Chapter 6

Standard of Care: Lawyers' Legal and Ethical Obligations to Clients and Community

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Introduction[1]

In October 2015, the City of Columbia, South Carolina,[2] experienced a devastating flood that destroyed a great deal of the city, including multiple public infrastructures such as bridges, dams, and roads. Columbia mayor Stephen Benjamin proclaimed,

> As nearly 12 trillion gallons of rain took its toll, we watched as our city experienced great devastation—homes and businesses were destroyed, vital infrastructure experienced millions of dollars in damage and, sadly, many lives were lost. . . . But Columbia is special. We are resilient. We are strong. We are one.[3]

1. The author would like to thank Susan S. Kuo, University of South Carolina School of Law, Associate Dean for Diversity and Inclusion; Sarah C. Frierson, Research Clerk, University of South Carolina School of Law; Edward Thomas, Natural Hazard Mitigation Association, President; and John Travis Marshall, Georgia State University College of Law, Associate Professor, for their encouragement and help on this chapter.

2. The author of this chapter resides in Columbia, South Carolina, and witnessed this and other natural disasters throughout the state.

3. Stephen K. Benjamin, Mayor of Columbia, Message from the Mayor of Columbia, Road To Recovery Annual Report, Status of Recovery One Year After the Historic Flood Event in October 2015

In the wake of this devastating event, Columbia residents and professionals were forced into litigation to remedy some of the damage cause by the floodwaters.[4]

Following disaster, there are three primary ways communities support reconstruction: self-help (loans, savings, charity, etc.), insurance disaster relief, and litigation. It is preferred, however, that no damage occurs during these events, which is a result of safe and proper design. This preferred method is also known as community resilience.

As a society, we tend to throw money at problems in the wake of disaster. As lawyers, however, we need to encourage our clients to act under a higher standard of care, outside of the bare minimum, and to expend more money on the front end. This extra effort could save exponentially more money and, more importantly, lives, on the back end. If we advocate for higher standards to protect our people and resources proactively, then we are contributing to a safer and more sustainable future.

Although the "1,000-year flood" and the many hurricanes that affect the eastern coast of South Carolina are devastating events, they also present opportunities for South Carolina and its cities. They are able to build community resilience by enacting legislation, codes, and regulations to prevent or lessen the fallout. After the 1,000-year flood," South Carolina immediately

(Oct. 2016), https://columbiasc.gov/depts/flood/final-road_to_recovery_annual_report_print.pdf.

4. Although the litigation resulting from this flood mainly surrounded the damage caused by dam failure, *see, e.g.*, Heilich v. United States, No. 3:16-cv-030854-JMC, 2018 WL 6725864 (D.S.C. Dec. 21, 2018) (suit against the U.S. for negligent inspection of the dam); Crosby v. South Carolina Electric & Gas Co., No. 3:15-cv-04877-JMC, 2016 WL 3049353 (May 31, 2016) (suits against SCE&G for faulty use of the flood gates), suit against design professionals was certainly possible. Roughly one month prior to the flood, the South Carolina Supreme Court in *Columbia Ventures, LLC, v. Richland Cnty.* 413 S.C. 423, 776 S.E.2d 900 (2015) found that heightened county restrictions on development in federally designated floodways did not result in a taking. The court noted that at the time the developer purchased the land it knew FEMA's preliminary flood map designated almost all of the property as lying within the regulatory floodway and also knew that the county's stormwater ordinance could be interpreted to preclude commercial development.

began allocating more resources to the Department of Health and Environmental Control, to use in the inspection and maintenance of South Carolina dams, and appeared to be turning an eye toward being prepared for future disasters.[5] Only a few short years later, it appears that the past may be forgotten as the state legislature attempts to weaken dam safety laws by deregulating an estimated 1,600 dams.[6] Similarly, there is no indication that Columbia enacted any stronger building codes or regulations to enhance the standard of care for design professionals.

