

ACEC Risk Management Committee

Client Expectations of Perfection

Design professionals are required by law to meet the standard of care in the performance of their professional services. If they fall short of that standard and their clients or third parties are damaged thereby, they may be found negligent and therefore responsible for compensation. That standard, however, is not perfection but rather performance with the skill and care ordinarily exercised by members of the same profession practicing under similar circumstances.

It is not news that clients want to hold design professionals to a higher standard, despite the fact that long-standing common law recognizes that perfect performance is not expected of design professionals. This is an old problem, and the time-honored solution has been a combination of client education and sensible refusal by the design professional to accept inappropriate contract language and even entire projects that represent uncontrollable and uninsurable risk.

To the extent there is anything “new,” it is that a difficult economy has created an environment in which clients are free to assume that a design can be “perfect” and that design professionals will pay for fixes for problems over which they have little or no control and for which they have little or no insurance coverage. It is more true than ever that “If you don’t want to do it, another design professional will” – and design firms know it. In these times, clients believe that they have all the leverage, and design professionals, understandably, are reluctant to contradict them.

So now more than ever, design professionals must contend with unrealistic expectations like these:

- The design professional warrants or guarantees the design to be defect-free and suitable for the intended purpose of the project.
- Change orders are unnecessary and if they do happen, they are invariably the result of design defects.
- Contract documents include all information necessary for construction and therefore if there are more than a few contractor RFIs, that in itself is indicative of design defects.
- The design professional guarantees that contractor bids will not exceed budget.
- Opinions of probable construction cost are guarantees.
- Design professionals are responsible for ensuring that the contractor builds the project correctly.
- All extra costs, including betterment (project improvements or additions that benefit the owner) will be paid for by the design professional.
- Design professionals know every federal, state, local, and industry-issued code and standard. Moreover, they are able to infallibly predict changes in those codes and standards, and their ultimate interpretation by the courts.
- Design professionals guarantee that the project will comply with any interpretation of code, no matter how invalid.
- Design professionals guarantee that a project will receive the desired level of LEED certification.
- Using Building Information Modeling (BIM) software ensures an error-free design and construction process.
- The design professional’s professional liability policy covers all of the above.

The list of mistaken expectations is long and varied, but the underlying misperception is the same: Design is a product that can and should be perfect, and the design professional is a guarantor of the project's success.

In this paper, we will explain why the legal standard of care is not perfection, and why professional liability insurance coverage does not guarantee defect free professional services. But we will also go further and suggest that viewing design as a professional service rather than a commodity guaranteed to be "defect-free" will yield better projects with better overall outcomes.

Not All Errors Constitute Negligence

Aren't all errors negligent errors? The answer is "no."

Consider design professionals who specified fire retardant plywood roof decking in the early 1980s – an accepted use of the product at that time. By mid-1988, it was apparent that there was a widespread problem with early deterioration of the plywood. To building owners with leaky roofs, specification of fire retardant plywood certainly appeared to be an "error." But was it *negligence*?

The answer is *no*, not if the design professionals acted reasonably when they specified the fire retardant plywood product. A design professional who used the skill and care ordinarily exercised by similar design professionals at the same time and place – in other words, one who took reasonable steps to verify the appropriateness of the product for that application – would not be negligent. Remember, the standard of care is not perfection, and it does not call for the design professional to have the gift of prophecy and anticipate that many years in the future, it would turn out that the product did not work as expected.¹

That is cold comfort to the client with a wet and ruined ____ (fill in the blank here – these claims conclusively established that many indoor objects are not improved by being rained on). The client might well ask, "Fine, but who will pay to replace my goods? Why should I have to bear that risk?" The answer is that all endeavors have risks and rewards. Project ownership is no different. The law requires design professionals to take reasonable care in practicing their trade, but it does not require them to absorb all risks of every project in which they participate.

Errors and omissions can and do occur without any negligence on the part of the design professional. For example:

- Using information provided by others (and upon which the design professional has a right to rely) that turns out to be incomplete or inaccurate.
- Scope of services reduced by the client when a more complete scope could have prevented or mitigated the loss or cost.
- Unforeseen site conditions that were not detected through normal investigations.
- Changes in client personnel that change project goals and expectations.
- Changes in laws, codes, standards, and technology that occur during the design process.

