

EC RISK REVIEW

A PUBLICATION OF THE PROFESSIONAL LIABILITY INSURANCE NETWORK



FINANCE INSURANCE, LTD.
Quality Service For Your Insurance Needs

VOLUME 28, 2004

For More Information Contact:

Don Kurosumi

Tel: 522-6081

Fax: 522-2082

email: dkurosum@financeinsurance.com

Meeting the Standard of Care

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We'd like to thank professional liability insurer DPIC Companies for their contributions to this article.

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, environmental 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 consulting 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 and conditions. This "standard of care" concept dates from English Common Law doctrine. This doctrine 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 project, and that qualified subconsultants are used where 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 environmental consulting is perceived as an exacting profession or science, some clients have difficulty acknowledging any potential for human error on the part of an environmental consultant. 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. 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 Insurance:

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 scope of services. 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.

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 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.

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 Insurance:

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 seek to insert language in the General Conditions of the Owner/Contractor contract 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.

Defects in Service

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

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.