This, however, does not mean that design professionals should not take the initiative to adhere to a higher standard of care for the good of the public and their own liabilities. Columbia is not the first city to go through such a devastating natural disaster, and it certainly will not be the last. As lawyers, we owe a duty to our clients to be aware of the potential for exposure they may face when they unknowingly fall below their standard of care. This begs the question: What is the relevant standard of care for design professionals, and on what theories can they be liable?

Theories of Liability and the Relevant Standard of Care

Attorneys must be aware that several causes of action exist for a plaintiff to bring against a design professional. These claims include those under the common law of torts and liability arising out of a contractual agreement and a breach thereof. This chapter focuses on those claims derived from negligence and the ever-evolving standard of care placed upon design professionals.

Common Law Negligence

The essence of negligence is the failure to exercise reasonable care under the circumstances; thus, the threshold element for a

5. Paul Zoeller, *We Need Tougher, Not Weaker, Dam Safety Law*, The Post and Courier (Mar. 20, 2019), https://www.postandcourier.com/opinion/editorials/we-need-tougher-not-weaker-dam-safety-law/article_061c2e10-49bb-11e9-bb7f-5b2e2e5c5d01.html.

6. *Id.*

cause of action for negligence is the existence of a duty.[7] The existence of a duty is based on the reasonable foreseeability of risk.[8] Negligence claims enforce the generally accepted principal that everyone should act in a reasonable way so as not to cause foreseeable harm to those around them. While historically a person was not able to sue a design professional for negligence if they were not in privy with them, the modern trend is to allow such suits even if there is no privity between the design professional and the plaintiff.[9] In explaining this connection, a Missouri court determined that

> where one under contract with another assumes responsibility for property or instrumentalities and agrees under his contract to do certain things which, if left undone, would likely injure third persons, there seems to be no good reason why he should not be held liable to third persons injured thereby.[10]

Establishing a negligence claim requires an injured party to first establish that the person causing the harm had an obligation or "duty" to behave in such a way as to avoid the harm. This duty or obligation to act in such a way is often referred to as the "standard of care," and design professionals must meet it when acting in their professional capacity. The duty of care extends to any person who foreseeably and with reasonable certainty may be injured or harmed as a result of the architect or engineer's failure to exercise reasonable care in the preparation of plans and specifications. To succeed in a negligence action, a plaintiff must

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7. *See* Weseloh Family Ltd. P'ship v. K.L. Wessel Constr. Co., Inc., 125 Cal. App. 4th 152, 22 Cal. Rptr. 3d 660 (4th Dist. 2004); Beacon Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP, 211 Cal. App. 4th 1301, 150 Cal. Rptr. 3d 712, 714 (2012), *review granted and opinion superseded sub nom.* Beacon Residential Cmty. Assn. v. Skidmore Owings & Merrill, 295 P.3d 373 (Cal. 2013), and *aff'd*, 59 Cal. 4th 568, 327 P.3d 850 (2014).

8. *See* Charvoz v. Bonneville Irrigation Dist., 120 Utah 480, 235 P.2d 780, 783 (1951).

9. *See* Prichard Bros., Inc. v. Grady Co., 428 N.W.2d 391 (Minn. 1988); Forte Bros. v. Nat'l Amusements, Inc., 525 A.2d 1301 (R.I. 1987).

10. Chubb Group of Ins. Cos. v. C.F. Murphy & Assocs., 656 S.W.2d 766, 774 (Mo. Ct. App. 1983) (internal citations and quotations omitted).

also establish that the design professional breached the duty of care and that the breach was the proximate cause of his injuries. The focus of this chapter is on the relevant standard of care for design professionals as it relates to natural disasters and community resilience, thus the breach of duty and proximate cause elements will not be further analyzed.