¹ In case the example of "fire retardant plywood" seems antiquated, just substitute "green building product" for that term in the above scenario, and it will seem miraculously up to date.

- Interpretations made by building officials and inspectors, which may differ from the actual text of the code or from previous inspectors' determinations.
- Contractors (and clients) misinterpreting design documents.

Professional Services Are Not Products or Commodities

The law holds professional services to a different standard than "goods." Goods – products – are impliedly warranted to be free from defects. If I make pencils, and sell one that does not write or erase as a pencil should, I will be obligated to fix the pencil for free or, more likely, to exchange the defective pencil for a perfect pencil.

But professional services are not pencils. They involve the application of professional judgment to the client's unique circumstances. The ultimate outcome typically depends in part, at least, on the actions of the client and others. The standard for professional services is not "Was the client's objective achieved?" but rather, "Did the professional exercise reasonable care and skill under the circumstances?" The law does not, for example, require doctors to guarantee their patients' cures, and it would be unfair (and delusional) to do so. Diagnosing illness and choosing a course of treatment for each individual patient requires the exercise of professional judgment. And the ultimate outcome depends in part on factors beyond the doctor's control: the patient's willingness and ability to follow instructions, the quality of nursing care, and so on.

The law treats doctors and design professionals similarly. It is just as unreasonable to expect the design professional to perform "perfectly," or to guarantee the outcome of the project, as it is for a doctor to guarantee his or her patients' cures, and the law does not require it. Like the doctor, the design professional calls upon professional judgment and experience to discern the client's goals and choose a design solution likely to achieve them given the budget, schedule, scope, site, governing laws, and many other factors. Unlike a pencil, which can be designed and constructed over and over until the product is perfect, every project is a one-of-a-kind original that will be constructed only once.

And similarly, the project's ultimate success depends in large part upon the actions of others. Building inspectors interpret code requirements – accurately or not. The contractor builds the project – skillfully or ineptly. The owner maintains and operates the building – correctly or carelessly. A third party certification authority grants a sustainability certification – or not.

This concept seems harsh when things go wrong. It is obvious that a client does not want a leaky roof, any more than a patient wants his cure to fail. But clients consult professionals for their judgment and skill in solving a unique problem, and sometimes that reasonable judgment and skill – in fact, even *superb* judgment and *outstanding* skill – will fail to yield desired results.

"Errors and Omissions" Insurance Is a Misnomer

Professional liability insurance coverage reflects the fact that professional services are not and should not be held to the standard of "perfection" or "defect-free performance." The policy will cover the design professional's negligence – *i.e.*, falling short of the professional standard of care – but will not cover non-negligent "errors and omissions." Calling the policy an "errors and omissions" policy is a misnomer, unless one is willing to add the qualifier "negligent" before that phrase.

And most clients, it seems, are not. Design professionals are often presented with contracts that obligate them to provide “defect-free design,” “the very highest standard of care,” and the like. Agreeing to this language creates a significant coverage gap, because a professional liability policy excludes coverage for liability assumed by contract that the design professional would not otherwise have. (Remember that even in the absence of a written contract, the design professional must still meet the standard of care.)

Clients confronted with this coverage gap tend to respond in a few different ways:

- Why don't you buy better coverage, then?
- I don't care how you pay for your errors and omissions – whether or not it's covered is your problem.
- Someone else will sign our contract if you don't.

The answer to the first question is simple: You can't. Insurers are not in the business of insuring against a sure thing. No project is perfect, and no design is perfect. An insurer who backs a promise of perfection is on a collision course with reality and financial ruin.

The second response has some surface validity, but not much. If the client does not care about whether or not insurance coverage exists, why then does the contract require the design professional to carry professional liability insurance with \$X limits, for X years after the project is complete, with an A- or better rated carrier, etc.? If coverage does not matter, who cares?

Perhaps the client's Plan B, if coverage falls short, is for the design firm to pay the damages owed with its own funds. But design firms typically do not have a vault of gold in the cellar. And design professionals – unlike contractors – do not have a back lot full of yellow iron that can be seized and sold to satisfy a judgment. The proceeds from the sale of some workstations and chairs (however fancy) will not go very far towards making good a loss.

