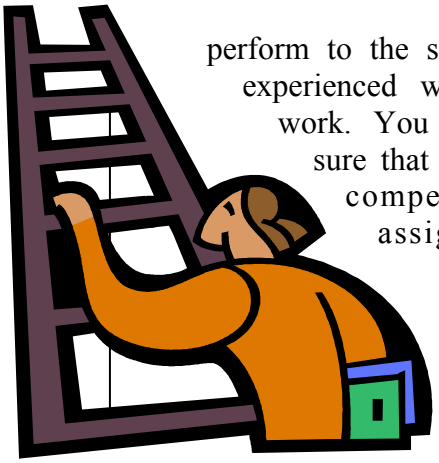
# PROFESSIONAL LIABILITY UPDATE

**A Loss Prevention Newsletter for the Design Profession**

MSP PL 11/2006: "Meeting the Standard of Care" November, 2006


# Meeting the Standard of Care

*Article courtesy of Professional Liability Agents Network (PLAN), with special thanks to XL Design Professional, publisher of* **The Contract Guide**, *for its assistance*



Nobody expects you to be perfect – except maybe your client. However, when you fall short of infallibility and a client files a claim, you are not necessarily guilty as charged. Fortunately, design professionals are held to a more reasonable standard than absolute perfection.

From a professional liability standpoint, all that is expected or required of you is that you render your design services with the ordinary degree of skill and care that would be used by other reasonably practitioners of the same discipline under similar circumstances and conditions.

This "standard of care" concept dates from English Common Law doctrine, which 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. Being perfect isn't required as long as you act with due care.

Acting with care includes practicing within the limitations of your firm's skills and expertise. If you accept a project in an area outside of your expertise, you will be expected to perform to the standards of those experienced with that type of work. You must also make sure that only experienced, competent staff is assigned to any

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project, and that you use qualified subconsultants when necessary.

Continuing education and training can be essential to keeping up with prevailing knowledge, technology and standards of care.

### To Error is Human

Perhaps because architecture and engineering are perceived as exacting professions or sciences, some clients have difficulty acknowledging any potential for human error on the part of a design or technical professional. And it is unmet expectations – not necessarily technical errors – that most often lead to professional liability claims.

Some clients may attempt to raise the standard of care by imposing contract language that requires you to *"perform to the highest standard of practice."* Others may present contracts containing a provision that would have you guarantee to perform your services "in a non-negligent manner."

Agreeing to such language could be construed as making a warranty, with all the related issues of insurance and statutes of limitation. If you accept such contract clauses – or any 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 since it represents a voluntary contractual assumption of risk for which you would not otherwise be responsible.

You also 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 or project proposals. These statements can be perceived as warranties that raise your performance requirements beyond those of your peers.

### Tempering a Client's Great Expectations

Regardless of what your client may think or expect, perfection is impossible to attain. Nor is it required of you under the law. In fact, the perfect set of plans has yet to be produced by a design firm. Your best approach, therefore, is to ensure that your client has realistic expectations of you and your services. Communicate to your client that perfection is unattainable at any price, and errors and omissions are common parts of the process.

If your client drafts a contract clause that raises the standard of care to a higher level, you must delete the offending language and return the standard back to a normal or reasonable level. It is a good idea to have a clause in your contract that defines the standard of care to which you will perform. Have your legal counsel consider the following clause suggested by XL Design Professional:

***Standard of Care***

*In providing services under this Agreement, the Consultant 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.*

Should you feel it is necessary, or if the client demands it, offer to correct defective services without additional fee. However, make it clear to your client that this offer does not include any of the costs to perform construction or to add items that may have been omitted from the original design. You might add to the previous clause:

*Upon notice to the Consultant and by mutual agreement between the parties, the Consultant will, without additional compensation, correct those services not meeting such a standard.*

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**Standard of Care** *(continued from page 2)*

Some might 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. The courts disagree. A 1992 decision (Gibbes Incorporated v. Law Engineering, 960 F2d 146 4th Cir. 1992), expressly found that contract language stating that the 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 professional standard of care and did not create any express or other warranty obligation.

