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Standard of Care: A Moving Target

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.

Any architect or engineer familiar with the basic principles of risk management knows about the concept of the "standard of care." Put simply, the standard of care sets the benchmark for acceptable performance and provides the boundary for professional negligence.

To meet the prevailing standard of care, a design professional needs to render services with the ordinary degree of skill and care that would be used by other competent practitioners of the same discipline, under similar circumstances, considering the contemporary state of the art of the profession and geographic conditions. Note there is no call for perfection. You only need to practice in a manner that is consistent with the practice of your peers -- an *ordinary* degree of skill and care.

Sounds like a relatively easy standard to live up to, right? Keep on performing your services as you always have and you should avoid the risk of being charged with negligence.

Not so fast. There is still plenty of danger that your next client will feel you have not met the standard of care and therefore are negligent in your actions. Let's take a closer look at that danger.

It's a Changing Landscape

Think back to the practice of architecture and engineering a mere 20 years ago. Would today's clients be satisfied if you delivered the same type and level of service provided back then? Would they think your drawings, renderings, models and project delivery methods are acceptable? Could you convince a lead architect to hire you as part of a cutting-edge design team offering state-of-the-art service?

Imagine what design practices will look like 20 years from now. On second thought, don't waste your time. You'll likely be using tools and project delivery methods that don't exist today and are hardly imaginable.

The point being, the standard of care you are required to live up to is a moving target. That's why it's often referred to as the *prevailing* standard of care. Meeting the standard today does not guarantee you'll be meeting the standard tomorrow.

Your Words are Important

You are expected to live up to the prevailing standard of care whether you specifically say you will (verbally or contractually) or not. Still, your words do matter.

Suppose you say in your contract, or even in your marketing materials, that you are an "expert" in Building Information Modeling (BIM). Guess what: you have raised the standard of care to which you must practice. Practicing in an ordinary manner is now no longer sufficient. You have raised the performance bar and will be expected to perform to the level of other BIM "experts." Has a client ever presented a contract clause that begins something like:

The design professional represents that its services will be performed in a manner consistent with the highest standards of care, diligence and skill exercised by nationally recognized consulting firms offering similar services.

The client's clause might go on to say that you agree to comply with all laws, ordinances and regulations. It might say you will pay to correct all errors and omissions. It may guarantee that your documents will be 100% complete and free from defects.

Such language should be a deal-breaker for you. As we said, this contract clause raises your standard of care above and beyond the prevailing standard. And oh yeah -- if your client later comes back and files a claim against you for making a mistake and failing to perform to the highest standards of nationally recognized consulting firms, your liability is likely uninsured!

That's right. Your professional liability insurance only covers your errors and omissions that are deemed negligent according to the prevailing standard of care. If you contractually or otherwise voluntarily assume additional liabilities that you would not be responsible for absent the volunteer assumption, chances are your insurance company will *not* provide coverage for those losses should you lose a claim and be assessed damages.

Your Clients are Demanding

The onerous contract language above is an example of unrealistic client expectations. It's not unusual for unsophisticated clients to expect perfection. They simply don't recognize change orders, requests for additional information, unforeseen site conditions, faulty vendor information and the like as part of the typical design and construction process. Their expectations of perfection often manifest themselves in charges of negligence against design firms. And once a charge of negligence is made, the design firm is open to the possibility of losses regardless of how it actually performed.

A charge of negligence often brings about a trial, hearing, arbitration or other form of dispute resolution. A claim typically results in each party bringing in expert witnesses who provide testimony as to whether the designer met the prevailing standard of care. It is then up to the trier of fact, whether an unsophisticated jury or a professional judge or arbitrator, to make a determination, based on how they were swayed or not swayed by testimony. So it's perfectly possible you could perform to the standard of care but end up having to settle or pay a judgment based on the unreasonable expectations of a client and the questionable testimony of a so-called subject matter expert.

