In a case where a building element fails prematurely, owners want to recoup their expenses and resolve the problem. But how to know what constitutes negligence on the part of the designer, contractor, engineer, or consultant? Where responsibilities among these parties overlap, who has ultimate responsibility? In short, where to lay the blame?

The answer lies in the subtle definitions and interpretations of what is called “standard of care.” If a building owner suspects that members of the project team have acted with negligence and have failed to adequately perform their professional duties, that owner may choose to file a legal claim. This guide is intended to help both building owners and design professionals better understand and navigate standard of care disputes—and, ideally, avoid them.

**Defining the Standard of Care**

In professional liability cases, the burden of proof often falls more heavily on the defendant (the architect or engineer) than on the plaintiff (the party suffering a loss). That’s because it’s up to the design professional to define the relevant standard of care, and then to demonstrate that he or she has met or exceeded that standard.

According to the American Institute of Architects (AIA) Owner-Architect Agreement, the standard of care is set forth 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.*” (AIA B101-2007 § 2.2)

Designers, consultants, owners, and contractors should discuss any inherent risks and assume shared responsibility for project outcomes.
Let’s break this down:

**Consistency**

First, we have “…services consistent with the professional skill and care ordinarily provided by architects….” Here, the wording is important: the designer is not expected to be the very best in the field; he or she must provide competent professional practice that is on par with the average. Anything below this constitutes negligence.

**Locality**

Next, we find the qualification: “practicing in the same or similar locality under the same or similar circumstances.” The architect of a shopping plaza in the southwest would not necessarily be expected to provide the same level of professional services as one who designs urban high-rises on the eastern seaboard. This is not to say that in one case shoddy work is acceptable, whereas the other must provide competent professional practice. Building materials, for example, that will corrode irreparably after a single winter in New England might last decades in the dry climate of the Arizona desert.

**Efficiency**

Finally, we have a statement as to the project schedule: services are to be performed “as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.” As with the previous statements, this language is open to interpretation. How to appropriately balance good workmanship with efficiency is the sort of question to which there are as many answers as there are architects. Here again is where the idea of consistency comes into play. It might save time to cut down on the number of site visits during construction, or to skip documenting observations during those site visits, but if common practice dictates otherwise, the architect can be held liable should problems arise that might have been avoided with more diligent oversight.

**Scope of Services**

The section of the Owner-Architect Agreement cited above is preceded by a statement that can have bearing on standard of care considerations: “The Architect shall provide the professional services as set forth in this Agreement” (AIA B101-2007 § 2.1). At first blush, this seems self-evident, but the implications of this qualification can limit the liability of the architect. In principle, the designer need only perform the work as laid out, and is not responsible for problems that arise outside that scope of services.

In practice, however, the issue is a bit murkier. Let’s look at an example: an architect is retained for a limited investigation of a single facade, during which she discovers a potentially unsafe condition at another, adjacent facade. Even though the hazardous area is outside the contractual scope of services, the architect still has a responsibility to inform the owner and recommend emergency action. In cases of safety, professional obligation may carry beyond contractual services.

Furthermore, the statement regarding scope of work limits the reach of the contract language that follows, in that an architect cannot perform fewer services than are listed in the agreement, even if standard practice in the community would permit less. That is to say, for example, that while review of certain contractor submittals might not be commonplace for a given location and building type, if the contract stipulates that such drawings, samples, and documents will be reviewed, the architect is bound to do so despite the prevailing standard of care.

**Expert Witnesses**

If standard of care is so hard to pin down, how then is professional negligence determined? The most common method is through expert witness testimony. Preferably, the expert should have first-hand experience in
the exact discipline in question. However, it is only required that the expert be acquainted with the procedure or practice, due to the sometimes limited availability of professionals with direct experience in highly specific technical areas.

Expert selection is critical, as it is on the basis of professional opinion that breach of standard of care can be established or refuted. Each side of a dispute will select their own experts, and where these professionals disagree, it is up to the judge, jury, or arbiter to decide who to believe. Straightforward presentation of evidence and conclusions, sound credentials, and in-depth documentation are all factors in establishing a witness’ reliability and in reinforcing the accuracy of his or her assessment. Referencing guidelines from trade publications, insurers’ caveats, or standard design guides lends credence to professional opinion.

An architect or engineer with a specific practice in the field at hand may be at an advantage as an expert witness, as his or her credibility is bolstered by specificity of expertise. For example, premature failure of a thin stone wall cladding system would be best addressed by a building envelope specialist, while an under-performing ventilation system would be better evaluated by a mechanical engineer.

