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The Standard of Care: Setting the Bar for Your Performance

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

It is no secret that clients file the vast majority of claims against design professionals. And inevitably, each one of these claims involves unmet client expectations.

In some cases, the client has every right to be upset. When a design firm's negligent errors or omissions result in long project delays, extensive added costs or serious project flaws the client is justified in filing a claim against the design firm to try to recoup its losses.

In other cases, however, clients simply expect too much from their design teams – they demand perfection. Any minor delay, added cost or design change is taken as a sign of incompetence on the part of the architect or engineer. Unreasonable clients are quick to file a claim against a design professional even though the cause of their upset is nothing more than a common project snafu that can – and should – be resolved through cooperation rather than confrontation.

Managing client expectations is key to avoiding these unnecessary confrontations, demands and claims. When clients are educated as to what to expect during the design and construction phases of their projects and what standards design firms must meet, then minor upsets can be viewed as nothing more than everyday hiccups in the design and build process and energy can be directed toward resolving these routine problems amicably and effectively.

Sophisticated clients are aware of the ups and downs of the design and construction process and work with the designer and contractor to remedy project upsets. However, clients unfamiliar with the trials and tribulations of a project need to be educated on the process before design and construction begin. One of the first concepts to explain to these clients is the prevailing "standard of care" for design professionals.

Understanding the Standard of Care
Your clients need to understand that all that is required of you as a design professional is to:

1) Perform all of the services outlined in your agreement and
2) Render your design services with the ordinary degree of skill and care that would be used by other reasonably competent practitioners of the same discipline under similar circumstances and conditions.

This second point, known as the "standard of care," dates from English Common Law doctrine. It holds that the public has the right to expect that those providing services will do so in a reasonably normal, careful and prudent manner, as tested or established by the actions of one's own peers under like circumstances. Notice that "being perfect" isn't required; you only need to act with due skill and care.

Acting with care includes practicing within the limitations of your firm's staff size, skills and expertise. If you accept a project outside of your area of expertise, you will be expected to perform to the standards of those professionals experienced with that type of work. Likewise, you must be familiar with the standard practices within the locale in which the project resides.

The standards of design and construction are much different in Florida, for example, than in Alaska.

You must also make sure that only experienced, competent staff is assigned to the project, and that qualified subconsultants are used. And because the standard of care is a constantly moving target as the design industry evolves, continuing education and training are essential to keeping up with prevailing knowledge, technology and design. Part of meeting the standard of care is joining professional societies, subscribing to professional journals, keeping up to date on manufacturer's literature and attending relevant seminars, webinars and continuing education courses.

Setting Standards in the Owner Contract

Some clients may attempt to impose contract language that requires you to perform above the prevailing standard of care. Such language may demand that you perform "to the highest standard of practice," "in a non-negligent manner," or some other standard of perfection.

Agreeing to such contract language can be construed as making a guarantee or warranty. If you accept any contract language that raises your standard of care beyond that which is reasonable and customary for your profession, you are dramatically increasing your risk. Worse yet, your professional liability insurance may not cover you for the added exposure you have accepted contractually. The insurer will perceive this as a voluntary assumption of risk for which you would not otherwise be responsible, and therefore uninsurable.

If your client presents a contract clause that raises your standard of care to a higher level, you must make every effort to delete the offending language and return the standard back to a reasonable level. Explain to the client that such language is unreasonable and could jeopardize your insurance coverage.

There has been debate of whether or not to include any standard of care language in a contract with a client. Some argue that if your contract says you will perform to the standard of care, it might give rise to an additional cause of action against you for breach of warranty. Fortunately, the courts have disagreed with this position. A 1992 decision *(Gibbes Incorporated v. Law Engineering, 960 F 2d 146 4th Cir. 1992*) expressly found that contract language stating that an engineer "will use that degree of care and skill ordinarily exercised under similar conditions by reputable members of our profession practicing in the same or similar locality" simply incorporated the pre-existing professional standard of care into the work agreement and did not create any warranty obligation.

Historically both the AIA owner-architect agreements and the AGC's ConsensusDOCS were silent on the matter and did not provide recommended standard-of-care language. That changed in 2007 when the AIA for the first time provided the following recommended language in its B102 Form:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Generally, we feel it is a good idea to have a clause in your contract that defines the standard of care to which you agree to perform. Such language confirms that in providing services you will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. It also educates the client as to what they can expect regarding your level of service. Discussing this clause can help dispel unrealistic client expectations.

Should you feel it necessary, or if the client demands it, you can expand your standard of care contract clause by offering to correct defective services without additional fee. However, make it clear to your client that this offer does not include any construction or material costs or additional items not included in the original design scope you agreed to perform. Such language might state that, upon notice and by mutual agreement, you will correct any design services that do not meet the standard of care at no additional fee to the client. As always, work with your legal counsel to draft appropriate language.

Beyond the Contract

Be aware that your words and actions beyond the client contract can raise your standard of care above that

which is generally demanded. For instance, you leave yourself open to greater liability risk if you overstate your firm's abilities in exaggerated terms ("the best" or "most qualified") in your correspondence, marketing materials, Website or project proposals. These marketing statements can be perceived as warranties that raise your performance requirements beyond those of your peers.

Give No Guarantees
Have your legal counsel consider including a contract clause stating that you will not be required to sign any documents from any parties that would result in you having to certify, guarantee or warrant the quality of your services. Likewise, never make payment of any amount due to you contingent upon you signing a guarantee or certification.

Notice of Defects in Service
Help your client understand that the contractor may be in the best position to first spot design defects and minimize potential damages. Consider adding contract language that requires your client to promptly report any defects or suspected defects in your services so that you may take measures to minimize the consequences of such defects. Have the client further agree to impose a similar notification requirement on all contractors and subcontractors. Have your contract clause specify that failure by the client and the client's contractors or subcontractors to notify you of known or suspected design defects shall relieve you of the costs to remedying the defects above the sum such remedy would have cost had prompt notification been given when such defects were first discovered.

It's the Law
Regardless of what your client may think or expect, perfection is impossible to attain. Your best approach, therefore, is to ensure that your client has realistic expectations of you and your standard of care. Communicate early and often with your client stressing that perfection is unattainable at any price, and errors and omissions are common parts of the design and construction process.

Your client contract does not have to state that you agree to abide by the standard of care – although we recommend that such a clause be included. However, the law requires you to perform to that standard – and to compensate those who are damaged or injured due to your negligence.

When facing litigation, the plaintiff's expert witness will likely testify that you did not meet the standard of care. Your expert witness will testify the opposite. No hard and fast rules apply, especially when dealing with an unsophisticated jury. However, educating your client as to the prevailing standard of care and having appropriate contact language that does not raise that standard will significantly increase your chances of avoiding an expensive judgment.

Can We Be of Assistance?
We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.