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DIFFERENT WORKS



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

The Standard of Care

and its impact on your client communications

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DIFFERENT WORKS

The Standard of Care

The most well-known, yet least understood
facet of the design profession?

This course is designed to provide a basic understanding of the legal standard that is imposed upon design professionals – the Standard of Care and how to effectively communicate its intent to Clients. In addition, we'll also provide an important discussion on the use of the standard of care as a defense in professional liability claims.

Learning Objectives

Participants in this session will

1

Gain an understanding of the definition and key terminology relating to the Standard of Care for design professionals;

2

Discover how design professionals can effectively communicate the Standard of Care to their Clients;

3

Develop strategies for conveying that the Standard of Care is not a compromise of quality; and

4

Learn to identify and address potential conflicts in the contractual requirements and performance expectations.

What is the Standard of Care?

Do you know
the Standard of Care
and its implications
for you?

Does your client?

Standard of Care Defined

Standard of Care for Ordinary Persons

Exercise the degree of care that a reasonable person must exercise in a given situation.

*Applies to activities unrelated to your professional practice

Standard of Care for Professionals

Exercise the degree of skill and care ordinarily exercised by other design professionals in similar circumstances.

*Applies to activities related to your professional practice

Elements – Negligence Claim

Whether or not you owe a duty, and whether or not you met that duty of care is determined, in part, by the standard of care.

- 1** **Duty** Duty of care
- 2** **Breach** Violation of duty of care
- 3** **Causation** Actual and proximate cause
- 4** **Damages** Harm suffered

What is the Standard of Care in your state?

How does your state define the applicable standard of care for design professionals?

* If you practice in more than one jurisdiction, you may be subject to different standards of care.

16 CCR § 404(dd)

To satisfy the standard of care, design professionals must:

“use the care **ordinarily exercised** in like cases by **duly licensed** [design professionals] **in good standing.**”

20 CSR § 2030-2.010(3)(A)

To satisfy the standard of care, design professionals must:

“act with **reasonable care and competence**, and shall apply the technical knowledge and skill which are **ordinarily applied** by [design professionals] of **good standing, practicing in Missouri...**”

Perfection is NOT required!

“

The undertaking of a [design professional] implies that s/he possesses skill and ability, including taste, sufficient to enable him/her to perform the required services at least ordinarily and reasonably well; and that he will exercise an apply in the given case, his/her skill and ability, his/her judgment and taste, reasonably and without neglect. But the **undertaking does not imply or warrant a satisfactory result**. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. **An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.**

Coombs v. Beede, 89 Me. 187, 188-89 (1896).

”

Perfection is NOT required!

“

The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge the duty will subject them to liability for negligence. Those who hire such persons are *not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.*

”

Gagne et al v. Bertran et al, 43 Cal.2d 481, (1953).

Perfection is NOT required!

“

Architects, doctors, engineers, attorneys, and others, deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional services people to gauge them with complete accuracy in every instance. Thus, just as doctors can't be certain that every operation will be successful...architects and engineers cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

”

City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn. 1978).

Establishing the Standard of Care

The following may be presented as evidence of the applicable standard of care:

Expert Testimony

Codes

Licensing Statutes & Regulations

Professional Societies

Contract

Expert Testimony

Expert witness may testify to:

- 1 The **proper practices** of your profession
- 2 Whether or not you **met the performance level**
- 3 Whether or not your acts/omissions **caused the damages**

Compliance with applicable building codes

Exercise of professional judgment is critical because:

- 1 Building codes represent the **minimum standards**
- 2 Codes and regulations may **conflict and/or be inconsistent**
- 3 **Applicability** to your specific project is uncertain

*Expert testimony may be necessary to support your professional judgment.

Licensing Statutes & Regulations

Rule governing the practice of your profession

- 1** The laws and regulations that govern the licensure of your profession
- 2** Codes of conduct/ethics developed by professional societies

Contract Documents

Contract with your clients:

- 1 Outlines your scope of services
- 2 May define the standard of care
*Beware of inadvertently elevating your standard of care

Scope of Services

Have a clearly defined Scope of Services

Consider addressing the following:

- 1** Services your firm **will perform** for basic compensation;
- 2** Services your firm **may perform** for additional compensation;
- 3** Services that are **excluded**.
*Services your firm doesn't provide, the Client has refused, or will be provided by third parties engaged by the Client.

