

THE STANDARD OF CARE FOR ARCHITECTS

PRESENTED BY:

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Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.

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Introduction

Martin J. Kenworthy is a president of Kenworthy Law, P.C. Marty has been practicing law for 28 years and is licensed in the state and federal courts of Iowa, Ohio, Kentucky, and Florida and the United States Supreme Court. Marty holds a B.S. degree from Bradley University in Construction Engineering and worked in the industry for 8 years prior to beginning the practice of law in Cincinnati, Ohio. Marty's practice in construction matters includes representing public and private owners, design professionals, general contractors, sub-contractors and suppliers. Marty is also a registered arbitrator with the American Arbitration Association primarily for construction matters.

Course Description

Design professionals such as architects have a duty to perform their services in accordance with the prevailing standard of care.

- What is the standard of care?
- Who decides if the standard of care has been met or not?
- Who is entitled to bring a claim asserting breach of the applicable standard of care?

This course will answer these questions and others related to the standard of care by presenting case law decisions that have addressed claims against design professionals.

Learning Objectives

No.1: Understand the elements of the standard of care.

No.2: Understand how a contract may alter the standard of care.

No. 3: Understand what parties may be able to assert a claim for breach of the standard of care.

No. 4: Understand the legal process in determining if the standard of care has been met.



WHAT IS THE STANDARD* OF CARE?:

As an example, the American Institute of Architects (AIA) Owner-Architect Agreement (AIA B 101) explicitly states the standard of care to which the architect must perform. Section 2.2 reads as follows:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

* Sometimes referred to as “DUTY”

A Summary of Iowa Law Concerning the Standard of Care:

An architect's performance is measured against that degree of skill, care and learning ordinarily possessed and exercised by members of the profession in good standing in similar circumstances.¹

The elements of a professional malpractice case against an architect requires proof of: the applicable standard of care; the architect's breach of the standard; and a causal relationship between the architect's conduct and the plaintiff's damages.

The architect is bound to exercise reasonable care to see that the work is done in a proper manner with proper materials.²

A jury will usually determine whether the architect has met the standard of care. Expert testimony is usually necessary to generate a jury question that the standard of care has not been met. In some cases, the negligence may be so obvious as to be within the comprehension of a lay person so that an expert is not needed.

A contract between the architect and the client may also create a heightened standard of conduct. The phrase “highest standards in the engineering profession” can create a jury question as to the scope of that standard.³ Suggest that the following be included:

“The performance standard is not intended to create a warranty, guarantee or a strict liability standard, and it is expressly agreed that Design Professional is agreeing only that its services will not be performed negligently or with willful or reckless misconduct.”

Misrepresentation Claims:

Iowa law may impose the duty to use reasonable care in supplying information to those persons engaged in the business or profession of supplying information to others (such as plans relied on by contractors).

Negligence: Negligently prepared plans or specifications may give contractors a cause of action against architects for economic loss. A negligent misrepresentation theory may be based on either supplying false information in the plans or specifications or failing to exercise reasonable care in obtaining or communicating information.⁴

Fraud: In one case, an architect indicated that re-caulking would solve the repair problem at a building was found to be a fraudulent misrepresentation. The tort of fraud is difficult to prove (includes proving the architect knew the representation was false and intended to deceive the other party).⁵

A California case provides:⁶

Architects are sought because of their special skill.

Must use the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence.

Balances with the fact that those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. Owners have purchased a service, not insurance.

What is expected of an architect:

1. possess the required degree of learning, skills, and experience that is ordinarily possessed by similarly situated professionals in the community;
2. use reasonable and ordinary care and diligence in the exercise of your skill to accomplish your professional tasks; and
3. use good professional judgment in performing your professional tasks.

Notice that “perfect” is not part of the expectation.



"Be back by suppertime, Hump ... and, as always,
you be careful."

