

PRO-FORM INSURANCE SERVICES

15 Allstate Parkway, Suite 220
Markham ON L3R 5B4
Tel: (905) 305-1054 Fax: (905) 305-1093
www.proforminsurance.ca



Nobody Is Perfect: How to Manage Client Expectations

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 unique circumstances.

The majority of claims against architects and engineers have one thing in common – an upset client. Clients file the vast majority of claims against design professionals and each one of these claims involves unmet client expectations.

In many cases, the client has every right to be upset. When a design firm's negligent errors or omissions result in long project delays, extensive added costs or serious project flaws the client is justified in filing a claim against the design firm to try to recoup its losses. That's why you have professional liability insurance.

In other cases, however, clients simply expect too much from their design teams – they expect perfection. Any minor delay, added cost or design change is taken as a sign of incompetence on the part of the architect or engineer. Unreasonable clients are quick to file a claim or make a demand against a designer even though the cause of their upset is nothing more than a typical project snafu that can – and should – be resolved through amicable cooperation rather than antagonistic confrontation.

Managing client expectations is key to avoiding these unnecessary confrontations, demands and claims. When clients are educated as to what to expect during the design and construction of their project and what standards a design firm must meet, then minor upsets can be viewed as a necessary evil of the design and build process and energy can be directed toward resolving those routine problems amicably and effectively.

Sophisticated clients are aware of the ups and downs of the design and construction process and usually work with the designer and contractor to remedy project upsets. However, clients unfamiliar with the trials and tribulations of a major project need to be educated on the process before design and construction begins. One of the first concepts to explain to these clients is the prevailing "standard of care" for design professionals.

Understanding the Standard of Care

Your clients need to understand that all that is expected or required of you is to render your design 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. It 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. In other words, being perfect isn't required as long as you act with due skill and 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 the project, and that qualified subconsultants are used. Continuing education and training can be essential to keeping up with prevailing knowledge, technology and standards of care.

Watch Your Language

Some clients may attempt to raise your standard of care by imposing contract language that requires you to perform above the prevailing norm. Such language may demand that you perform "to the highest standard of practice" or "in a non-negligent manner."

Agreeing to such language could be construed as making a guarantee or warranty, with all the related issues of insurance and statutes of limitation. If you accept any contract 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.

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. Such language should confirm that in providing services you 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 necessary, or if the client demands it, you can expand this contract clause by offering to correct defective services without additional fee. However, make it clear to your client that this offer does not include any construction or material costs or add items not included in the original design you agreed to perform. Such language might state that, upon notice and by mutual agreement, you will correct any design services that do not meet the standard of care at no additional fee to the client. As always, work with your legal counsel to draft appropriate language.

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. Fortunately, the courts have disagreed with this position. A 1992 decision (*Gibbes Incorporated v. Law Engineering*, 960 F 2d 146 4th Cir. 1992) expressly found that contract language stating that an 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 warranty obligation.

Give No Guarantees

Have your legal counsel consider including a contract clause stating that you will not be required to sign any documents from any parties that would result in you having to certify, guarantee or warrant the quality of your services or the existence of any jobsite conditions whose existence you cannot ascertain. Also have your client agree not to make resolution of any dispute or payment of any amount due to you contingent upon you signing any guarantee or certification.

You and your attorney can go even further to make certain everyone understands you do not have to be perfect. You can suggest language to be placed in the general conditions of the client/contractor contract that sets reasonable expectations for your performance. Have the contractor acknowledge it understands that the design documents may be imperfect and may contain errors, omissions, conflicts, inconsistencies, code violations or improper use of materials. Agree that such deficiencies will be corrected when identified. Have the contractor agree to study and compare the individual contract documents and report in writing to the client any deficiencies discovered. Also have the contractor agree to require each subcontractor to study the documents and report on a timely basis any deficiencies they may find.

Defects in Service

Help your client understand that the contractor may be in the best position to first spot design defects and minimize any potential damages. Consider adding contract language that requires your client to promptly report any defects or suspected defects in your services so that you may take measures to minimize the consequences of such defects. Have the client further agree to impose a similar notification requirement on all contractors and subcontractors. Have your contract clause specify that failure by the client and the client's contractors or subcontractors to notify you of defects or suspected defects shall relieve you of the costs to remedying the defects above the sum such remedy would have cost had prompt notification been given when such defects were first discovered.

Final Contingency

To make sure any imperfections can be corrected, attempt to add a contingency fund provision to your contract. This provision should have the client recognize that the final design and construction cost may exceed the estimated cost. Further, it should require the client to set aside a contingency fund equal to a reasonable percentage of the estimated construction cost as a reserve to pay for unanticipated expenses. Seek agreement from the client that it will not make a claim against you or your subconsultants with respect to increased costs within the agreed-to contingency.

Finally, 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.

It's the Law

Regardless of what your client may think or expect, perfection is impossible to attain. Your best approach, therefore, is to ensure that your client has realistic expectations of you and your services. Communicate early and often with your client stressing that perfection is unattainable at any price, and errors and omissions are common parts of the design and construction process.

Your client contract does not have to state that you agree to abide by the standard of care. However, the law requires you to do so – 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, educating your client as to the prevailing standard of care, having appropriate contract language that does not raise that standard, and receiving 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.