The third response is unassailably true: Someone else *will* be willing to sign that contract, even though many of the risks it represents are beyond that “someone's” control and are not covered by insurance, either. This seems to be an unwise method of vetting design professionals, as it would tend to screen out those who take risk and contractual obligations seriously, and who are in high demand because of the quality of their services, and give preference to design firms who are willing to accept any project regardless of the risk it represents or even the firm's capability to perform the work.

As we have noted, in this economy it is reasonable to assume that even the very best design firms will face hard choices and end up considering projects and signing contracts that represent enormous risk, because the alternative is more layoffs or even the death of the firm. But clients need to understand that when a design firm takes on too many “bet the farm” projects and contracts, it may not have the financial means to back its uninsured bets when claims ultimately emerge. Accordingly, it is in both parties' interests – design professional *and* client – that the services provided under the contract ultimately have coverage under the professional liability policy.

The Design Professional Is Not the Insurer of Project Success

The expectation of perfection seems to go hand in hand with the belief that the design professional and/or the professional liability insurer will pay for anything that goes wrong with the project. These

clients view the design professional as a source of cost recovery on projects that have run over budget, encountered changed conditions, or involve a construction contractor that submits frivolous change orders to increase compensation.

This is often expressed in the form of a contractual requirement for the design professional to indemnify the client for all errors and omissions, negligent or not, and whether or not other parties are also at fault. Professional liability insurance will only cover damages to the extent they are caused by the design firm's negligence. It will not cover non-negligent acts, nor will it pay any damages caused by other parties.

To make matters worse, clients often expect their design professionals to "defend" them against claims as well. This may sound innocuous, but it actually requires the design professional to pay for the client's defense from the moment a claim is made, whether or not the claim involves negligence on the part of the design professional, and whether or not the claim ultimately proves to be meritorious.

Professional liability insurance will defend the insured design firm, but it will *not* cover the design professional's promise to defend the client. This can come as a surprise to clients who are accustomed to working with contractors, who will agree to defend because they can name the client as an additional insured on the general liability policy. This is not possible with professional liability insurance.

It would be wrong to assume that overreaching contracts are the only problem. It is not uncommon for clients to demand that their design professionals contribute toward fixing problems they did not cause, or fix imperfections at no additional cost – *even when the contract terms do not support the client's position*. In this situation, the specter of a malpractice suit looms large. Going to war with a client is never an easy choice. Lost time, reputational damage, and the ruin of client relationships are virtually certain. Moreover, because professional liability insurance deductibles are large, there will be a significant financial outlay on the part of the firm. In times when cash is tight and clients are few, the threat of litigation is more potent than ever. But caving in to these unreasonable demands is not the answer either, as doing so only gives added encouragement to unreasonable client expectations.

Where Do Clients' Expectations Come From?

Given the trouble created by clients' expectations of perfection, it is reasonable to try to identify the source of those expectations, to see if we can nip them in the bud. The bad news is that clients' expectations arise, at least in part, from factors design professionals cannot control. The good news is that we can manage clients' expectations if we are willing to tell them the truth – that no project is perfect –and explain why this is so in a clear and forthright manner at the outset of the project.

Some unreasonable expectations are inevitable, arising either from wishful thinking or unfamiliarity with the design and construction process. It is natural and perhaps reassuring for the novice client (or novice representative of even a sophisticated client), to assume that once construction documents are issued, the project can be built from those plans much like a child's bicycle can be assembled from the directions packed in the box – without further input from the designer, and by any constructor, whether highly skilled or fairly incompetent. This, of course, is not true, but clients will persist in these unreasonable expectations if they are not properly informed.

Other expectations come from outside influences. For example, the US Green Building Council has extensively promoted the benefits of sustainable design – energy savings, greater sales and productivity, a healthier workforce, etc. It falls to the design professional to explain that these marketing pieces do not constitute guarantees on their part. Similarly, those who produce and sell BIM software are free to suggest that it will yield perfectly coordinated design – faster and cheaper than ever before. Design professionals who fail to deflate these expectations will face disappointed clients and the claims they will inevitably make.