Heighted Standard of Care for Design Professionals

Architects and engineers, like doctors and lawyers, are held to a higher standard of care than the average person. This heightened standard is known as the professional level of care.[11] Typically, an architect or engineer must exercise the reasonable care, technical skill, ability, and diligence ordinarily required of an architect or engineer in the same or similar circumstances.[12] This heightened standard of care does not rise to the level of strict liability, which essentially guarantees that a professional's work is flawless, and if it is not, they are liable. As such, courts have recognized the requisite professional standard of care for a design professional in the construction of a residence or other infrastructure; these professionals must exercise "reasonable care and competence," not "infallibility."[13] This is in part because it is quite impossible

11. Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 401 Pa. 358, 359, 164 A.2d 201, 202 (1960).

12. *See* Martin v. Sizemore, 78 S.W.3d 249 (Tenn. Ct. App. 2001); Dumas & Assocs., Inc. v. Lewis Enter. Inc., 704 So. 2d 433 (La. Ct. App. 2d Cir. 1997); *see also* Weill Constr. Co., Inc. v. Thibodeaux, 491 So. 2d 166 (La. Ct. App. 3d Cir. 1986) (elevating the foundation above foreseeable water levels is a sound and acceptable means of avoiding drainage problems. The testimony of both engineers and architects established that this system of choosing an elevation was reasonable and a common practice in Lafayette. A higher foundation (12 to 14 inches) would have prevented water from reaching the cold joint, thus effectively removing the facility from the risk of flooding. The chosen method of drainage comported to the engineering standards set in the Lafayette community).

13. Beacon Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP, 211 Cal. App. 4th 1301, 150 Cal. Rptr. 3d 712, 714 (2012), *review granted and opinion superseded sub nom.* Beacon Residential Cmty. Assn. v. Skidmore Owings & Merrill, 295 P.3d 373 (Cal. 2013), and *aff'd*, 59 Cal. 4th 568, 327 P.3d 850 (2014); *see also Martin*, 78 S.W.3d 249; *Dumas & Assocs., Inc.*, 704 So. 2d 433; *Bloomsburg Mills*, 401 Pa. at 359, 164 A.2d at 202 ("While an architect is

for an architect to "be certain that a structural design will interact with natural forces as anticipated."[14]

To determine what is reasonable for a design professional, courts must review a wide range of factors by looking at the relevant evidence indicating what a reasonable architect or engineer would have done under similar circumstances. These factors include, but are not limited to, the following:

Foreseeability of Harm/Likelihood of Disaster

Foreseeability or knowledge of the likelihood for disaster, such as a location's susceptibility to flooding or other natural phenomenon, could be used to establish a legal duty. In fact, there are instances where design professionals are expected to be aware of flood hazards simply through the availability of flood maps or other indications of possible flooding and reflect this heightened awareness in their designs.[15] As noted by a Delaware court,

> the Federal Emergency Management Agency, U.S. Army Corps of Engineers, state floodplain management agency and local governments have mapped major floodplain areas throughout the Nation. Local governments and state agencies have broadly adopted these maps as part of

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not an absolute insurer of perfect plans, he is called upon to prepare plans and specifications which will give the structure so designed reasonable fitness for its intended purpose, and he impliedly warrants their sufficiency for that purpose.").

14. City of Mounds View v. Walijarvi, 263 N.W.2d 410, 424 (Minn. 1978).

15. Jon Kusler, Professional Liability for Construction in Flood Hazard Areas, ASFPM Foundation (Sept. 24, 2007) (citing Seiler v. Levitz Furniture Co., Etc., 367 A.2d 999 (Del. 1976)). However, though there are situations where these professionals are expected to be knowledgeable about flood maps, it is worth noting that there are numerous limitations to FEMA's Flood Insurance Rate Maps. *See* Sarah J. Adams-Schoen and Edward A. Thomas, A Three-Legged Stool on Two Legs: Federal Law Related to Local Climate resilience Planning and Zoning, *The Urban Lawyer*, 47 Urb. Law 3 (2015) ("FEMA standards have required that flood levels are determined by the projection of flood risk based on historic data that fail to consider numerous flood risks, including, for example, projected sea level rise and increased frequency and intensity of storms, and risks related to stormwater drainage in areas with less than one square mile of drainage.").

