

ASCE Quality Guide: Sword or Shield?

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ASCE Manual 73, *Quality in the Constructed Project*, has been criticized as potentially creating new legal standards of care, particularly for design professionals. In reality, adherence to the recommendations and guidelines should help, not hurt, the design professional. By way of comparison, the use of codes, standards, handbooks, and even legislation as a standard of care for design professionals has been addressed frequently by the courts with predictably mixed results.

The conception, development, and issuance of ASCE Manual 73, *Quality in the Constructed Project* (hereafter sometimes referred to as the "ASCE Guide" or "Manual 73"), generated an intense debate over the legal implications of its content. The concerns expressed by legal commentators are identified and discussed and their merit in the present context is evaluated.

(The author participated in the development of Manual 73 as a chapter author and as a reviewer. He declined to participate in the legal forum convened by ASCE in the belief that such participation could potentially detract from the legal forum's objectivity.)

CONCERNS—QUALITY AND LIABILITY

The ASCE Guide was developed to provide a means of enhancing quality. It was intended to be a positive, constructive, and affirmative effort. From the beginning some contended that the ASCE Guide would become in effect a sword—a weapon to be used against them in professional liability lawsuits. That is, there was a fear that nonconformance with the recommendations of the ASCE Guide would result in a finding of negligence. This was a realistic concern. The drafters, the steering committee, and the editors were sensitive and responsive to that concern, as evidenced by the final manual. Thus, it was made clear that the ASCE Guide is an aspirational document, not a minimum.

In addition, ASCE took these concerns to heart by establishing a legal forum of leading construction lawyers and professional liability insurance executives from across the nation. The forum was charged with reviewing the ASCE Guide for unintended liability exposure. In addition, ASCE retained John R. Clark, longtime counsel to the Engineers Joint Contract Documents Committee, to provide a detailed review of the early drafts of what was to become Manual 73.

STANDARD OF LIABILITY—GENERALLY

Now that Manual 73 is a reality, it is useful to assess whether it is a potential sword or shield.

Recovery from a design professional, whether sought by the disappointed project owner or an injured third party, requires proof of negligence. Most often this comes in the form of expert testimony. The standard of negligence as stated by one court decision is as follows:

In performing professional services for a client, an engineer has the duty to have that degree of learning and skill ordinarily possessed by reputable engineers, practicing in the same or a similar locality and under similar circumstances.

It is his further duty to use the care and skill ordinarily used in like cases by reputable members of his profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his best judgment in the exercise of his professional skill and in the application of his learning, in an effort to accomplish the purpose for which he was employed.

In addition to expert testimony as to what was appropriate professional conduct under project-specific circumstances, plaintiffs have sometimes been able to rely on a design professional's failure to comply with a code, standard, or handbook as *prima facie* evidence of negligence.

This concept was the basis for one of the most fundamental concerns of early legal critics of Manual 73. The claim was that the ASCE Guide would be looked at as a minimum and that failure to follow its provisos might constitute a legal finding of negligence.

Given the normal standard applied to find a design professional liable on a negligence theory (e.g., failure to adhere to the standard of due care under the circumstances), reservations concerning a publication that could be characterized as a standard can be appreciated. To be sure, there can be no guarantee or assurance that there will not be attempts to use the ASCE Guide in such a fashion. But, as will be discussed, the chances of this being successful are not great.

ASCE GUIDE NOT A CODE OR STANDARD

The question of whether failure to comply with an organization's practice recommendations, such as those contained in the ASCE Guide, can be evidence of negligence is an important one. A brief review of potentially analogous case law may be helpful in answering the question. Courts have addressed situations where there has been noncompliance with codes, standards, and handbooks. Manual 73 is clearly not a code or standard; it is most like a handbook.

Design Not Complying with Code Constitutes Negligence

Design of a masonry wall contrary to terms of a municipal building code was deemed to be evidence of negligence in *Johnson v. Salem Title Company*, 246 Or. 409, 425 P.2d 519

(1967). Similarly, failure to comply with a safety provision of the Ten State Standards of the Great Lakes–Upper Mississippi River Board of State Sanitary Engineers was held to be evidence of negligence in *Evans v. Howard R. Green Company*, 231 N.W.2d 907 (Iowa 1975). But, in *Allemeier v. University of Washington*, 712 P.2d 306 (Wash. App. 1985), the court concluded that the failure of the University of Washington to erect a barricade on a campus service roadway as required by the *Uniform Manual for Traffic Control Devices* was not negligence per se.

