Background on the American legal system

(What follows is a rough sketch of some major structures within the U.S. legal system, together with some pointed/contentious/idiosyncratic/cranky observations about the way the system works.)

I. Buzzwords and key distinctions.

A. **Civil litigation** and **criminal prosecution.**

1. **Civil litigation:**

a. Typically initiated by private parties (individuals, partnerships, corporations).

b. Relief granted includes:

(1) Money damages paid to the injured party;

(2) Orders **(injunctions)** preventing future injury.

c. Social interests are sometimes at stake, but sometimes not; the conduct at issue is not necessarily illegal or even immoral (for example, breach of contract).

2. **Criminal prosecution:**

a. Initiated by public authorities (the U.S. attorney, the District Attorney) in the name of the people.

b. Conviction results in such penalties as prison sentences (for felonies), jail sentences (for misdemeanors), fines usually paid to the public treasury.

c. Criminal prosecutions recognize private interests to some extent (for example, statements by victims prior to sentencing, restitution to victims as a condition of probation), but are focused on interests of society at large.

d. In most instances, there is a strong correlation between criminal law and widely shared moral standards.

(1) As a result, criminal cases often turn on intent. In a homicide trial, the issue is not merely whether the victim died, but also the accused's state of mind - the presence or absence of "malice," "deliberation and premeditation," "wanton disregard for human life."

3. Some behavior may give rise to both civil and criminal liability.

a. Most assaults are dealt with by the police and the criminal justice system, but if the assailant has money or insurance, the victim can also sue to be compensated for his injuries.

b. Different standards apply in civil and criminal cases.

(1) To collect money damages after an accident, the victim need only prove negligence; to put the responsible party in jail, the prosecutor must prove recklessness.

(2) Civil claims are established by preponderance of the evidence; criminal charges by proof beyond reasonable doubt.

B. **Trial courts, appellate courts and administrative agencies.**

1. **Trial courts** - such as U.S. District Courts and California Superior Courts - receive evidence, find facts, and apply the law to the facts they find.

2. **Appellate courts** - such as the U.S. Courts of Appeals and Supreme Court, the California Courts of Appeal and Supreme Court - can be asked by the parties to review decisions of trial courts to ensure that the law has been applied correctly.

3. Implications of this division of roles:

a. Trial courts hear what witnesses have to say, but appellate courts act on the written record of what happened below; the

"INSTRUCTION MANUAL" USED BY CALIFORNIA JUDGES.

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DUTY OF PROFESSIONAL

Requested by Plaintiff		Requested by Defendant		Requested by	
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn					

Judge

Print Date 1/86

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In performing professional services for a client, a _____ has the duty to have that degree of learning and skill ordinarily possessed by reputable _____, practicing in the same or a similar locality and under similar circumstances.

It is his or her further duty to use the care and skill ordinarily used in like cases by reputable members of his or her profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his or her best judgment in the exercise of his professional skill and in the application of his learning, in an effort to accomplish the purpose for which he or she was employed.

A failure to fulfill any such duty is negligence.

NOTE: THIS IS CIVIL NEGLIGENCE. CRIMINAL NEGLIGENCE REQUIRES A MORE SERIOUS ACT OR BREACH OF DUTY.

Team liable for fatality

The family of an ironworker killed by a falling truss was entitled to $3.3 million from the owner, general contractor and architect-engineer on a project, a Michigan appeals court has ruled.

William P. Phillips, a 22-year-old ironworker employed by Steelcon Inc., was killed on an auto assembly plant project in Michigan owned by Mazda Motor Manufacturing Corp. Kajima International Inc. was the general contractor and Andrew Elliot & Associates was the architect-engineer.

As a "connector" for the steel subcontractor on Jan. 4, 1986, Phillips was connecting two 60-ft-long trusses to the top of a 37-ft-high column. The column leaned and fell, carrying the trusses with it. Phillips was thrown from the steel framework and pinned underneath a fallen truss. Phillips was cut almost in half by the truss and was conscious for about a half hour before he was freed. He died later in a hospital.

The columns were secured at their base to concrete caissons by anchor bolts and had shim packs—groups of thin metal plates—placed in between. The columns were not braced or shored. Phillips' parents sued Mazda, Kajima and Elliot for the wrongful death of their son, arguing that the method of erecting the columns was dangerous.

Following a trial in Michigan state court, a jury awarded the family $3.3 million, finding all three defendants liable for the accident. The companies appealed to the state Court of Appeals, which upheld the verdict.