For more than a century, the law has viewed architectural and engineering services similar to professional services provided by physicians and attorneys. In the 1896 landmark case from Maine the court held that "The responsibility resting on an architect is essentially the same as that which rests upon a lawyer to his client, or upon a physician to his patient..."⁷

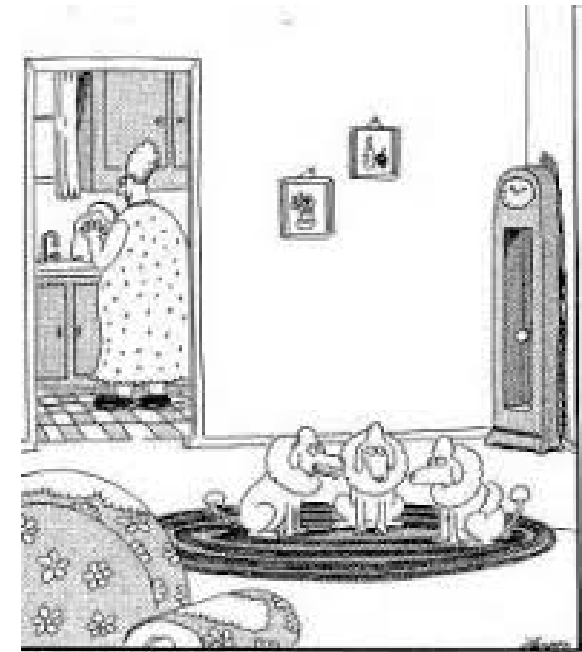
Other Elements of the Standard of Care

The University of Iowa Design Standards & Procedures provides:

1. The Design Standards document in its entirety and other written instructions from the Owner (including review comments) to the Design Professional, establish an expectation of the standard of care to be employed by the Design Professional in pursuit of the performance of their work.
2. Conflicts between Owner-provided instructions, documents, codes, standards and other instruments and Owner program requirements related to the project shall be brought to the attention of the Owner by the Design Professional. The Design Professional may be held financially responsible for resolving conflicts that were not brought to the Owner's attention.
3. Marked review documents and written instructions from the Owner that are not incorporated into the design by the Design Professional prior to bidding shall be documented by the Design Professional and approved by the Owner.
4. The Design Professional shall be financially liable for deviations from this document, marked review drawings, and written instructions, unless deviations are approved by Owner in writing...

A contractually defined standard of care clause is a provision that requires the designer to design in compliance with the owner's set of design standards, written instructions and/or marked-up project document review sets.

If the designer fails to meet this reasonable and contractually established expectation, there is little room for the A/E to argue that the standard of care was met. If the designer did not incorporate the owner's review comments into the design or failed to design to the published design standards, liability will probably follow.



"Well, yes, that is the downside, Fluffy ... When we kill her, the pampering will end."

What Not to Do:

Do not undertake projects which are clearly beyond your own technical abilities or those of the personnel that you have available to work on the assignment. Only experienced, competent, and qualified staff should be assigned to each task. Junior and inexperienced personnel should be carefully supervised by fully qualified architects. Whenever necessary, the firm should retain outside engineering and other consultants to supplement its own capabilities.

How can an architect know what the professional standard of care is?

The burden is on each architect to keep informed on a current continuing basis and on each firm to assure that its personnel maintain and improve their professional skills.

- Subscribe to and read the professional press including the national architectural, engineering, and construction magazines as well as the regional and local publications.
- Review manufacturers' literature.

- Attend seminars, workshops, and other continuing education offerings.
- Examine other architects' work and review their construction documents whenever possible. Participate in peer review programs.
- Teach courses, give talks, and write articles.
- Architects will usually be found negligent if they continue specifying materials or procedures which have been proven harmful or unsuccessful.
- Architects who do not utilize checking procedures are probably not meeting the standard of care when it is a general practice among architects to do so.

When an Expert Fails to Define the Standard:

An engineer was hired "to design, engineer, and survey the site where the homes" were to be built. A lawsuit against the developer alleged problems with the homes related to the water-table levels and drainage. The developer, in turn, sued the engineer.⁸

The developer's expert offered that the engineer "deviated from the standard of care applicable to engineers in that it failed to properly recognize and evaluate the water table when determining the minimum building pad elevations."