> floodplain regulations. Design professionals are expected to familiarize themselves with all applicable regulations including regulatory maps.[16]

Additionally, design professionals should be aware of what their peers are doing in the profession. If most of the other design professionals in the area refer to flood maps to design their projects, then others will be expected to use these flood maps, as it would be the established standard of care. In failing to adhere to the industry norm and not using his or her best judgment, the respective design professional would breach the standard of care and open himself up to a negligence suit.[17]

Depending on the project, a prudent design professional would want to thoroughly research the applicable tests ordinarily used in his or her relevant profession. The type of testing required for a project depends largely on the geographic area surrounding the project. Whether the area is prone to flooding, hurricanes, tornados, or other natural disasters should factor into the design professional's work to ensure that the structure can withstand the relevant geographic elements.[18] As technology advances, making it easier to discover the relevant risk of harm, it is certain that the respective standard of care will increase and will require design professionals to make use of all available technology in this risk assessment stage. With more information available to them, design professionals can make the safest and most durable structures ever.

These advances, however, create greater risks that failure to consider this information or make reasonable efforts to discover it will constitute a breach of the standard of care. This failure will

16. *Id*. *See also* Seiler, 367 A.2d 999.

17. Additionally, widespread availability of flood maps and flood predictions reduce the situations in which defenses such as the Act of God defense may be used. *See, e.g.*, Hoge v. Burleigh Cty. Water Mgmt. Dist., 311 N.W. 2d 23 (N.D. 1981) (finding that the "act of God" was not the sole proximate cause of flood damages).

18. *See* Johnson v. Bd. of Cnty. Comm'rs of Pratt Cnty., 897 P.2d 169 (Ct. App. Kan. 1995) (where engineers were held liable for failing to consider erosion in the design of a bridge).

likely open design professionals up to more liability for smaller defects than ever before.[19] Similarly, prior to performing work for a client, the design professional should make any questionable elements known to clarify any confusion of the testing required and work performed by the professional.[20]

Relevant Codes and Regulations

The construction and design industries are filled with building codes and regulations. As such, design professionals should be cognizant of these codes and regulations as they relate to disaster preparedness and resiliency. The failure to adhere to and incorporate these rules could establish a plaintiff's negligence per se claim.[21] Simply complying with these applicable regulations, however, does not shield a design professional from liability. It is certainly possible to comply with the relevant statutes and still fall below the standard of care ordinarily exercised by other design professionals in the field. In fact, Michael Sanio, ASCE director of sustainability, stated, "Taking into account the

19. *See* Barr v. Game, Fish & Parks Comm'n, 497 P.2d 340 (Ct. App., Div. 1. Col. 1972) (stating that the use of modern meteorological techniques could have foreseen the storm and resulting flooding and the defendants knew or should have known of the possibility from the technology).

20. *See* Swett v. Gribaldo, Jones & Assocs., 115 Cal. Rptr. 99, 101 (Ct. App. 1974) (stating that the engineer did not fall below the standard of care by conforming to the standards of the profession and testing the soil prior to constructing the structure); Stuart v. Crestview Mut. Water Co., 110 Cal. Rptr. 543, 549–50 (1973) (stating that the engineers could be held liable under a negligence theory at trial for failing to design the water system in a way that allowed the water to reach the far end of the development for use of putting out fires).

