PROFESSIONAL LIABILITY UPDATE

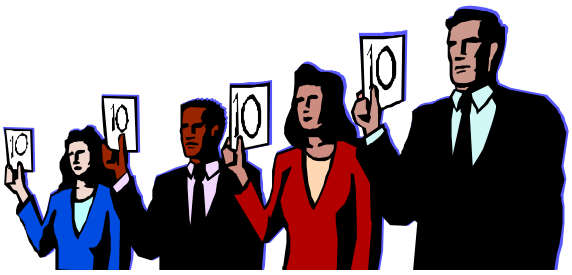
A Loss Prevention Newsletter for the Design Profession

MSP PL 09/2003: "What Is the Standard of Care?" September, 2003

What Is the Standard of Care?

Article courtesy of Professional Liability Agents Network (PLAN) with special thanks to Design Professionals Insurance Company (DPIC Companies) for excerpts from ***DPIC's Contract Guide: A Risk Management Handbook for Architectural, Engineering and Environmental Professionals***

When a design firm is accused of negligence, the first questions often asked by its legal team are: What is the applicable standard of care? Was it met? The



definition of the applicable professional standard of care, however, may vary widely from the designer's perception – and a client's expectations. And it is often an unsophisticated jury that ultimately decides whether that standard was met.

From a liability standpoint, all that is expected or required of you as a design professional is that you render your 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 – taking into consideration the contemporary state of the art and geographic idiosyncrasies. This concept dates from English Common Law doctrine, which holds that the public has the right to expect that those providing services would do so in a reasonably careful and prudent manner, as tested or established by the actions of one's own peers under like circumstances.

Nowhere in this doctrine or definition is there any mention of "perfection." Being perfect isn't required or even contemplated. The only test is the quality of the design professional's actions: are they reasonable, normal and prudent under the given circumstances?

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To Err Is Human

Perhaps because architecture and engineering are perceived as exacting professions or sciences, the public has difficulty acknowledging your potential for human error. Clients, too, often have unrealistic expectations of you as a design or technical professional. And it is unmet expectations – not necessarily technical errors – that often lead to liability claims.

Some clients will attempt to raise the standard of care in their contracts, requiring you to "perform to the highest standard of practice." If you accept such a clause – or any language that raises the customary standard of care – you are dramatically increasing your risk. Worse yet, your professional liability insurance will not cover you for the added exposure you have contracted to accept since it represents an assumption of risk for which you would otherwise not be responsible.

Other client-written contracts contain a provision that would have you agree to perform your services in a non-negligent manner. This could be construed as a warranty, with all the related issues of insurance and statutes of limitation.

You also may be leaving yourself open to heightened risk and difficulty in negotiating realistic contract terms with your client if you tend to overstate your firm's abilities in exaggerated terms ("the best" or "most qualified") in your correspondence, marketing materials or project proposals.

Tempering a Client's Great Expectations

Regardless of what your client may think, perfection is impossible to attain. Nor is it expected or 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.

If your client drafts a contract clause that attempts to raise the standard of care to a higher level, you must delete the offending words and revise the standard back to an "ordinary," "normal" or "reasonable" level. It is a good idea to have a clause in your contracts that affirmatively defines the standard of care to which you will perform. Consider the following:

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 necessary or helpful, you may want to offer to correct defective services without an additional fee. Note, however, 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:

... similar circumstances. 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.

Some might argue that if your contract says you will perform to a certain standard, it might give rise to an additional cause of action against you for breach of warranty. They suggest you soften the provision with qualifiers like attempt to or strive to.

The courts disagree. A 1992 decision *(Gibbes Incorporated v. Law Engineering, 960 F 2d 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.

Delete any warranty-like language (such as promising to perform in a non-negligent manner) that could create insurance-coverage problems or extend the applicable statute of limitation. In fact, you could turn this around by adding to your Standard of Care clause, additional wording such as:

...under similar circumstances. The Consultant makes no warranty, express or implied, as to its

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professional services rendered under this Agreement.

And you 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 Contract 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.

Finally, you should 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. Following 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 __ percent 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 contract with your client does not have to state that you agree to abide by the standard of care. However, whether or not that commitment is included in the contract, the law requires you to abide by that standard – and to compensate those who are damaged or injured by problems stemming from negligence.

In fact, the standard of care is the way in which the service in question is ordinarily performed by professional peers operating in the same situation. However, when facing litigation, your standard of care may be established in court by a judge or jury on an after-the-fact basis.

Generally speaking, whenever negligence is alleged against you, the plaintiff's expert witness will testify that you did not meet the standard of care. Your side will testify that you did meet the standard of care. No hard and fast rules apply, especially when dealing with an unsophisticated jury.

Having appropriate contact language and the protection and expert representation from your insurer will significantly increase your chances of showing that you have practiced to the prevailing standards.

The Underwriting Ramifications of Your Web Site

By Jeffrey W. Cavignac, CPCU, RPLU

Those of you who have been reading the information that we have sent you over the past several years and/or paying insurance premiums will realize that we are in the middle of a hard market. A hard market in the insurance industry is characterized by lack of availability, restrictive coverage and increased pricing.

In this type if environment, underwriters carefully scrutinize each application they are sent. In addition to loss histories and basic underwriting information, they also require resumes of the principals, financial statements, premium history, and in almost every case they carefully underwrite the applicant's Web site.

Most companies use their Web sites as an electronic brochure, and are inclined to list just about every service they might provide, whether or not these have been provided it in the past.

As an example, one of our civil engineering clients performed a small amount of construction management (which scares underwriters, by the way.) When you clicked on construction management, it indicated that the firm provided *"complete construction services"* and went on to list the types of projects the firm would work on. Among those projects were condominiums.

For those of you not familiar with the liability exposures arising out of multi-family construction, in a word, they are immense. This item alone caused the underwriter to non-renew the design professional's general liability policy. However, the design professional had done only one condominium project in the past, and it was an insignificant part of the firm's overall operation.

The message is clear: **Be careful what you put on your Web site!** Not only can it affect how an underwriter perceives your company, but in certain cases it can also elevate your standard of care.