However, proficiency in failure analysis and forensic investigation may not be enough when it comes to establishing the standard of care. An expert witness must also demonstrate familiarity with current codes, recommendations, and manuals, as well as possess varied industry experience. Architects and engineers who assume leadership roles in professional societies and industry associations, such as the Construction Specifications Institute (CSI), the American Institute of Architects (AIA), or the American Society of Civil Engineers (ASCE), are in a better position to evaluate the prevailing standard of care than are their less involved peers.

**Emerging Technologies**

From innovation in document preparation to new sustainable design systems, up-and-coming materials and methods mean architects and engineers must keep current on product performance, regulations and standards, and accepted practices. In addition to review of trade publications, manufacturers’ guidelines, and other literature, design professionals can stay up-to-date by attending educational seminars, maintaining active participa-
tion in professional organizations, and seeking peer input from others in the industry.

Failure to stay on top of state-of-the-art standards and practices can be disastrous for both the owner and the designer should any aspect of the project approach prove unsuccessful. Even where the vast majority of the work is competent, a single lapse in judgment or knowledge can constitute breach of standard of care.

**Evolving Standards**

Keeping abreast of current practices, changing standards and codes, and product developments is critical for architects and engineers, both to minimize the possibility of substandard work and to protect the well-being of building users. Specifying a product or practice when it has been demonstrated inadequate or even harmful carries a grave risk. As the saying goes, “ignorance of the law is no excuse.” Professing to be unaware of the hazards of asbestos, for example, did little to defend any designers who continued to specify it after research confirmed its carcinogenic properties.

Often, designs are held to industry standards even where contract documents dictate otherwise. Let’s say, for example, that a designer specifies more stringent wall tolerances than is standard, but the contractor builds the walls to comply with customary tolerances. In the event of a failure, the designer could argue that the walls were not constructed as specified. However, the contractor can counter that the design defied industry standards and so was not buildable. Keeping sight of design standards, and discussing openly any deviations from those standards, is essential to meeting standard of care obligations.

**Novel Materials and Procedures**

The green building industry is host to a deluge of relatively untried innovations in design strategy, materials, and procedures. While creativity and invention are valued in architecture, if the new technology fails to perform as anticipated, the architect or engineer may be accused of negligence. How, then, to continue to advance in the direction of environmental sustainability while minimizing potential conflict?

Through open, honest risk-benefit discussions among the design professional, the contractor, and the owner or developer. The architect or engineer should stay current with manufacturers’ literature and industry standards and understand the material properties and anticipated behavior of any product he or she specifies. Contractors and consultants need experience, if not with the precise system or process in question, at least with similar construction design and relevant methodologies. As an informed consumer, the owner should understand the potential consequences of applying a technology for which a standard of care may not yet exist.

**Informed Consent**

Where new technologies are employed, particularly in green building projects, design professionals and owners need to discuss any risks inherent to experimental materials, assemblies, or systems. The owner needs to be an active participant in the decision-making process, particularly for emerging and untried technologies. Informed consent enables architect and

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A When new technologies are used, owners must be active participants in the decision-making process. Pictured here, from left: a green roof at Yale University, the Smithsonian National Museum of the American Indian’s undulating facade, and a Mediamesh® screen at the Crowne Plaza Times Square.
owner to experiment with creative solutions and new materials with full knowledge that should those systems not perform as expected, both parties consciously agreed to the risk.

With technologies constantly being developed and refined, design professionals may find that the best product for the job is one with which they have little or no experience. Being forthcoming about that fact is crucial to protecting professional integrity and allowing clients to make appropriate choices.

As an example, parking structure and bridge deck expansion joint covers, which are subjected to deformation and thermal cycling, are notorious for frequent failures. A new joint cover purports to improve performance, and product data points to positive results. Before forging ahead with the new material, though, the design professional would do well to visit installations of the covers with the client, as well as discuss potential benefits and drawbacks, to facilitate an educated product assessment.

Innovation in design, engineering, and materials is as important as it is exciting. It is through the willingness of developers, building owners, and design professionals to try new systems and strategies that significant strides are made in the performance, durability, and sustainability of today’s built structures. However, novel methods come with some measure of risk. When all parties are kept up-to-date with current codes, standards, research, and procedures, both the benefits and the potential risks can be appropriately evaluated, avoiding potential standard of care disputes down the road.