These cases can be distinguished because the ASCE Guide is not a legally enacted code.

Safety Manual Referenced in Contract

And, in *Mervin v. Magney Construction Company*, 416 N.W.2d 121 (Minn. 1987), the Supreme Court of Minnesota held that the Corps of Engineers' safety manual incorporated by reference into a construction contract did not state the standard of care for negligence purposes. Again, it is not expected that Manual 73 will ever be incorporated into contracts.

Advisory Codes and Standards Not Even Admissible

In *Hackley v. Waldorf-Hoerner Paper Products Company*, 149 Mont. 286, 425 P.2d 712 (1967), it was held that advisory codes or safety standards not having the force of law were not even admissible as evidence of the standard of negligence.

Noncompliance with Architect's Handbook Not Conclusively Negligence

In *Taylor, Thon, et al. v. Cannady*, 749 P.2d 63 (Mont. 1988), the court permitted the *AIA Handbook of Professional Practice* to be used to show evidence of a duty on the part of architects, but held that just because an architect did not comply with a provision of the handbook, the architect was not automatically negligent.

Legislative Enactments

Indeed, even a legislative enactment or administrative regulation is not always conclusive in establishing the standard of conduct. Section 286 of the *Restatement of the Law of Torts* provides as follows:

The Court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect a particular interest which was invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against a particular hazard from which the harm results.

Court application of this standard has been mixed. For example, in *Macey v. U.S.*, 454 F.Supp. 684 (D. Alaska 1978),

it was held that OSHA regulations did not impose a standard of care toward a 4-year-old who drowned in a partially excavated ditch on a construction site. But this should be compared with *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176 (Alaska 1977), where the Alaska Supreme Court held that a motel's failure to comply with the Uniform Building Code would be prima facie negligence. However, the court noted that this could be overcome by evidence of justification for the nonconforming conduct. But in *Harned v. Dura Corporation*, 665 P.2d 5 (Alaska 1983), the court held that the jury should have been instructed that failure to manufacture a compressed-air tank in accordance with the standards of the American Society of Mechanical Engineers constituted negligence per se.

It is important to note that those standards were incorporated into law. Thus, they are unlike the ASCE Guide.

Compliance with "Standard" Not a Safe Harbor

The reverse of the situation often arises. That is, a defendant uses compliance with a standard as a complete defense. Normally, this is not effective. For example, in *Turner v. American Motors General Corporation*, 392 A.2d 1005 (D.C. App. 1978), the court noted that a bus manufacturer's compliance with federal safety regulations was not dispositive of the question of its alleged negligent design of the bus.

This is certainly not to say that many liability claims could be prevented by applying the suggestion of the ASCE Guide where appropriate. For example, the ASCE Guide should help communication with the owner—which, in turn, will result in more realistic expectations and a better understanding of the engineer's tasks and roles.

MANUAL 73 AS A SHIELD

However, it is unfair to characterize the ASCE Guide as only a sword. In reality, it has the potential to be a much larger and more powerful shield. In other words, it is entirely possible that the ASCE Guide will do much more good than harm. In most instances where design professionals and their insurers have paid dollars for verdicts after trial (the only instance where the legal standard of care is truly applied and tested), there was a valid basis for the verdict. Stated differently, the reason many dollars are paid out by insurers (and their insureds, in ever-increasing deductibles) is that the design professional was indeed found negligent.

Accordingly, it would be much more productive in the long run if greater attention were given to using the ASCE Guide as a shield. This publication identifies carefully thought out procedures directed to the avoidance of quality problems, often by means of affirmative steps. By suggesting practices and policies intended to promote quality, it raises the consciousness of all parties to the construction process.

Manual 73 has the distinct potential to help design professionals avoid the problems that were referred to earlier. The rewards, in terms of potential protection, outweigh the risks.

SUMMARY

Thus, whereas the use of industry and profession and practice publications can never be ruled out in terms of what a plaintiff's attorney might seek to introduce as evidence, it seems that as long as a document does not mandate minimum standards of performance, but rather promotes practices that tend to reduce the likelihood of errors and omissions, they will be more helpful than harmful. There are others who will forever disagree, and do so vehemently. However, it is suggested that

such unyielding opponents would have the profession "trash" the AISC Manual, various ACI protocols, and the entire library of AASHTO and TRB technical publications.

On balance, it certainly seems that preventive recommendations such as those of the ASCE Guide should not be discouraged.

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