In all cases, an expert must establish an adequate foundation to the standard of care the design professional is alleged to have violated. **The expert failed to explain how a "proper" evaluation should have been performed.** The expert **failed to explain industry practices or to refer to the engineer's contract or industry guidelines** related to the evaluation or recognition of the water table. The mere conclusion that the engineer "deviated from the standard of care" was found to be insufficient.

The court held that the developer's standard-of-care expert in this case failed to establish "with any precision the applicable standard of care." The court noted that the expert merely made the bare assertion that "the standard" was breached.

What About Limits on Liability?

No Iowa state case has decided whether a limitation of liability in an architect's contract is permissible.

A federal case that applied Iowa law, allowed a design professional to limit by contract their liability as follows:

The court concludes that the design professionals here could properly limit by contract their liability for the harm alleged, because the harm did not involve physical injury or death to any person, as was the circumstance in the cases cited above rejecting contractual limitations on liability. Furthermore, the harm for which liability is sought to be disclaimed is harm to the contracting party.⁹

It has been reported that an Iowa district court has upheld a limitation of liability provision in an engineering contract. An engineer agreed to conduct a phase one environmental assessment and geotechnical survey on real estate. The contract contained a limitation on the amount of the engineer's liability to the lessor of \$1 million or the total compensation paid to the engineer. The engineer was only paid \$2,350 for its services. The court upheld the clause and limited the damages to \$2,350.

Limitation of Liability Recap:

- Limitation of liability clauses are not disfavored;
- In contracts presumed to be entered into at arm's length; and
- Not applicable to injury to person or property.



"No way. I'll put my magazine down when you put yours down."

Who Can Sue the Architect?

A woman falls twenty feet and is paralyzed when the balcony of a home she was visiting tore away from the house and collapsed. The architect that designed the house and performed construction administration services is sued.

Texas Court Appeals No. 1 (architect loses):¹⁰

The court held that the guest had third party rights against the architect, and that a jury could consider expert evidence to determine whether the architect was negligent and, therefore, liable for a share of the multimillion dollar damages.

The architect had a duty, “after having contractually agreed to ‘endeavor to guard’ against defects and deficiencies, to notify the owner of open, obvious, and observable defects implicating critical safety and structural integrity concerns” [and this duty] “extends to third-party visitors who are ultimately injured....” The court concluded that “[A/Es’] duty to use due care in fulfilling its contractual duties ... extended to those persons foreseeably subjected to the risk of personal injury.”

Texas Court Appeals No. 1 Continued:

The issue was whether by failing to observe and report various construction defects, the architect had thereby failed to satisfactorily perform its construction administration services. Pursuant to the Owner-Architect agreement, the purpose of the architect's site visits was "to endeavor to guard the Owner against defects and deficiencies in the Work."

Problems with the construction work included:

The balcony was not bolted to structural members of the house; a rim joist and wood block was not used; light-weight clips were used instead of specified welded tabs for handrails; and the handrail was not bolted to the house.

Not only were these defects found by the court to be readily observable, they noted that the defects had even been photographed by the A/E's site observer during construction, and the A/E failed to notify the owner about the defects.

Texas Court Appeals No. 1 Continued:

The plaintiff's expert testified that safety of the balcony is such a critical matter that a reasonable A/E should pay special attention to its structural integrity during construction administration services. A jury found the A/E negligent. The A/E appealed — arguing it had no duty to identify the defects shown in the photos; and even if it had a duty, it was owed only to its client and not to visitors to the home. The court held **“the A/E had a duty to identify significant deviations from its own design drawings when those deviations implicated critical structural integrity concerns and were plainly visible on photographs....”**

Texas Court Appeals No. 2 (architect wins):¹¹

- The obligation to guard the owner against defects did not run to third-parties
- There was no special relationship between the architect and the builder and therefore the architect had no duty to protect another from the defects of the builder
- The contract specifically provided that the architect had no control over the work of the builder or means, methods and techniques