21. Negligence per se creates an automatic presumption of negligence when a person violates a statute or regulation if the statute was enacted to protect the class of persons injured and to prevent the type of injury the person sustained. *See*, *e.g.*, Dent v. Nat'l Football League, 902 F.3d 1109 (9th Cir. 2018); Chessie Logistics Co. v. Krinos Holdings, Inc., 867 F.3d 852 (7th Cir. 2017). *See also* Burran v. Dambold, 422 F.2d 133 (10th Cir. 1970) (stating that statutes that set the minimum standards for construction must be applied to every stage of construction and those who work in the stages).

best science is a responsibility . . . designing to existing codes is insufficient."[22]

In a recent non-disaster California case, the appellate court addressed liability where a two-year-old child tragically fell to his death from the third floor of the Staples Center in Los Angeles.[23] He was standing on a concrete shelf/banister that ran along the front seats in a luxury sky box and had a glass barrier from 26 inches to 10 inches mounted in various locations.[24] The court found that it was foreseeable for someone to sit or stand on the shelf and suffer injuries or death from a fall.[25] An expert testified that even if the glass partition was code compliant, it constituted a dangerous condition because the shelf/bannister invited patrons to sit or stand on it, which they did often.[26] Although this example rests outside the scope of natural disasters, this case acts as a cautionary tale for design professionals. Even if they are meeting the building code and regulations for their particular city or county, they are not necessarily immune from liability if the disaster and resulting damage was foreseeable.[27] As one court explained, "unreasonable conduct is not an excuse when one merely complies with minimum regulatory requirements."[28] Thus, the standard of care may exceed code requirements.

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22. Justin Rice, *Nor'easters Force Designers to Consider Climate Liability*, Engineering News-Record, (Mar. 22, 2018), https://www.enr.com/articles/44188-noreasters-force-designers-to-consider-climate-liability?v=preview.

23. Henry Tang v. NBBJ, LP, 2014 WL 555163 (Cal. App. 2 Dist. (2014)).

24. *Id.*

25. *Id*.

26. *Id.* at *3.

27. *See, e.g.*, Luxen v. Holiday Inns, Inc., 566 F. Supp. 1484, 1486 (N.D. Ill. 1983) (a premises liability case where the court stated that "[w]hile defendant may well have been in compliance with the applicable building and safety code provisions, such compliance does not preclude a determination that, under the circumstances, defendant was nevertheless negligent. As Prosser notes, compliance with a statute does not necessarily mean that due care was used. . . . Thus, where specific circumstances present situations beyond those which the statute was designed to meet, a plaintiff may prove that the defendant was negligent in not taking extra measures.") (internal citations omitted).

28. Corley v. Gene Allen Air Serv., Inc., 425 So. 2d 781 (La. 1983).

Express Standards in the Contract

As noted previously, in the absence of a special agreement in a contract, a design professional generally does not promise infallibility.[29] It is possible, however, for a design professional to agree to perform services at a higher degree of skill and result than otherwise required by the traditional standard of care. When a design professional provides for an express warranty of a certain result, a plaintiff may bring suit against the professional for a breach of express warranty.[30] Thus, design professionals and their attorneys should be hyperaware of contractual agreements that contain written standards to which design professionals must adhere. Failing to adhere to these expressed standards could amount to a breach of the standard of care. Absent an express standard, however, a plaintiff must prove the duty by some other means.[31]

This lack of attention to express standards of care became apparent in 2007 when the American Institute of Architects (AIA) found that while parties often included a standard of care in design agreements, it was frequently misstated. Specifically, "that parties often added standard of care language to contracts irrespective of" the common law standard of care for design professionals.[32] The AIA also discovered that, in many instances, even the general standard of care was misstated. Accordingly,

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29. Klein v. Catalano, 386 Mass. 701, 719, 437 N.E.2d 514, 526 (1982) ("We believe that unlike a manufacturer, an architect does not impliedly guarantee that his work is fit for its intended purpose. Rather he impliedly promises to exercise that standard of reasonable care required of members of his profession.").

30. *Id.*

31. *See* La Rossa v. Scientific Design Co., 402 F.2d 937, 939–41 (3d Cir. 1968) (stating that a promise to perform the contract in a "workmanlike" manner will not give rise to an express promise above the normal professional standard of care). This also bolsters the proposition that despite statutory or common law requirements, the standard of care is open to negotiation as private parties can bargain in the shadow of the law.