Scope of Services Sample Provision

“

The Client and the Design Professional have agreed to a Scope of Services the Design Professional will perform under this Agreement. This Scope of Services is set forth and fully described in the attached Exhibit A, Scope of Services. Services not set forth in Exhibit A of this Agreement are specifically excluded from the scope of the Design Professional’s services. **The Design Professional assumes no responsibility to perform any services not specifically listed in Exhibit A.**

”

What terms to look for
and what terms to avoid
in your Standard of Care

Standard of Care Sample Provision

“

The [Design Professional] shall perform their services consistent with the professional **skill and care ordinarily provided** by [Design Professionals] practicing **in the same or similar locality under the same or similar circumstances...**

”

AIA B101-2017 §2.2

Standard of Care Sample Provision

“

The standard of care for all professional [services] and related services performed or furnished by [Design Professional] 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**. [Design Professional] makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by [Design Professional].

”

EJCDC E-500 §6.01

Red Flag Words

Words to avoid:

“Highest”

“Best”

“Superior”

“Expert”

Sample phrases to avoid:

“Highest standards in the profession”

“Highest professional standards”

“Highest standard of care”

More Red Flag Words

Avoid absolutes such as:

“All”

“Any”

“Every”

Sample provision to avoid:

“Comply with **all** Federal, State, and Local laws, rules, regulations, codes, requirements, ordinances of **all** governmental authorities having jurisdiction over the project currently in effect now **or promulgated in the future.**”

Compliance with Law Provision

The [Design Professional] shall perform its services under this agreement in accordance with the generally accepted standard of care in conformance with the laws, codes, ordinances and regulations of those governmental authorities having jurisdiction over the Services and this Project that are published and in effect as of the date of this Agreement.

Compliance with Law Provision

The [Design Professional] shall perform its services under this agreement in accordance with the generally accepted standard of care in conformance with the laws, codes, ordinances and regulations of those governmental authorities having jurisdiction over the Services and this Project that are published and in effect as of the date of this Agreement.

Policy Exclusions

Contractual Liability

This Policy does not apply to any Claim(s):

as a result of **liability assumed by the Insured under any contract or agreement**. This Exclusion does not apply to liability for Damages that the Insured would have had in the absence of the contract or agreement.

Policy Exclusions

Express Warranties or Guarantees

This Policy does not apply to any Claim(s):

Based upon or arising out of any express warranties or guarantees. However, this Exclusion does not apply to a warranty or guarantee by the Insured that the Insured's Professional Services are in conformity with the standard of care applicable to that Professional Service.

Standard of Care Warranty Provision

The [Design Professional] warrants and guarantees that its services under this agreement shall be performed in conformance with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

Standard of Care Warranty Provision

The [Design Professional] warrants and guarantees that its services under this agreement shall be performed in conformance with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

How do you
communicate what the
Standard of Care is
to your Client(s)?

Managing Risk

Effectively Manage the Risk of a Claim:

- 1** Manage your Client's Expectations
Make sure your Client understands what the applicable Standard of Care is for your state, and has reasonable, realistic expectations for your and your firm.
- 2** Manage the quality of your services
Manage a process to identify and meet your Client's goals, priorities, and expectations.

Client Expectation

Managing Client Expectations:

- 1** Establish the proper Standard of Care
Make sure your Client understands what the applicable Standard of Care is for your state.
- 2** Explain how an elevated Standard undermines your Client's interest
Clarify what is and is not covered by your insurance policy.
- 3** Identify the Client's goals and priorities (time, money, and quality)
Do this as early as possible.
- 4** Have a clear, well-defined Scope of Services
Address what will be provided, what can be provided for an additional fee, and what services are excluded. Avoid ambiguous working that creates confusion, overlaps, or gaps.

Client Expectation I

Examples of Unreasonable Expectations

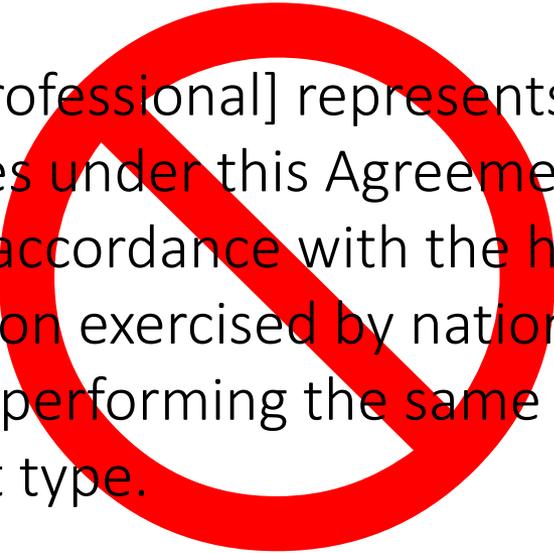
- 1** Perfection
You are not obligated to provide a perfect result.
- 2** No mistakes or errors
Reasonable mistakes are permitted. You are not required to pay for any and all mistakes or errors.
- 3** Designs are fully complete and free from all defects
Designs may not contain all of the information necessary for the construction of a project. Requests or information and change orders are expected and not your fault.