According to the appeals court, the employer of an independent contractor generally cannot be held liable for the contractor's negligence. However, there is an exception when the independent contractor is hired to do work that is inherently dangerous. The court concluded that the work performed by "connectors" is inherently dangerous. Thus, both Mazda and Kajima could be held liable for the dangerous way in which the columns and trusses were erected, said the court.

The court also ruled that Kajima was liable for the negligence of Steelcon, because the general contractor was responsible for safety policies on the job site, and because it took part in the decision to use shim packs.

The court concluded that Elliot also was liable because the architect-engineer's contract required it to observe construction. The court noted that an expert witness testified that Elliot had a duty to monitor the steel erection, that the use of shims was very dangerous and that the frame should have been supported. *Phillips v. Mazda Motor Manufacturing Corp., 516 N.W.2d 502 (Mich. App. 1994).*

Defective saw blade cuts manufacturer

A New York State appeals court has upheld a $780,000 award to a construction worker injured when a piece of a defective saw blade flew off a pavement cutting machine.

Robert S. Van Deusen was injured while working as a flagger for R.V.L. Contracting Inc. on a New York road consruction site. He was struck by a piece of a diamond-tipped saw blade that his employer was using to cut pavement. Van Deusen suffered permanent damage to his hand, wrist and arm.

Van Deusen sued Norton Construction Products, which manufactured the saw blade in 1981. He claimed that the saw blade was defective. After the accident, the blade had only five of its original 31 segments remaining in place.

After a trial in state court, a jury awarded Van Deusen $780,873, finding that Norton was negligent and that the blade had a manufacturing defect. Norton appealed unsuccessfully to the Appellate Division of the state Supreme Court. The court noted that two engineers had testified at trial that the blade contained excessive brazing material, which caused the blade to have weak joints. Although another engineer had testified that the blade was not defective, the appeals court concluded that there was sufficient evidence to support the jury's finding.

The court also ruled that there was evidence that Norton was negligent in inspecting and testing the blade for defects before it put it on the market. *Van Deusen v. Norton Co., 612 N.Y.S.2d*

Loaned worker gets damages for injuries

A laborer on loan to a testing firm was entitled to $500,000 for injuries suffered while helping the firm test pipes fabricated by his employer, a Louisiana appeals court has ruled.

On Sept. 21, 1989, Dennis Cavalier was injured while conducting hydrostatic testing of pipe at Transcontinental Gas Pipeline Corp.'s compressor station in Gibson, La. Transcontinental had hired his employer, WHC Contractors, to fabricate and install pipe at the station. WHC subcontracted testing to Cain's Hydrostatic Testing Inc.

Cavalier had been instructed to help a Cain's employee test the pipe. He was injured when he removed a plug from a pressurized valve. Cavalier sued Cain's and Transcontinental, but settled with the owner before trial. A jury concluded that WHC was 80% at fault and Cain's 20% and that Cavalier suffered damages of $500,000. The judge ordered Cain's to pay $100,000.

Cain's and Cavalier appealed to the Louisiana Court of Appeal. It said Cain's was at fault because the firm did not train Cavalier. "Cain's owed a duty to train and/or warn Cavalier [and] breached this duty by allowing an inexperienced worker to assist with testing." The court ordered Cain's to pay the full $500,000 because the firm was "the only remaining blameworthy" party in Cavalier's lawsuit. *Cavalier v. Cain's Hydrostatic Testing Inc., 637 So.2d 724 (La. App. 1994).*

its supervisory jurisdiction to review a lower court's denial of summary judgment, the court dismissed the case. The action furthers "judicial efficiency and fundamental fairness," said the court. *Apolinar v. Professional Construction Services, Inc., 650 So.2d 1239 (La. App. 1995).*

Engineer has duty to protect workers

An engineer that had general supervisory powers over a sewer project on behalf of an owner but no safety responsibility could be liable for the death of a construction worker because it had actual knowledge of unsafe conditions in a trench, a New Jersey appeals court has ruled.

Francisco F. Carvalho was crushed to death while working in an unshored trench for excavation subcontractor Jude Enterprises. It had been hired by Toll Brothers, the contractor installing a sewer for West Windsor Township. The project was designed by Bergman Hatton Engineering Associates.

Under the construction contract, Bergman was to have a full-time representative onsite to ensure that Toll performed according to plans and specifications. The engineer could stop work and order work improvements, but the contract specifically noted that "the contractor alone shall be responsible for the safety, adequacy and efficiency of his plant, equipment and methods."