Avoiding Disputes and Resolving Claims

Litigation is expensive and time-consuming, and it creates ill will among parties. How then to avoid negligence suits altogether or, where that’s not possible, to resolve claims efficiently? Moreover, how can we avoid the blame game and focus our attention where it’s needed most: fixing the problem?

The simple answer is to build it right the first time. But with the complicated building systems of today, which demand integrated efforts from countless contractors, consultants, and specialists, in practice there is much room for error. For both rehabilitation and new construction projects, common sense measures can keep lines of communication open and help safeguard against avoidable failures:

- **Apply current codes and standards.** Building and administrative codes in many cities have undergone substantial changes in recent years, particularly in regard to energy efficiency and green building requirements. Common standards, such as those from ASTM International and the American Concrete Institute (ACI), evolve as new developments and data emerge. Applying outdated codes or standards, such as those for wind resistance or fire protection, can constitute negligence should building elements fail.

- **Consider interdependent building systems.** As building components grow increasingly complex and disciplines become more fragmented, fewer design and construction teams attend to areas where these technologically advanced systems intersect. Thus, connections between roof areas, facade and roof intersections, penetrations, and openings are at high risk for leaks, cracks, splits, and other catastrophic failures. Assigning a member of the project team the express task of monitoring such trouble spots can reap dividends by preventing distress and resultant litigation.

- **Define roles on and off site.** With so many consultants and sub-consultants involved in everything from waterproofing to window design, it’s critical to delineate...
Building owners and developers have untangled one mess only to become entrapped in another. As an example, a roof assembly at a prominent financial institution was installed using the incorrect adhesive, and the system failed. Construction began again, only to fall prey to new shortcomings in design and workmanship. At long last, the beleaguered owner retained a building envelope architect to provide peer review services to the prime architect, and the additional administration provided the guidance necessary to see the project to successful completion.

Professional Standards for Professional Practice

Architects and engineers must meet two basic criteria: they must deliver the services in their contract, and they must perform those services in accordance with the professional standard of care. The former is fairly straightforward: failure to deliver contractual services is breach of contract. The latter, however, is subject to interpretation, as we have seen. Standard of care is embodied in tort law, which considers negligence and liability. An
Standard of Care

As building enclosure experts, Hoffmann Architects’ professionals often serve as expert witnesses. Active in industry organizations and versed in current standards, our architects and engineers provide the documentation necessary to establish standard of care and evaluate professional conduct. We support building owners, design professionals, and construction managers alike through arbitration, mediation, and litigation.

Our clients for standard of care consultation include:

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- Garcia & Milas
- Gibbons
- Gordon, Muir & Foley
- Harter Secrest & Emery
- Heilman, Ekman & Associates
- Jackson & Campbell
- Jones, Glenn & Robinson
- Law Offices of Steven M. Basche
- McCarthy & English
- Michelson, Kane, Royster & Barger
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Sivin & Miller
- Suisman Shapiro
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**Owners**
- Aetna
- Elizabethtown Gas
- Fairfield Public Schools
- Foxwoods Resort Casino
- M&T Bank
- Seneca Niagara Casino & Hotel
- State of Connecticut
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- Gilbane Building Company
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Our services for litigation and claim support include:

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- Forensic investigation

**A** Failure investigation, remediation, and litigation support at a state facility.

**A** Exterior investigation, rehabilitation, and expert witness services for an office complex.

**A** Litigation support relating to roof design and installation errors at a primary school.

**A** Defect evaluation, remediation, and expert witness services for a hotel parking garage.
understand is not so much the precise definition of the standard as used historically by courts, but the ways in which designers, consultants, contractors, owners, and developers might facilitate communication, improve accuracy, and assume shared responsibility for any risks. Through cooperative effort, the project team as a whole can shoulder the burden of blame for technologies that fail—and share the glory of successful innovation.

architect or engineer might perform contractual services, but do so in a way that fails to meet the degree of care ordinarily practiced in that location and discipline.

Because the standard of care is defined in a relative, rather than absolute, way (i.e. architects are compared with others in their profession and geographic area), it can be confusing, both for building owners and for design professionals. What’s important to understand is not so much the precise definition of the standard as used historically by courts, but the ways in which designers, consultants, contractors, owners, and developers might facilitate communication, improve accuracy, and assume shared responsibility for any risks. Through cooperative effort, the project team as a whole can shoulder the burden of blame for technologies that fail—and share the glory of successful innovation. ■

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