

Professional Conduct: What Standards Exist and What Impact Might They Have in Practice?

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■ Course Description

Design professionals, in accordance with the codes and guidelines maintained and upheld by their states and professional societies, often agree to abide by **codes of conduct** such as the following:

- **Protect** the **safety, health and welfare** of the public in the performance of professional duties.
- Perform services **only in areas of competence**.
- Issue all statements in an **objective and truthful manner**.
- **Safeguard** the **trust** of clients.

This course will review several common **challenges** faced by design professionals and some possible **solutions** to upholding those guidelines.



■ Learning Objectives

Participants will learn:

- What steps you need to consider to **protect the safety, health and welfare of the public**, and what common **mistakes** design professionals make when they observe an unsafe condition.
- How you can adhere to a contractual **confidentiality requirement** while still **issuing public statements** in an objective and truthful manner.
- What duties are owed to a client if you are required to **act as a faithful agent or trustee** for that client.
- What considerations exist if you are asked to **sign or seal the drawings of another**.

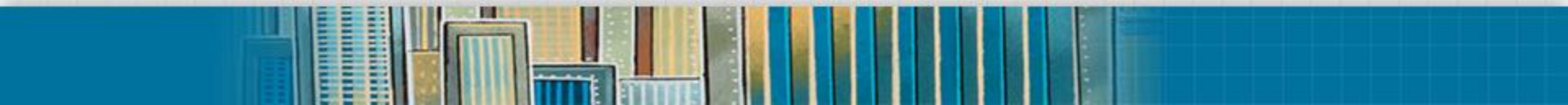


Who Cares?



■ So, For Our First Example...

If you observe
an **unsafe condition**
on a construction site,
what steps should you
consider to protect the
safety, health and welfare
of the public, and...
what **common mistakes**
do design professionals make
in such circumstances?



■ Protecting Safety, Health, and Welfare



Safety is generally not part of a consulting professional's contractual duties



Sole responsibility for safety of all individuals and property rests with contractor



Regardless of contractual safeguards, there is responsibility and potential liability to design professionals



■ Protecting Safety, Health, and Welfare



Fall Protection

Each year, falls consistently account for the greatest number of fatalities in the construction industry.

Factors:

- unstable working surfaces,
- misuse or failure to use fall protection equipment, and
- human error.

■ Preventing Injuries on a Project Site

While on the site, follow the safety program established by the party responsible for site safety!

Guardrails with toeboards and warning lines or control line systems

Fall arrest systems (body harnesses) and safety nets

Aerial lifts or elevated platforms

Covers for floor holes

Restraint systems



■ Protecting Safety, Health, and Welfare

Hazard:

Serious head injuries can result from blows to the head.

Solution:

Wear hard hats where there is a potential for:

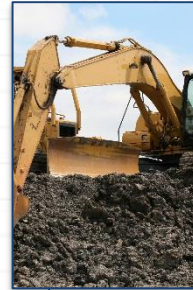
- objects falling from above,
- bumps to the heads from fixed objects, or
- accidental head contact with electrical hazards.



■ Protecting Safety, Health, and Welfare



Give immediate verbal notification of the specific hazard to the contractor with overall safety responsibility.



Address only specific safety hazard posing an imminent risk of serious harm.



Do not give a recommended solution.



Thereafter, give written notification to the owner (client) with a copy to contractor.



Explain in writing that you do not have safety responsibility; this serious circumstance came to your attention and you are writing on a *one time basis*.

■ For Our Next Example...



If a design professional contractually commits to a **confidentiality provision**, then how can that design professional **abide by that obligation** while... still issuing **necessary public statements** in an **objective and truthful manner**?



■ Guarding Confidentiality

The most recent edition (2007) of AIA's Owner-Architect Agreement forms specifically address each party's treatment of such information received from the other, and designated as such...

- Now **mutual**, previously just obligation of Architect
- Architect's right to disclose does not include right to disclose to **prevent harm, comply with law, or perfect a claim**

*§10.8 If the Architect or Owner receives information **specifically designated** by the other party as "**confidential**" or "**business proprietary**," the receiving party shall keep such information **strictly confidential** and shall not disclose it to any other person **except** to (1) its **employees**, (2) those who **need to know** the content of such information in order to perform services or construction solely and exclusively for the Project, or (3) its **consultants** and **contractors** whose contracts include similar restrictions on the use of confidential information.*



■ Guarding Confidentiality

Failures can lead to...

An excuse to terminate you.

Strict and expensive enforcement.

Substantial administrative burdens.

Denying you a complete set of project records.



■ Guarding Confidentiality

Narrow definition of
“Confidential
Information”

Try to require the
confidential documents
must be identified in
writing.

Exclude information you
already have or that is
already in public domain.

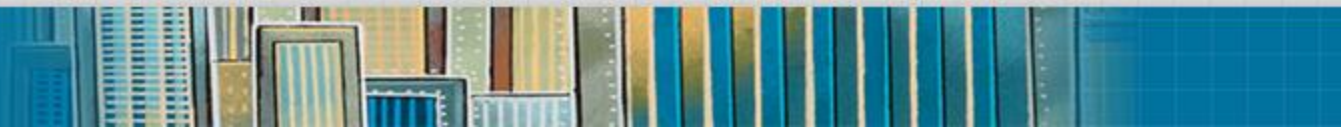
Exclude information
required to be disclosed
by court or government
official, to prevent harm,
or to perfect a claim.