Carvalho's widow filed a wrongful death lawsuit against Toll Brothers, Bergman and the township. The trial court dismissed the suit against the West Windsor on procedural grounds and the plaintiff settled with Jude and Toll Brothers. The court also granted Bergman's motion for summary judgment on the grounds that the contract clearly limited its responsibility for jobsite safety. The judge said Bergman had no duty to warn workers.

Not so, said the Appellate Division of the New Jersey Superior Court. Although noting that there was no other state case on point and a split of opinion in other jurisdictions, it reversed the summary judgment and sent the case back for further proceedings.

"Generally the inquiry focuses on the extent to which the professional assumes a supervisory role under relevant provisions of the construction contract," said the court. "Nevertheless, it is clear that an engineer or architect may owe a duty, despite the absence of any contractual obligations concerning safety, when [they have] knowledge of a dangerous condition."

In this case, Bergman site representative Bruce Stoneback testified in depositions that he was aware that trench boxes normally were used to protect workers. He also said parts of the trench had collapsed previously, soil in the trench was unstable with pools of water visible, and he recognized that a 13-ft deep trench was dangerous.

"We are satisfied that Bergman owed a duty to take some reasonable action to prevent injury to workers," said the appeals court. "This is not a breach of contract case...Contractual duties are imposed by agreement between the parties. A duty of care owed by an engineer under tort law is based primarily on social policy."

According to the court, a duty was owed because it was reasonably foreseeable to Stoneback and Bergman that a worker may be killed or injured unless action was taken to prevent it. *Carvalho v. Toll Bros. & Developers, 651 A.2d 492 (N.J. Sup. App. Div. 1995).*

SITE SAFETY: RIGHTS, RISKS AND RESPONSIBILITIES

In the thorny arena of construction site safety, liability often hinges on small details. A review of recent cases suggests that engineers need to be more aware of their legal obligations so that they can protect themselves as they protect others.

THOMAS W. SMITH III

On average, about 1,000 U.S. construction workers have died at the jobsite each year for the past 16 years—more fatal injuries than in any other industry, according to the National Institute for Occupational Safety and Health (NIOSH) and the Bureau of Labor Statistics.

Injured workers and families of the deceased usually turn first to workers' compensation, and NIOSH reports that construction injuries account for 15% of workers' compensation costs, but payouts are usually much lower than the expected yield from a court case. Add the fact that injured workers generally cannot sue their employers under state workers' compensation laws, and the result is a steady stream of lawsuits against another group—architects and engineers (A/Es). DPIC, an insurance company in Monterey, Calif., reports that construction site safety accounts for about one in 10 liability claims against A/Es, and underwriter Victor O. Schinnerer & Co., Chevy Chase, Md., reports that approximately 8% of claims against their A/E clients involve construction worker injury.

Today's construction projects can be complex, and A/Es are assuming multiple roles and responsibilities in alternative project delivery methods such as design/build and construction management. It is therefore more important than ever for A/Es to understand their legal obligations relating to construction site safety and to be aware of the court rulings that have defined and shaped those obligations.

Professional liability generally hinges on whether an A/E owed a duty, or legal obligation, to the injured party. This determination, based on common law, contract obligations, state safe-place statutes and Occupational Safety and Health Act (OSHA) regulations, is not always consistent, even in similar cases, because of the many factors involved and differing court opinions.

DEFLYING DUTIES

Common law duties, which derive from usages and customs as enforced by the courts, can vary from place to place. To show negligence, an injured party must show a duty on the part of the A/E, breach of that duty, and consequent loss or damage. Currently, a contractual relationship between the injured party and the negligent party is not a prerequisite for a lawsuit.

To assess an A/E's professional duty for construction site safety, courts generally have considered the A/E's responsibility to supervise or control construction and worker safety as defined by contractual arrangements or by federal or state legislation. The courts also have recognized legal duties and imposed liability when A/Es, by their conduct at the site, have voluntarily assumed safety responsibilities. Conduct that may create professional duties includes control and supervision of workers and the means and methods of construction, safety inspections, control over safety precautions and procedures, and having the right to stop the work.

When an A/E does not assume

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commission decision.

Similarly, the commission ruled in 1993 that a design firm that did not exercise substantial supervision over construction was not subject to OSHA construction standards. On appeal, the U.S. Court of Appeals for the First Circuit affirmed the case on the narrow ground that the firm had no employees on the site at the time of the accident.

