testimony rather than expert materials.<sup>35</sup> Failure to appreciate the distinction between a hybrid witness and a retained expert also may cause other problems with respect to required expert disclosures, ability to take depositions, and other discovery requirements.<sup>36</sup>

#### IV. Takeaways

As evidenced in this article, peer reviews are gaining prevalence on construction projects. The reviews are beneficial to multiple parties as they identify potential errors and omissions within design and construction documents, thereby reducing costs associated with design changes and delays in construction. In order to ensure that the peer review is successful, project owners should keep in mind the following issues and/or take the following steps:

- (a) a peer review is typically a worthwhile investment;
- (b) given the relatively low fees associated with a peer review,

indemnification or other limitations of liability may be necessary to induce professionals to assume the role of peer reviewer; (c) determine if design professional will be solely a peer reviewer or act in a hybrid role; (d) negotiate and execute a professional service agreement that clearly defines each party’s role, including the scope of the peer review; and (e) comply with the agreement’s terms with respect to the roles and methods of communication.

Similarly, design consultants should consider (a) the project requirements; (b) cooperation with ownership, design, and construction team; (c) whether they are practicing in a jurisdiction that provides statutory protections for the performance of peer reviews; (d) their ability to negotiate for the inclusion of risk-limiting provisions within their professional service agreement; (e) whether they could face potential exposure to third parties for their peer review services; and (f) the potential risk versus the benefits of performing services for the project. ■

#### Endnotes

1. See ASCE Policy Statement 351, Peer Review, defining a peer review as “the practice of obtaining an independent, unbiased evaluation of the adequacy and application of engineering principles, standards and judgment from an independent group of professionals having substantial experience in the same field of expertise.”
2. City of Miami, Structural Peer Review (revised Apr. 2, 2015), <http://www.miamigov.com/Building/Docs/Dropdown-Forms/StructuralPeerReview.pdf>.
3. New York City Building Code § 1617, available at [https://www1.nyc.gov/assets/buildings/bldgs\\_bulletins/bb\\_2015-031.pdf](https://www1.nyc.gov/assets/buildings/bldgs_bulletins/bb_2015-031.pdf).
4. San Francisco Administrative Bulletin 082, available at <http://sfdbi.org/sites/default/files/AB-082.pdf>.
5. Structural Peer Review Program, City of Chi., [https://www.cityofchicago.org/city/en/depts/bldgs/supp\\_info/structural\\_peer\\_reviewprogramoverview.html](https://www.cityofchicago.org/city/en/depts/bldgs/supp_info/structural_peer_reviewprogramoverview.html).
6. 967 A.2d 702, 714 (Me. 2009).
7. See, e.g., Jeffrey D. Masters & John R. Musitano Jr., Managing Liability Risks in Green Construction, 30 L.A. Law. 17, 20 (December 2007) (“Peer review is even more critical on green projects because of the varying levels of green experience and expertise among design professionals. This is particularly true regarding selection and specification of green products and components”).
8. 2 PhilP L. Bruner & PatriCk J. o’Connor, Bruner & o’Connor on ConstruCtion Law § 7:133, Project risks— Communication risks—Poorly coordinated contract documents (citing wiLLiam t. nigro & martha w. nigro, rediCheCk interdisCiPlinary Coordination 4 (1987) (“An average project contains five coordination errors per contract drawing. The number of coordination errors can be staggering on a large project. A project of 500 drawings will typically contain 2,500 coordination errors.”)).
9. Id.
10. Keith R. Molenaar, Amy Javernick-Will, Alfonso G. Bastias, & Meredith A. Wardwell, Construction Project Peer Reviews as an Early Indicator of Project Success, J. mgmt. in eng’g (Oct. 2013).
11. 845 So. 2d 161, 163 (Fla. 2003).
12. Id.