Make certain that
administrative burdens
are manageable and do
not restrict project
performance.

Include subconsultants.

Confirm you may retain a
complete set of
documents.

Try for mutuality.



■ And For Our Third Example...

If an attorney approaches a design professional to serve as an expert witness, and that design professional notices that he/she previously served as an expert witness on behalf of counsel for the opposing side,

- To what extent does that prior relationship impact the design professional's responsibility to act as a **faithful agent or trustee** on behalf of each party?
- What is the design professional required to **disclose** and to whom?
- **How far** does the **duty** to act as a faithful agent or trustee **extend**?



■ Agents and Trustees

One Possible Course of Action

Notify the law firm currently seeking to engage you of the potential conflict.

While discussing this with the current law firm, consider additional disclosure(s) to the prior law firm that engaged you.

Allow those parties to determine what steps, if any, they wish to take in connection with your services.

■ Agents and Trustees

How far does this agent/trustee duty extend?

A fiduciary duty is the highest duty of trust and confidence that one person may owe another. Common examples include:

- Accountant and Client
- Bank and Depositor
- Trustee and Beneficiary

All of these relationships required the more expert party to act at all times for the sole benefit and interest of the one who trusts.



■ Agents and Trustees

Is a Design Professional Also a Fiduciary?

This is a duty that may be assumed—or guarded against—by contract. Consider:

A “no fiduciary responsibility” clause

A “no warranty” provision



■ What About, For Our Last Example...

If an owner or other party furnishes a design professional with plans, drawings, documents, or specifications prepared by that party or another party,

- To what extent is the design professional entitled to **rely upon** that information?
- What happens if the owner asks that design professional to **sign, stamp, or seal** those instruments of service?
- Where and how is it clarified **who owns the instruments of service** at the completion of a project?



■ Relying...or Verifying?

Owner shall be responsible for, and Engineer may rely upon, the accuracy and completeness of all requirements, programs, instructions, reports, data, and other information furnished by Owner to Engineer pursuant to this Agreement. Engineer may use such requirements, programs, instructions, reports, data, and information in performing or furnishing services under this Agreement.

Article 2.01.C

EJCDC E-500, Agreement Between Owner and Engineer for Professional Services



■ Ownership: Yours, Mine, or Ours?

Evaluate language such as:

“In consideration of the mutual covenants, conditions, and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Owner agrees:

- 1) the Owner has **permission** from [Other Design Professional] that Owner can forward plans and specifications and any and all Instruments of Services created by [Other Design Professional] to the Design Professional **for the Design Professional’s use** in the preparation of the Design Professional’s plans and specifications; and,
- 2) Owner agrees to **waive any and all claims against the Design Professional** and to **defend, indemnify and hold the Design Professional harmless** from and against any and all claims, losses, liabilities and damages arising out of or resulting from the services performed by the [Other Design Professional].”



■ Signing, Stamping, and Sealing

You are responsible for the design information contained therein

You cannot represent that you prepared it, or that it was prepared under your personal supervision, without being responsible for its content

You cannot assert the information was not prepared by you or under your personal supervision without violating the statute

The source of the design may also be liable for the information contained on that sealed document – if you can prove that source without violating the licensure law

■ Signing, Stamping, and Sealing

What does Michigan say?

Sec. 339.2008

“...(3) A licensee shall not seal a plan, drawing, map, plat, report, specification, or other document that is **not prepared by the licensee or under the supervision of the licensee as the person in responsible charge.**”

Michigan Compiled Law (MCL), Act 299 of 1980, Sec. 339.2008
<https://www.legislature.mi.gov>



■ Signing, Stamping, and Sealing

***Sec. 339.2001.(d)* defines a “person in responsible charge” as follows:**

“A ‘person in responsible charge’ means a person licensed under this article who:

- ✓ determines technical questions of design and policy;
- ✓ advises the client;
- ✓ supervises and is in responsible charge of the work of subordinates;
- ✓ is the person whose professional skill and judgment are embodied in the plans, designs, plats, surveys, and advice involved in the services; and
- ✓ who supervises the review of material and completed phases of construction.”

Michigan Compiled Law (MCL), Act 299 of 1980, Sec. 339.2001.(d)



Ownership: Yours, Mine, or Ours?

In exchange for the transfer, does the Recipient agree that:

Payment

Do the documents remain the Design Professional's property until the Design Professional has received full payment for the services provided, and the project is completed?

Reuse

The documents are **project-specific** and are **not intended for reuse** on other projects?

Owner's Risk

Any **reuse** by the Recipient without the Design Professional's involvement will be at the Recipient's **sole risk**?

Indemnification

The Recipient will **defend, indemnify, and hold the Design Professional harmless** from any claims brought against them arising out of the reuse?

DP's Rights

The Design Professional has the right to **retain one record copy** of all project documents and to **reuse standard details** of the contract documents?

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A