More recently, however, the OSHA commission held that an engineering firm was subject to the OSHA construction standards in a case involving a methane gas explosion that killed three employees working on a water pollution abatement project in Milwaukee. Both the engineer and the construction contractor received OSHA citations, but the administrative law judge ruled that the engineering firm did not exercise supervision over the construction and was not subject to OSHA standards. The commission reversed the decision, finding that the engineer's tasks were broad and involved hands-on oversight. The commission noted that the engineering firm had overall managerial or administrative responsibilities under its contract for construction management and planning and had broad contractual and de facto safety authority. On appeal to the Federal Court of Appeals, the case was recently sent back to the commission on a procedural matter.

In another recent case, an engineering firm was retained by an architect to inspect for contractor compliance with plans and specifications for a university building in New York. After a shoring collapse injured three employees, OSHA issued a citation to the firm. Affirming the decision of the administrative law judge, the commission ruled that the regulations were not applicable because the firm did not have overall managerial or administrative responsibility for the project. The commission also noted that the engineer had no contractual or actual authority to direct the work of the contractors, although the firm did notify the contractor of observed safety hazards. The secretary of labor appealed the decision to the U.S. Court of Appeals for the Second Circuit but subsequently withdrew the appeal.

The original precedent appears to remain intact, absolving from OSHA safety regulations an A/E who provides traditional on-site construction services but does not perform actual construction work or exercise actual or de facto supervisory authority over construction. The precedent is important because facts established in OSHA enforcement proceedings may also adversely affect the defense against third-party civil actions under the legal doctrine of "collateral estoppel," depending on the circumstances and laws of the governing jurisdiction.

As A/Es continue to become involved in new methods of project delivery, they should have a basic understanding of the sources of their rights and obligations and the consequences of their actions from the standpoint of construction site safety liability. In this way, A/Es can ensure that their expertise and compensation are consistent with the assumption of additional safety responsibilities. Regardless of their project roles, however, A/Es should remember their overriding moral and ethical duties and obligations to hold paramount the safety, health and welfare of the public in the performance of their professional duties. ♥

Thomas W. Smith III, A.M.ASCE, is ASCE's general counsel.

WHO SHOULD BE RESPONSIBLE FOR SITE SAFETY?

THE CONTRACTOR

Pros:

- **Contractors control the site, hire and supervise workers and subcontractors, and determine the means and methods of construction.**
- **Contractors have construction expertise and training.**
- **Contractor responsibility is generally accepted and included in standard contract documents endorsed by a leading contractor organization.**

Cons:

- **Some hazardous work may require technical expertise not normally possessed by a contractor.**
- **Safety management on multicontractor jobsites is challenging.**

THE ARCHITECT/ENGINEER

Pros:

- **A/Es can design structures that are safe to build, including temporary shoring.**
- **A/Es can review construction progress and contractor submittals.**
- **Some hazardous work may require technical expertise not normally possessed by a contractor.**

Cons:

- **A/Es do not control the contractor's employees and are generally not able to mandate safety procedures.**
- **A/Es often are not trained or experienced in construction methods and safety.**

THE OWNER

Pros:

- **Owners have the right to control the site and the selection and compensation of contractors and design professionals.**

Cons:

- **Many owners have no training or experience in construction or construction safety.**
- **Historically, owners have delegated safety responsibility to contractors.**

SHARED RESPONSIBILITY

Pros:

- **Every project has unique safety problems, and all parties should promote and thus be responsible for construction site safety.**

Cons:

- **Accountability is lost if responsibility is not assigned to a single party.**

responsibility for construction safety, the courts have not recognized a legal duty. A Georgia court ruled that a highway design engineer who reviewed shop drawings submitted by a contractor and failed to note the absence of handrails was not liable for a worker's fall from an unguarded walkway. The court explained that temporary handrails "are primarily a safety measure rather than an inherent design requirement of the structure" and that the duty for workers' safety rested with the contractor, because the engineer had no site control or supervisory responsibility for the workers.

In a recent and much-discussed case, the Supreme Court of New Jersey found that an engineer had a legal duty for the safety of workers on a construction site. The engineer, who was sued by the widow of an excavation company worker killed when a trench collapsed at a sewer installation site, had a contractual responsibility for the progress of the work, but not for the safety conditions. The state supreme court reversed a trial court ruling in favor of the engineer, noting that the engineer had responsibility for monitoring work progress, sufficient control to halt construction, a representative on the site each day and knowledge of the dangerous condition from which the risk of injury was clearly foreseeable. The court noted that actual knowledge of the risk of harm can be an "extremely important" factor in assessing liability. The facts in this case were compelling: the engineer observed the collapse and knew of the condition of the trench, having observed a similar collapse earlier.

