



Contract Corner: Elevating the Standard of Care

Welcome to the next in our occasional series of columns focusing on onerous contract clauses. In this issue, we look at owners' attempts to elevate the standard of care.

The law requires design professionals to perform in accordance with the "standard of care," which is defined by the Engineers Joint Contract Documents Committee (EJCDC) as "the care and skill ordinarily used by members of the designer's profession practicing under similar circumstances at the same time and in the same locality."

The American Institute of Architects (AIA) provides a similar definition. The Royal Architecture Institute of Canada's new Document Six states, "The Architect and the Consultants engaged by the Architect shall perform the Services to the standard of care ordinarily exercised by other members of their professions under similar circumstances, at the same time and in the same or similar locale." An architect or engineer's failure to meet the standard of care is a deviation, which is one of the elements of a cause of action for professional negligence.

Many owner-drafted agreements recite the accepted standard of care, but add all sorts of inappropriate requirements to it. For example, owners often attempt to add the obligation to "comply with all laws, codes, regulations, ordinances," or require the A/E to "comply with all ADA and FHA requirements." One owner attempted to add the requirement to comply with the project hotel's branding.

An owner in British Columbia attempted to elevate the standard of care by including the following language in a contract presented to a consulting engineering company:

Consultant hereby represents and warrants to [the client] that Consultant and all employees it will assign to perform the Services possess the necessary qualifications, knowledge, skills, expertise and experience to perform the Services to the highest professional standards.

An owner may also try to enlarge the locality that helps define the standard of care. One contract included the language, "greater North Carolina." Does that mean the design professional should be held to the same standard of care as those practicing in Virginia, Tennessee, South Carolina and Georgia? More compelling than this ambiguity, this "greater North Carolina" language allows the owner to retain an out-of-state expert to offer an opinion about the design professional's alleged deviation from the standard of care.

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To help counter your clients' attempts at raising the standard of care and increasing your liability, here are a few suggestions for points you can make:

- Design professionals, like all professionals, are held to a professional standard of care. If I perform shoddy work, ignore building codes or design something that is substandard, I can be held negligent.
- This is the same standard of care the law requires of lawyers, doctors, insurance brokers, counselors and any other licensed professional you might engage.
- The law doesn't expect me—or anyone—to be perfect. Everyone on this project, including you and those not under your control, will make mistakes. It's everyone's job to identify these mistakes and correct them as soon as possible. Adding an unreasonable contractual obligation does not change that reality.
- The fact is, contract language that requires my performance to meet a standard of care that exceeds what the law requires only serves to complicate the dispute resolution process because my insurance provides coverage only up to what the law requires.

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- Contract language that raises my standard of care not only heightens my risk but also jeopardizes my professional liability coverage, since the increased exposure represents an assumption of additional liability for which I would not otherwise be responsible. I won't be able to agree to such a clause.
- We all agree that the design must reflect the applicable codes, laws and regulations. But we should put this obligation in a separate sentence, not in the sentence reciting the standard of care, because inconsistencies in the codes, laws and regulations will be project-specific, and will require my interpretation and coordination.

When negotiating your project's professional services agreement, see that the stated standard of care recites the duty imposed by law, and doesn't set a higher standard.



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