And design professionals themselves create many of the expectations that will later come back to haunt them. The problem starts with proposals and marketing materials, including websites. Of course a certain amount of “puffery” in advertising is acceptable and even expected when trying to distinguish one’s services or wares from those of competitors. After all, we cannot seriously expect a design professional’s marketing piece to declare, “We will perform with the skill and care ordinarily exercised by other members of the same profession under the same circumstances.” This does not, however, give the design professional license to make statements with no basis in fact, and doing so will expose the design professional to claims of fraud and misrepresentation. The design firm marketing itself as “expert in racetrack design” is riding for a fall if its actual experience consists of betting on the ponies occasionally and designing exactly one racetrack.

More commonly, design professionals’ marketing materials cause problems in one or both of the following ways:

- **An inflated standard of care:** Saying that one’s firm is an “expert” in bridge design can be misconstrued, intentionally or not, to mean that the standard of care is a higher standard of care, and, accordingly, probably uninsurable. It is always better (and probably more convincing) to state an actual fact: “Our firm has designed 5,000 bridges in the last twenty years,” or “Our firm has extensive experience in designing bridges.”
- **The unintentional warranty:** Another source of trouble is the unintentional warranty. For example, “Sustainable design has been shown to reduce operating costs by 20% or more...” Really? On every project? Even if the owner doesn’t maintain or operate the systems properly? Even if energy costs skyrocket? Of course, no reasonable person would take the statement to such extremes, but claims are not always reasonable. When drafting proposals or marketing materials, it is a good idea to take a second look at the text – this time through the eyes of a lawyer who seeks to capitalize on alleged “warranties.”

These marketing materials have a way of resurfacing as exhibits to complaints at law. When design professionals include marketing materials in proposals or responses to requests for qualifications, clients may try to attach them to and incorporate them into the professional services agreement. Seemingly benign marketing clichés like “meet and exceed your expectations” take on a whole new meaning when included in a contract for professional services as the standard of care.

While design professionals should make sure that their marketing materials do not give rise to inflated expectations, this cannot be the whole solution. As noted above, client expectations have many sources. Therefore, design professionals who want to satisfy their clients, get paid, and avoid malpractice claims must have “The Talk” with their clients before the project begins. Though not the dreaded discussion of the “facts of life” with one’s children, this Talk is just as necessary, and may be every bit as uncomfortable. In design and construction, the “facts of life” boil down to this: No project is

perfect, no design is perfect and, therefore, perfection is not guaranteed. Disclosing these facts and deflating unreasonable client expectations is not fun.

But clients will discover the facts of life eventually, and it is far better for them to be prepared. The advantage of having The Talk with clients at the onset of the project – ideally during contract negotiations – is that they will be ready for the issues that inevitably arise, with a contingency in the budget and the knowledge that Change Orders are not the infallible signal of design professional negligence.

Omitting or postponing The Talk allows clients' inflated expectations to persist and become ingrained beliefs. And it is a missed opportunity to conduct this touchy discussion when attitudes are at their most positive and hopeful. Having The Talk *after* problems arise virtually guarantees that it will take place in a tense or outright hostile environment. Indeed, the client may perceive it as a bald-faced attempt to shirk responsibility, further aggravating the situation.

Moving Away from the “Product” Paradigm Benefits All Project Participants

So what is the answer? We believe it involves changing clients' misconception of design as a product warranted to be defect-free to an understanding of design as a professional service, and, as such, a collaborative process.

When we misconstrue design to be a “product,” its collaborative nature is obscured. It becomes a commodity – a pre-packaged, interchangeable, warranted, off the shelf solution to a generic problem. But design professionals rarely, if ever, set out to solve a generic problem. Design services are one-of-a-kind responses to client-specific goals and priorities, to be achieved under a unique set of circumstances. Communication and collaboration are at the heart of this process. And all project participants – client, design professional, and contractor – have a vital role to play in the project's success.

Setting aside the “perfect product” paradigm clears the way for each party to manage the risks they are best able to control. And it emphasizes the fact that the parties and their roles are inextricably intertwined. It is not a relay race, where the design is handed off to the contractor, and the project handed off to the client. It is a team sport in which each player contributes throughout the game, sometimes on the playing field, sometimes on the bench awaiting further opportunities to participate.

What Design Professionals Can Do

On the job:

- Establish the design professional as the trusted advisor of the client.
- Help the client understand that no set of design or Construction Documents is perfect, but the remedy is to identify and correct problems when they first arise, with the participation of the design professional.
- Discuss and document client expectations for the project. Although the design professional cannot guarantee the achievement of all goals, a thorough understanding of the client's wants and needs is essential, and documentation will help clarify intent and also avoid misunderstandings later.
- Unrealistic client expectations *must* be addressed during early negotiations. If expectations cannot be brought into line with reality, the design professional must be prepared to refuse the project.