Duty to Third-Parties:

The California Supreme Court has held that architectural firms owe a duty of care to future homeowners in the design of a residential condominium building even in situations where they do not make the final decisions on construction or exercise ultimate control over construction.¹²

A homeowners association sued several parties including the architect with whom the owners and developers contracted for architectural services. The alleged defects were extensive water infiltration, inadequate fire separations, structural cracks and other safety hazards. A primary allegation was that the solar heat gain is due to defendants' approval, contrary to state and local building codes, of less expensive, substandard windows and a building design that lacked adequate ventilation.

Does a duty exist:

- (i) The extent to which the transaction was intended to affect the plaintiff
- (ii) The foreseeability of harm
- (iii) The degree of certainty that plaintiff will suffer injury
- (iv) The closeness of the connection between the defendant's conduct and the injury suffered
- (v) The moral blame attached to the defendant's conduct
- (vi) The policy of preventing future harm.

The court held that the architect's primary role in the design of the project bears a "close connection" to the injury alleged by the plaintiff. Second, recognizing that an architect has a duty of care to future homeowners does not raise the prospect of "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

The court reasoned that public policy favors the extension of liability to the architectural firm.

“A liability rule that places the onus on homebuyers to employ their own architects to fully investigate the structure and design of each home they might be interested in purchasing does not seem more efficient than a rule that makes the architects who designed the homes directly responsible to homebuyers for exercising due care in the first place.”

Are the Damages Attributable to Architect?

Even when the standard of care is agreed upon, financial recovery may hinge on whether the mistake was an error or an omission. Omissions usually add value to a project. Instead of being included at the time of contract award, the building improvement that was “omitted” from the bid package is picked up by a change order. Architects and engineers will normally argue that the owner should pay for omissions since the owner would have paid a higher contract amount at the time of award. Owners will argue that a higher cost for the omitted item results from adding it by change order versus competitive bidding. Generally, however, recovering the cost of omissions is an uphill battle.

Design errors, on the other hand, are mistakes made by the designer that, when corrected, do not add to the greater value of the project. While a design error may be recoverable, we should be aware of the industry and legal acceptance that there is no such thing as error-free design. Even a modest building design effort requires scores of individuals acting on hundreds of major decisions to coordinate the design of thousands of building components. A design effort is a unique, one-time creative endeavor that does not have the benefit of product testing.

What Are Qualifications of the Expert?



Some states have an affidavit of merit requirement from a like licensed professional before a claim can be made. The affidavit in a case from New Jersey was from an engineer even though the claim was against an architect. ¹³

The court determined that was improper and offered a few illustrations. For example, the court noted that a physician is qualified to take and record a patient's blood pressure, and a nurse is equally qualified to do the same. However, the court said that nurse could not file an affidavit of merit against a physician or vice-versa.

The court also stated:

A licensee practicing within his or her profession or occupation who makes a mistake and harms another person should reasonably anticipate that he or she can be held to account for that mistake by the professional board that has issued him or her a license to practice.... In addition, the licensee must fairly anticipate that he or she could be sued for malpractice by the injured party, upon proof that he or she strayed from the "acceptable ... standards or treatment practices" within his or her profession or occupation.... The professional has a right to expect that those standards of care by which his or her conduct will be measured will be defined by the same profession in which he or she holds a license, and not by some other profession.

Contract Duties and Risks:

The following are a few of the Architect's Responsibilities under AIA B101 and A201:

- The Architect will provide administration of the Contract for Construction.
- The Architect will visit the site at appropriate intervals to become generally familiar with the progress and quality of the Work completed, observing if it complies with the Contract Documents.
- The Architect will keep the Owner informed about the progress of the Work and will report deviations, defects and deficiencies.
- The Architect will investigate matters regarding site conditions that are different than expected found by the Contractor during the performance of the Work.