13. *Swire P. Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1377 (S.D. Fla. 2001), *aff'd*, 331 F.3d 844 (11th Cir. 2003).
14. *Id.* at 1381.
15. *Sch. Bd. of Broward Cnty. v. Pierce Goodwin Alexander & Linville*, 137 So. 3d 1059, 1065 (Fla. 4th Dist. App. 2014).
16. *530 E. 89 Corp. v. Unger*, 388 N.Y.S.2d 284, 285 (N.Y. App. Div. 1st Dep't 1976), *aff'd*, 373 N.E.2d 276 (N.Y. 1977) (architects, like other professionals, must meet the test of ordinary and reasonable skill usually exercised by one of that profession); *Bayshore Dev. Co. v. Bonfoey*, 75 Fla. 455, 463, 78 So. 507, 510 (1918) (applying Florida common law, an architect's undertaking does not imply or guarantee a perfect plan or satisfactory result).
17. *kan. stat. ann. § 74-7047* (2016).
18. *mo. rev. stat. § 537.033* (2012).
19. *kan. stat. ann. § 74-7047* (2016).
20. Nat'l Soc'y of Prof'l Eng'rs, NSPE Position Statement No. 1780—Peer Review Legislation (Mar. 2017) <https://www.nspe.org/sites/default/files/resources/GR%20downloadables/Peer-Review-Legislation.pdf>.
21. *Id.*
22. *Id.*
23. Note that design professionals may have personal liability arising from their professional services due to statutory requirements. As such, provisions eliminating personal liability may not be applicable in all circumstances. Notwithstanding this caveat, it is recommended that they be included within the professional service agreements.
24. See eng'rs Joint ContraCt doCuments Comm., *Commentary on the eJCdC engineering serviCes doCuments* (2014), available at [https://www.asce.org/uploadedFiles/Publications/Books\\_and\\_Standards/Content\\_Pieces/E-001-2014.pdf](https://www.asce.org/uploadedFiles/Publications/Books_and_Standards/Content_Pieces/E-001-2014.pdf).
25. 81 Mass. App. Ct. 128, 134, 960 N.E.2d 344, 349 (2012).
26. See *Prieto v. Malgor*, 361 F.3d 1313, 1318 (11th Cir. 2004) (defining a “hybrid” witness as one who is “called upon to testify to both factual and expert matters”).
27. 137 So. 3d 1059, 1062 (Fla. 4th Dist. App. 2014).
28. *Id.*
29. *Id.* at 1065.
30. *Id.* at 1062.
31. See *fed. r. Civ. P. 26*; *Meredith v. Int'l Marine Underwriters*, CIV.A.JKB-10-837, 2011 WL 1466436, at \*4 (D. Md. Apr. 18, 2011) (these criteria also define a category of expert witnesses who are not required to file reports: i.e., those who are or have been employed by the party in some capacity but not specially for the purpose of giving expert testimony).
32. *Nat'l R.R. Passenger Corp. v. Ry. Express, LLC*, 268 F.R.D. 211, 217 (D. Md. 2010); see also *Prieto v. Malgor*, 361 F.3d 1313, 1318–19 (11th Cir. 2004) (requiring a police officer to produce an expert report before testifying on the appropriateness of level of force exhibited by officers when his testimony was based exclusively on his review of police reports and depositions); *McCulloch v. Hartford Life & Acc. Ins. Co.*, 223 F.R.D. 26, 28 (D. Conn. 2004) (finding that testimony regarding the adequacy of performance requires an expert report); *Funai Elec. Co.*, CIV.A.04-1830-CRB, 2007 WL 1089702, at \*5 (N.D. Cal. Apr. 11, 2007) (concluding that technical evaluations based on documents reviewed solely for litigation purposes require production of an expert report).
33. *Lee v. Valdez*, CIV.A.3:07-CV-1298-D, 2008 WL 4287730, at \*2 (N.D. Tex. Sept. 18, 2008).
34. *Miller v. L.A. Cnty. Flood Control Dist.*, 505 P.2d 193, 202 (Cal. 1973) (competent expert testimony is required to establish that a contractor deviated from the standards prescribed by law or prevailing in the industry).
35. *Nat'l R.R. Passenger Corp.*, 268 F.R.D. at 216–17 (in discussing discovery obligations for hybrid witnesses, the district court opined that “a party may not circumvent the requirements of Rule 26 by employing a witness, like a treating physician who treated an injured party, to provide testimony extending into classic expert opinion regarding causation and prognosis”); see also *Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1, 2 (D. Mass. 1996) (requiring expert reports from plaintiff's treating physicians, who were going to offer testimony based on “professional expertise going beyond treatment per se”); *Hall v. Sykes*, 164 F.R.D. 46, 48 (E.D. Va. 1995) (requiring expert reports where a treating physician formed a medical opinion based upon factors not learned in the course of treating the patient). For example, in *Desrosiers*, testimony about the day-to-day ordinary operation of a boring machine as observed by witnesses was not subject to expert report requirements, but testimony by the same witnesses as to the effects a guard would have had in preventing an accident on the machine required an expert report. *CIV.A.WDQ-07-2253*, 2009 WL 4406149, at \*5–6 (D. Md. Nov. 25, 2009); see also *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203–04 (4th Cir. 2000) (explaining that it is expert witness testimony to answer hypotheticals and draw conclusions that are not based on first-hand knowledge); *KW Plastics*, 199 F.R.D. 687, 689–90 (M.D. Ala. 2000) (testimony by a company's comptroller about the prospective damages his company would face as a result of alleged tortious activity and a breach of contract is likewise subject to the expert reporting requirement).
36. *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 501 (D. Md. 1997) (noting that as it relates to discovery obligations, “[t]he failure to appreciate the distinction between a hybrid witness and retained expert can be a trap for the unwary”).

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