Standard of Care Provision

The [Design Professional] represents and warrants that its services under this Agreement will be performed in accordance with the highest standards in the profession exercised by nationally recognized [design] firms performing the same or similar services for the project type.

Standard of Care Provision

The [Design Professional] represents and warrants that its services under this Agreement will be performed in accordance with the highest standards in the profession exercised by nationally recognized [design] firms performing the same or similar services for the project type.



Client Expectation II

Against the Client's Interest(s):

Show the Client how their demands may be against their best interest.

- 1** Remind the Client of the goal
You Client is seeking financial protection.
- 2** Explain the role of Professional Liability (PL) insurance
Protect the Client against losses incurred by your negligent services.
- 3** Inform the Client of policy exclusions
Most PL policies exclude coverage for contractually assumed liability as well as for warranties and guarantees.

Client Expectation III

Identify the Client's Goals and Priorities:

Explain how prioritizing one impacts the others.

Time

Project Schedule

Money

Project Budget

Quality

Project Result

Client Expectation IV

Clear, Well-Defined Scope of Services:

Show the Client how their demands may be against their best interest.

- 1** Clearly written, detailed and well-defined Scope of Services.
Avoid vague, ambiguous wording.
- 2** Clearly communicate the Scope of Services
Involve your project team in the development of the Scope.
- 3** Develop and adhere to a change of scope procedure.
Implement a process for monitoring and managing changes in your Scope of Services. Make sure the changes are confirmed in writing.

Thompson v. Gordon

Omission did not breach the standard of care

Western Development
Corporation (WDC)

Client



Jack E. Leisch and Associates, Inc.
& CH2M Hill, Inc.

Design Professionals

Corinne Thompson

Injured Party

Thompson was injured and her family killed when a car hit the median separating eastbound and westbound traffic, vaulted into the air, and landed on top of Thompson's vehicle. She filed a negligence action against the Engineering firms hired to replace the bridge deck.

Plaintiff's Expert Testimony

Failure to meet the Standard of Care:

- 1 Engineer failed to properly consider and analyze all available data provided by consultants
- 2 Failed to consider crossover protection and perform an analysis of such protection on the bridge deck
- 3 Failed to submit to Client for consideration the necessity of crossover protection
- 4 Failed to design a Jersey barrier over the bridge

Causation

Crossover accidents are likely to occur, had engineers performed work within the standard of care, a Jersey barrier would have been designed and constructed which would have prevented the collision.

Ruling by Supreme Ct of Illinois

“

The standard of care was limited to the degree of skill and diligence normally employed by professional engineers performing the same or similar services, namely, replacing the bridge deck.

As we have found, replacing the bridge deck did not include improving the bridge deck or considering or adding a Jersey barrier.

”

Quality Assurance

Managing Quality:

1

Manage Client expectations

Make sure you understand your Client's goals and priorities.
Ensure they are reasonable and realistic.

2

Choose the right team

Select members with the appropriate and compatible skills,
competencies and personalities.

3

Manage changes

Develop and adhere to a procedure for managing changes.

4

Communication and documentation

Proper communication and documentation focusing on budget, schedule
and scope.

Quality Assurance II

Choose the Right Team:

Understand the skills, competencies, and personalities of all parties performing services of your behalf.

- 1** Internal Staff
Make sure personnel maintain their licenses, are up-to-date on industry norms and practices, and properly supervised, where appropriate.
- 2** External Staff
Perform a sub-consultant risk analysis (ie: prior experience, financial capacity, litigation history, insurance coverages, etc).

Manage Change:

- 1** Develop a procedure
Mutually agree upon a change management procedure, clearly communicate it to all project participants, and document it in the contract.
- 2** Adhere to the procedure
Make sure the procedure is consistently followed by the relevant parties.

Quality Assurance IV

Effective Communication and Documentation:

Schedule regular progress meetings to address the following:

- Progress achieved
- Review of the agreed upon scope v. actual progress
- Review of budget and actual spending
- Changes to the scope, budget, or schedule
- “Look-ahead” to the progress to be achieved before the next scheduled meeting

Take Away

Avoid claims of professional negligence:

Know and communicate the applicable
Standard of Care

Avoid elevating the Standard of Care

Manage Client expectations and project quality

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
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