- The Architect is the point of communication between the Owner and Contractor, and the Architect's consultants.
- The Architect has authority to withhold payment if portions of the Work are defective, if third party claims may be or are made against the Owner, if Subcontractors have not been paid, if the Work cannot be completed for the unpaid balance of the Contract Sum or in the remaining Contract Time, if there is damage to the Owner or a separate contractor, or by repeated failure of the Contractor to carry out the Work in accordance to the Contract Documents.
- The Architect has the authority to order inspection or testing of the Work. The Owner may be obligated to pay for these inspections and tests, but if Contractor's work had been done incorrectly, then the Contractor shall be responsible for these costs and the Architect's additional time.
- The Architect will review Shop Drawings, Product Data and Samples submitted by the Contractor for compliance with the design intent only.

- The Architect is not responsible for the means and methods of construction or for safety precautions and will not be responsible for the Contractor's failure to perform the Work in accordance with the Contract Documents.
- The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes that do not affect the Contract Sum and/or Contract Time.
- The Architect will inspect the Work to determine the dates of Substantial Completion and Final Completion, check if the Contractor finished his punch list, and if the Work conforms to the Contract Documents.
- The Architect will receive and forward to the Owner all close out requirements, and will issue the final Certificate for Payment.
- The Architect will interpret and decide matters concerning the Contract Documents, decide matters regarding performance, and will respond to contractor's requests for information regarding the Contract Documents.

Observation vs. Inspection:

- *Observation* is the visual observation of the engineering system for general conformance with the approved plans and specifications.
- *Inspection* is the monitoring of materials and workmanship that are critical to the integrity of the project to ensure compliance with the approved plans, specifications and applicable laws.

Contractors supervise construction and architects observe the work to determine if it is in accordance with the contract documents. **An architect does not supervise construction.** If it is determined that architect is supervising the work, he can suffer inappropriate legal consequences. If a design professional has agreed to perform supervisory tasks on a construction project, the contractor on the project may have a right to rely on the competence of that supervision.

After visiting the site and observing the work, the architect issues the owner a certificate of payment based on the progress of the work stated by contractor. Owners rely on architect's professional opinion that the work has progressed to the point indicated and that the work is in accordance with contract documents. If architect issues certificates for payment without proper observation of the work, he may be liable to the owner for injury caused by defective work.

Other Considerations.

- Design/build.
- Green/Sustainable Building.
- Oral Contracts.
- Insurance carriers advise that disputes frequently arise because of documentation lapses/errors and not design errors.

Education is when you read the fine print.

Experience is what you get when you don't.

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End Notes

1. Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W. 2d 10 (Iowa 1975)
2. Wilson and Associates v. Forty-0-Four Grand Corporation, 246 N.W. 2d 922 (Iowa 1976)
3. Iowa-Illinois Gas & Elec. Co. v. Black & Veatch, 497 N.W.2d 821 (Iowa 1993)
4. Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005)
5. Mercy Hospital v. Hansen, Lind & Meyer, 456 N.W.2d 666 (Iowa 1990)
6. Gagne v. Bertran, 43 Cal. 2d 481, 275 P. 2d 15 (1954)
7. Coombs v. Beede, 89 Me. 187 (1896)
8. Pond Hollow Homeowners Ass'n., et al. v. Ryland Group, Inc., et al., 779 N.W.2d 920 (Minn. App. 2010)
9. Aetna Casualty & Surety Co. v. Leo A. Daly Co., 870 F. Supp. 925 (S.D. Iowa 1994)
10. Black+Vernooy Architects v. Smith, 2010 WL 5019659 (Texas App. Dec. 2010)
11. Black+Vernooy Architects v. Smith, 346 S.W.3d 877(Texas App. 2011)
12. Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP, 327 P.3d 850; 173 Cal.Rptr.3d 752 (2014)
13. Hill Int'l v. Atlantic City Bd. of Ed., 2014 N.J. Super. LEXIS 177 (App. Div. Dec. 30, 2014)