- Discuss with the client the need for an adequate contingency to pay for design enhancements or unexpected conditions.
- Review with the client the fact that Change Orders do not necessarily signal design defects. There are some who advocate “safe harbor” contract provisions whereby the client agrees not to take legal action on change orders so long as the total amount does not exceed a set percentage of construction costs. Generally speaking, these may create more problems than they solve. They must be drafted carefully so that the design professional remains liable only for its negligence, rather than for all change orders exceeding the set percentage. Even when thoughtfully crafted, they can give rise not only to ambiguity in interpretation, but incorrect assumptions on the part of the client – namely, that all costs above the set percentage are the design professional’s responsibility.
- Explain to the client that the cost of construction is not within the control of the design professional. For that reason, opinions or estimates of probable construction costs cannot be guaranteed. A sluggish economy has added a new twist to this old problem, in the form of contractor bids much *lower* than expected. This can create client dissatisfaction if the client perceives that its project could have had a more expansive scope for the budgeted amount, but for the design professional’s estimating “error.”
- Address with clients the issue of designing to budget. Design professionals control neither construction costs nor contractors’ bids, and thus cannot guarantee that bids will not exceed the budget. The client’s expectation may be that you will redesign the project at no additional charge until the project fits within the budget. (Actually, this is the expectation of some professional society contracts, too.) If that is not your intent, say so. Make sure the contract reflects your intention.
- Throughout the project, remain alert for and promptly address expectation inflation.
- After discussing with your insurance agent, insurance carrier or legal counsel, deliver bad news – along with any potential solutions – to the client as soon as possible. Do not wait for the client to learn about problems through other sources.
- Foster a team approach on projects. Client, contractor, design professional, and other relevant parties should function as a team, each playing their part to create a successful project. For example, the client should participate in all constructability reviews. The team should agree upon an approach for early recognition and resolution of project problems.

Back at the office:

- Institute training programs for all appropriate members of your firm regarding the following:
 - The role and responsibilities of the design professional.
 - The standard of care for design professionals – and why it is what it is. Share this article with them, and discuss the consequences of allowing clients to persist in the expectation of perfection.
 - Being an effective negotiator. This is critical for all members of your team with client contact, not just those who negotiate contracts.
 - How to create client satisfaction – and the importance of doing so.
 - Quality/Price/Schedule trade-offs, and the importance of understanding what matters most to the client – and communicating the client’s priorities to the entire design team.

- Documentation and its role in effective communications. Confirming communications need not be written in a lawyerly, “CYA” tone – but they must be written.
 - Proper handling of construction phase issues.
 - Warning signs of potential problems on projects and appropriate steps to take when they arise. Your project teams must realize that problems are cheapest and easiest to solve on the first day they are identified. Ignoring them will not make them disappear, but instead may increase their severity and make appropriate solutions disappear.
 - The definition of “claims” under your professional liability policy, and why they must be promptly reported to the insurance carrier. Many design professionals do not understand that failure to report claims during the policy period in which they are made will result in a loss of coverage. Make sure your colleagues don’t make this mistake.
- Make sure your marketing materials (including your brochures, proposal materials, and website) aren’t fueling clients’ expectations of perfection. Consider having your lawyer, risk manager, or specialized insurance broker review them for potential trouble spots.
 - Read your professional liability policy and make sure you understand the extent of your coverage. Address any questions you may have with your insurance broker.
 - Make sure that members of your firm with contract signing authority are able to spot contract language that heightens the standard of care, and propose alternatives. Your insurance company, insurance broker, and construction law attorneys can be good resources for this information.

Through ACEC, and in the community at large:

- Encourage other ACEC members to address the issue of “expectations of perfection” with their clients.
- Disseminate information about this issue in your community, including this paper and its accompanying PowerPoint presentation (available in Fall 2012).
- Stay abreast of developments in professional liability insurance coverage through the ACEC Professional Liability Insurance Survey of Member Firms and the ACEC/NSPE/AIA Professional Liability Insurance Survey of Carriers.

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