## No Guarantees

Delete from a client-written contract any warranty-like language (such as promising to perform in a non-negligent manner) that could raise your standard of care, create insurance coverage problems or extend the applicable statute of limitation. Also, have your legal counsel consider including the following contract clause from XL Design Professional:

***Certifications, Guarantees and Warranties***

*The Consultant shall not be required to sign any documents, no matter by whom requested, that would result in the Consultant's having to certify, guarantee or warrant the quality of services or the existence of conditions whose existence the Consultant cannot ascertain. The Client also agrees not to make resolution of any dispute with the Consultant or payment of any amount due to the Consultant in any way contingent upon the Consultant's signing of any Certification.*

You and your attorney can go even further to make certain everyone understands you do not have to be perfect. You can insert language in the General Conditions of the Owner/Contractor contract (the AIA document A201 or the EJCDC 1910-8, if you are using association standard documents) that sets reasonable expectations for both the owner and the contractor. Make it clear that the instruments of service may well contain conflicts, errors, omissions and other imperfections. Such a clause might read:

*The Contractor acknowledges and understands that the Contract Documents may represent imperfect data and may contain errors, omissions, conflicts, inconsistencies, code violations and improper use of materials. Such deficiencies will be corrected when identified. The Contractor agrees to carefully study and compare the individual Contact Documents and report at once in writing to the Owner any deficiencies the Contractor may discover. The Contractor further agrees to require each subcontractor to likewise study the documents and report at once any deficiencies discovered.*

The Contractor shall resolve all reported deficiencies with the Consultant prior to awarding any subcontracts or starting any work with the Contractor's own employees. If the Contractor without additional time or additional expense cannot resolve any deficiencies, the Contractor shall so inform the Owner in writing. Any work performed prior to receipt of instructions from the Owner will be done at the Contractor's risk.

## Defects in Service

Help your client understand that the contractor may be in the best position to first spot any design

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defects and minimize any potential damages. Seek a contractual obligation on the part of both the client and the contractor to bring defects in services to your attention at the earliest time possible. Consider this sample contract language:

***Defects in Services***

*The Client shall promptly report to the Consultant any defects or suspected defects in the Consultant's services of which the Client becomes aware, so that the Consultant may take measures to minimize the consequences of such a defect. The Client further agrees to impose a similar notification requirement on all contractors in its Client/Contractor contract and shall require all subcontracts at any level to contain a like requirement. Failure by the Client and the Client's contractors or subcontractors to notify the Consultant shall relieve the Consultant of the costs to remedy the defects above the sum such remedy would have cost had prompt notification been given when such defects were first discovered.*

## Final Contingency

Finally, to make sure any imperfections can be corrected, attempt to add a contingency fund provision to your contract. Or, if there is going to be a contingency fund in the owner-contractor agreement, you might attempt to have included in the list of contingencies those costs resulting from discrepancies in your design documents. Here is a sample contingency agreement:

***Contingency***

*The Owner and the Consultant agree that certain increased costs and changes may be required because of possible omissions, ambiguities or inconsistencies in the drawings and specifications prepared by the Consultant and, therefore, that the final construction cost of the Project may exceed the estimated construction cost. The Owner agrees to set aside a reserve in the amount of __% of the Project construction costs as a contingency to be used, as required, to pay for any such increased costs and changes. The Owner further agrees to make no claim by way of direct or third-party action against the Consultant or its subconsultants with respect to any increased costs within the contingency because of such changes or because of any claims made by the Contractor relating to such changes.*

Your client contract does not have to state that you agree to abide by the standard of care. However, the law requires you to abide by 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, having appropriate contract language that does not raise the standard, as well as expert representation from your insurer, will significantly increase your chances of avoiding an expensive judgment.

***Disclaimer:*** *This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

# Negotiating International Agreements

## Requires Special Knowledge and Extra Caution

*By Michael Strogoff, AIA*


An American motorist was baffled when an Indonesian court determined that he was responsible for the damage to the speeding car that careened across the road and collided with his vehicle. The American thought that, by all standards, the other driver was clearly at fault. The Indonesian court, however, ordered the American to pay for all damages. Its reasoning was that if the American wasn't driving in Indonesia, the accident never would have occurred.

