

# **Perfect Drawings: Client Expectations Often Don't Often Reflect Reality**

Some clients, we know, often expect perfection as to projects coming in on time, within budget, and code-compliant. Many believe the design firm's plans and specifications should be perfect, with no errors, omissions, or deviation from code. That's what the client is paying for, is it not? Of course, the goal of all designers is to meet these expectations. And most of the time, designers are quite successful in doing so. Those firms that do not meet such expectations disappear over time. Success is a wonderful thing. But we know what happens when it is when the project doesn't come in on time, comes in over budget, or it is discovered the plans are allegedly not in strict compliance with code. Owners become unhappy and look to the design firm to 'make it right'.

We look at code compliance issues with a broad stroke since so many variables are involved. Without a contractual promise to provide plans in strict compliance with code, courts will usually determine responsibility based on the standard of care. In preparing its drawings, did the design firm act within the applicable standard of care? There are important legal distinctions between a claim of negligence (breach of the standard of care) and a breach of contract claim. It is often much easier for a client to prove negligence than a breach of contract. Remember, most breach of contract claims are simply not insurable under any firm's professional liability policy. Such policies are designed to cover negligence claims and usually exclude coverage for breach of contract claims. So,,, this is an important issue for design firms.

Firms should be wary of signing off on a contract that provides both a standards of care clause and a strict code compliance statement. Unless that contract clearly states the performance of professional services by the design firm will be judged solely by the standard of care, a design firm still risks negligence claims and an uninsurable breach of contract claim. Consider the following:

*"Notwithstanding anything to the contrary, the services of Design Professional shall be performed in accordance with and judged solely by the standard of care exercised by similar professionals providing similar services on projects similar in type, magnitude, and complexity to the Project that is the subject of this Agreement."*

Let's examine some of the reasons an agreement to provide drawings that fully comply with code is so dangerous:

1. Legislatures, executive branches, court decisions, and governmental agencies at all levels, including but not limited to local city/village, county, state, regional, and federal levels, constantly create and modify untold numbers of rules and regulations involving zoning, handicap accessibility, historic preservation, health, environment, sustainable design, energy savings, safety, etc. The code 'environment' is not unlike our wonderful tax codes and other bloated governmental bureaucracies.
2. People interpret these codes. We human beings are all imperfect. On occasion, the people interpreting code issues are simply not the best and brightest. Even when they are very good, they are human and make mistakes, just like the rest of us. If one looks at our court system as an

analogy, countless cases that learned judges have decided are overturned. Sometimes, those decisions are again overturned by an even higher court. It's not uncommon to have different code officials disagree with each other. It's very common to have expert witnesses held in high esteem disagree on interpretations of code. With this in mind, we can see how a design firm realistically can't be expected to warrant a perfect set of plans.

3. It's not that uncommon that codes themselves sometimes conflict with each other. That situation may require discussion with authorities to arrive at an appropriate solution. But it still illustrates that sometimes it is impossible to comply with code.

Many firms are reticent to address the issue, fearing their proposals will be summarily tossed. Experience has shown that firms can address the issue without being summarily dismissed from consideration if 'handled' correctly. Additionally, other negotiation strategies may include providing a warranty that services will be provided in accordance with the standard of care. Talk to your insurance agent before doing so. If worded correctly, such a warranty might be a rare exception to the general rule that breach of contract claims are uninsurable. You might agree to the strict compliance requirement if your client agrees to a risk allocation clause, and the project is one where you feel code compliance presents much of a risk. Talk to your insurance agent, they may be able to provide you with sample language to consider.