Meeting the Standard/Avoiding Claims

So how does a design firm enhance its ability to meet the prevailing standard of care and avoid claims of negligence? You begin with the basic tenants of loss prevention:

Develop your staff. Continuing education and training are paramount to keep up with the prevailing standard of care. It is critical to keep your staff's knowledge and skills well honed and up-to-date regarding the latest techniques, tools, technologies, materials, building sciences, project delivery methods and national, state and local standards, laws, licenses, regulations and codes. Subscribe to professional journals and read manufacturer's literature on their products. Be active in state and national associations and take advantage of their seminars, workshops and other education courses to deepen your knowledge base and earn the valuable learning units you need to remain a licensed professional. Participate in peer review programs. Then, only assign qualified staff to your demanding projects.

Choose clients carefully. Working on projects with sophisticated clients with whom you've enjoyed a successful long-term relationship reduces your risks immensely. Unfortunately, most design firms don't have the luxury of limiting their client base to known commodities and must take on new, unfamiliar owners. In such cases, ask the new client for references and speak to other designers about the client's expectations and willingness to deal reasonably with project upsets. It's also important to directly address issues such as the standard of care to ensure the client has reasonable expectations. If a client insists on onerous contract clauses or otherwise demonstrates a history of demanding perfection, this might be a deal-breaker.

Choose projects carefully. Make sure that the projects you accept match your experience and skill set. If you actively seek and accept a lead designer role on a BIM project, your standard of care may rise from an "ordinary" architect to an architect skilled in managing BIM projects. If you live and practice in sunny Southern California and accept a project in unfamiliar upstate New York, you will be expected to design to handle snow loads. If you take on a project of designing a hospital clean room, you will likely be held to the standard of a design firm experienced in that field. If you lack necessary skills for an unfamiliar project type or location, chances are you'll need to find and rely upon a subconsultant who has the knowledge and experience you lack.

Measure your words. Take some time to carefully review your marketing pieces. Pay particular attention to your Website, including posted bios and resumes, as well as recent client proposals. Do you describe your firm or people as "the best," "top quality" or "highly qualified"? Do you refer to your work as "state-of-the-art," "excellent" or "top-notch"? Some level of hyperbole, both written and verbal, is to be expected, and perhaps even warranted. Just be aware that your glowing words of self adulation may come back to bite you should a project dispute arise.

Establishing Your Standard of Care in Your Contract

Speaking of words, what about establishing your standard of care in your contract? Interestingly, there used to be a lot of controversy as to whether it was prudent to define your standard of care in writing to your client. Naysayers felt that committing to achieve a given standard was tantamount to providing a service warranty or guarantee that could be used against you.

Fortunately, it has become well established that providing a well written standard of care clause in your client contract does nothing more than confirm the standard that you have to live up to anyway. What's more, it can discourage an unreasonable client from filing a claim against a design firm for the failure to be exceptional or even perfect.

A few standard of care contract clauses enjoy widespread use in the design and construction industry. The American Institute of Architects came up with their first recommended wording in 2007 and it still serves them well a decade later. AIA B101-2007 reads:

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.

Engineers often favor similar language developed by the Engineers Joint Contract Documents Committee. The EJCDC E-500 owner/engineer contract clause reads:

The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services.

Other associations, such as Counsel of American Structural Engineers (CASE), as well as some insurance companies serving the professional liability needs of design firms have their own recommended language. Insurer XL Catlin provides the following in its *Contract eGuide for Design Professionals*:

In providing services under this Agreement, the Consultant shall 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 at the same time and in the same or similar locality. The Consultant makes no warranty, express or implied, as to its professional services rendered under this Agreement.

We suggest that you review these and other standard of care clauses with your attorney and develop language that you can try to include in all of your client contracts. Should a client refuse to include any type of standard of care clause in the contract, that is not necessarily a deal breaker -- as long as they don't insist on their own onerous language. Even if the contract is silent on the standard of care you are obligated to meet, you'll still be held to the prevailing industry standard.

Finally, watch your actions and words on the jobsite. Voluntarily taking on added responsibilities in the field can raise your standard of care and create liabilities, regardless of what your contract says.

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.