While economies become more global and international work provides tremendous opportunities, American design professionals who pursue business in other countries must adjust their expectations and adapt their business practices and negotiating tactics in order to succeed. There are horror stories among the nation's most sophisticated design firms of foreign clients not paying invoices, expensive international marketing efforts caused by clients' fishing expeditions for American knowledge, foreign clients that viewed signed contracts as only a starting point for future negotiations, unrelenting demands for free services, and profits that evaporated due to currency fluctuations or undisclosed foreign taxes.

American design professionals must be aware of four significant differences when pursuing projects in other countries:

1. **Clients Expect More Comprehensive Services** — Most foreign clients demand more of architects and engineers than do U.S. clients. For example, if local authorities unexpectedly require that an existing utility system be upgraded, many foreign clients expect their design professionals to wrap the additional engineering into their existing fees. The prevailing attitude among foreign clients relative to design professionals' services is "whatever is needed."
2. **Project Delivery Methods Differ** — Most other countries utilize various forms of design-build on most projects, rely more heavily on performance specifications and expect contractors rather than architects or engineers to develop construction details.
3. **Getting Paid Is More Difficult** — When services are no longer required, projects are abandoned or disputes arise, be prepared to spend considerable effort collecting any payments still due. Some design professionals assume they will never receive the last payment – they know that many clients find a technicality to avoid paying it.
4. **Written contracts Have Less Significance** — In some cultures, a close relationship or a handshake is worth more than a tightly drafted contract.

In light of these differences, consider these guidelines when negotiating international agreements:

### General Guidelines

- Start by researching the cultural practices, business ethics and negotiating tactics of the countries in which you will be doing business.

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Ask other design professionals about their experiences in each country and form a relationship with a local firm that can guide you through its country's practices. Be sure, however, to write your contracts directly with clients, not through local consulting firms. Otherwise, you may lose valuable leverage or get squeezed out of the project.

- Develop strong social ties to the client in order to establish bonds beyond just contractual ones.
- Describe the level of completeness and deliverables associated with each phase of services. Clients in other countries don't have the same definitions of schematic design, design development, etc. Consider using examples from other projects as benchmarks.
- Confirm the project delivery method that will be used and define the extent of the design professionals' services required for that delivery method.
- Incorporate carefully defined dispute resolution procedures and reference specific arbitration and mediation rules. Don't expect that clients in other countries will resolve disputes the same way as domestic clients do or according to your sense of fairness.
- Insist on a deposit and a signed contract or letter of intent before starting services.

## Fee Guidelines

- Don't rely on itemizing additional services or exclusions in your contract.

  Instead, negotiate fees and budget your time based on providing a wide array of services.
- Delineate expenses (most foreign clients assume all expenses are within base fees). Bill for expenses separately so payments on invoices for services are not delayed.
- Many countries impose special taxes that may not be apparent to outsiders. To protect yourself, specify that all payments are net of taxes and that the client is responsible for all taxes imposed.

## Payment Terms

- Get paid in U.S. dollars or include provisions to adjust your fees if the local currency is devalued.

  Alternatively, obtain insurance against currency fluctuations.
- Obtain a deposit or retainer large enough to cover your largest expected payment and specify that the entire amount will apply against your last payment.
- Specify monthly or milestone payments. Many foreign clients expect to withhold payment until they deem that work is satisfactorily completed.
- Consider opening an escrow account in U.S. dollars. Most foreign clients will resist this but it's worth trying.
- Include a provision to stop work within 15 or 20 days if payment is late.
- Consider tying your team's deliverables to receiving payments from your client.
- Include a provision that allows you to bill via fax. This may reduce the turnaround for payments by several weeks.
- Incorporate protections against nonpayment, such as a payment guarantee by a domestic subsidiary or parent of the foreign company, a collection guarantee by a third party, a financial guarantee by an insurance company or a letter a credit by a financial institution.



*This article initially appeared in* **Negotiating Strategies**, *published by Strogoff Consulting, a management consulting firm dedicated to helping design professionals in practice management, negotiation, ownership transitions and business development.*

*For more information about Strogoff Consulting or* **Negotiating Strategies**, *visit www.StrogoffConsulting.com or call 866-ARCH ENG (1-866-272-4364).*

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