Courts often consider the A/E's actual knowledge of a dangerous condition when determining liability, though the ramifications of that knowledge are not always the same. Like the New Jersey case, a recent Ohio decision implied that A/Es having actual knowledge of a hazard may have a duty to stop or prevent the dangerous condition. In another Georgia case, however, the court ruled that a municipal engineer was not liable for the death of a worker in a sewer line trench collapse because the engineer, although present on the day of the accident and aware that the trench was not shored, had no responsibility for safety inspections. And in a case filed by the heirs of three workers killed in a sewer line trench cave-in, the Supreme Court of Mississippi ruled that although the architect had prior knowledge of dangerous soil conditions on the site, he had no general supervisory duties and thus was dismissed from the case.

Regardless of liability issues, knowledge of a hazardous situation is an important ethical consideration, and engineers should not shirk their responsibility to warn others of danger. See the ASCE Code of Ethics, Canon 1, and supporting guidelines: "Engineers shall hold paramount the safety, health and welfare of the public . . . in the performance of their professional duties."

CONTRACT DEFENSE

In addition to the conduct of the parties in a construction contract, the courts place a great deal of credence on contract language to allocate responsibility. In three recent cases, courts ruled that when no evidence suggests that A/Es voluntarily assumed responsibility, they are not liable for worker deaths or injuries when contract language specifically exempted them from such responsibility or assigned it elsewhere.

The state supreme court reversed a ruling in favor of the engineer, noting that the engineer had sufficient control to halt construction and knowledge of the dangerous condition.

To protect engineers, the Engineers Joint Contract Documents Committee, comprising ASCE, the National Society of Professional Engineers and the American Consulting Engineers Council, publishes contract documents for use in construction projects. The construction general conditions, developed with and endorsed by the Associated General Contractors of America, state that the contractor is "solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the work." The general conditions also explicitly state that the owner and the engineer are not responsible for the means and methods of construction or for related safety precautions and programs.

The rationale behind these s
contract provisions is that the cont
the party with authority and accou
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sibility for ensuring safety. The A
Institute of Architects' construction
conditions contain similar language

Many states have enacted statu
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A/Es. New York's labor laws, for
provide that "all contractors and
and their agents" must comply wit
requirements when constructing o
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These statutes vary from states
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A/E is responsible for supervisio
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where they provide services.

Congress enacted OSHA in
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requires that every employer p
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cause death or are likely to cause
serious physical harm to employee
OSHA, the secretary of labor has
specific regulations for the con
industry stating that A/Es deem
"engaged in construction work"
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The proceedings may result in
penalties and in some cases ma
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BROKEN "ENGAGEMENT"

A 1977 decision by the OSHA Rev
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commission held that an A/E firm
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Sentence Is Upheld In Cyanide Exposure

SAN FRANCISCO, Oct. 23 (Reuters) — A federal appeals court upheld a 17-year sentence today against an owner of an Idaho fertilizer company for exposing employees to cyanide. The term was the longest ever handed down for an environmental crime.

The court threw out a $6 million fine levied against the owner.

In handing down its decision, the United States Court of Appeals for the Ninth Circuit rejected defense arguments that the matter should have been tried in state court.

But the three-judge panel also said the crime was not subject to mandatory restitution and voided a court-ordered $6 million restitution payment to Scott Dominguez, a former employee who was left brain damaged, and his family.

Prosecutors said that over two days in August 1996, Allan Elias, then the owner of the Evergreen Resources fertilizer company, told workers who were wearing only jeans and T-shirts to enter a 25,000-gallon storage tank and clean out cyanide waste. Federal safety officials had notified Mr. Elias about the dangers of cyanide and the protective gear needed, they added.

Mr. Dominguez, who was 20, collapsed inside the 11-foot-high, 36-foot-long tank and could not be rescued for nearly an hour because Mr. Elias had not given workers the required rescue equipment, prosecutors said.

In 1999 Mr. Elias was convicted of having knowingly exposed his employees to industrial cyanide and of illegally disposing hazardous waste at his business in Soda Springs, Idaho. The judge also ordered him to pay $400,000 to clean up the site.