32. Patrick J. O'Connor, Jr., *Duties Owed by Design Professionals: Standards of Care and Other Mysteries*, 9 Am. C. of Constr. Laws. J. 1, 9 (Jan. 2015) (citing AIA Document B101-2007 Commentary at 3 (2007); AIA Document B101-2007 Commentary at § 2.2 (2007)).

the AIA saw fit to include a clear and explicit statement of the generally applicable standard of care in its 2007 revisions. The Institute stated that the architect will perform its services consistent with that level of skill and care ordinarily provided by architects practicing under the same or similar circumstances.[33] Failure to recognize and subsequently adhere to an express standard of care can almost certainly lead to inadvertent missteps, which could result in a potential liability.

Industry Customs

Failing to adhere to industry customs is another factor relevant to the duty of care analysis. Industry standards vary with the geographic region in which the design professional is operating.[34] "An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life[,]" but a failure to comply or calculate in the first place is no excuse to a claim for negligence.[35] On the other hand, even if a design professional complies with the relevant industry customs, a court could find that mere compliance is not enough to shield a design professional from liability of a claim for negligence. For instance, in *T.J. Hooper*, the plaintiff sued a tugboat operator under a towing contract when two barges and the cargo of coal the tugboat was towing were lost in a storm. The plaintiff's negligence claim stated that it was negligent of the tugboat operator not to equip the tugboats with reliable radios.[36] If the tugboats had radios, the defendant would have received storm warnings, and plaintiff's two barges would have been put safely into breakwater. The tugboat operator argued that it complied with

33. *Id*.

34. *See* Housing Auth. of City of Carrollton v. Ayers, 88 S.E.2d 368, 373 (Ga. 1955) ("The law imposes upon persons performing architectural, engineering, and other professional and skilled services the obligation to exercise a reasonable degree of care, skill, and ability, *which generally is taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances,* is ordinarily employed by their respective professionals.") (emphasis added).

35. *See* Coombs v. Beede, 36 A. 104, 104 (Me. 1896).

36. The T.J. Hooper, 60 F.2d 737, 739–40 (2d Cir. 1932).

the industry custom by not having a working radio on board and should therefore not be liable.[37] The court noted that "[t]here are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence. . . . Indeed in most cases reasonable prudence is in fact common prudence."[38] It concluded, however, that the tugboats were responsible for the injury sustained even though tugboats at the time generally did not have working radios.[39]

As Judge Learned Hand, a famous federal appeals court judge, once explained, "[A] whole calling may have unduly lagged in the adoption of new and available devices. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard [within a particular industry] will not excuse their omission."[40] Thus, although compliance with relevant industry customs can be evidence of due care in some instances,[41] courts could, and have, found that compliance with industry customs under certain circumstances is simply not enough to establish reasonable care.[42] Moreover, what is deemed generally accepted in practice in a community may become outdated due to changes that are occurring in the climate, weather, or accessible technology.

Ethical Considerations Supporting the Movement Toward a Higher Standard of Care

In addition to the legal duties or standards of care placed on these design professionals, our clients also have an ethical obligation to act with the utmost concern and foresight when it comes

37. *Id*.
38. *Id*. at 740.
39. *Id*.
40. *Id*.
41. *See* Rutherford v. Lake Michigan Contractors, Inc., 28 Fed. Appx. 395, 398 (6th Cir. 2002) (holding that permitting a deckhand to handle a cable did not on its own establish negligence because doing so was standard industry practice).
42. Riley v. Burlington N., Inc., 615 P.2d 516 (Wash. 1980) (holding that the decision of Yakima County not to install a more sophisticated warning system than a non-mechanical railroad approach warning sign at a railroad crossing was nondiscretionary and subject to potential suit for negligence).

to developing and designing. The first Fundamental Canon of the American Society of Civil Engineer's (ASCE) Code of Ethics states: "Engineers shall hold paramount the safety, health, and welfare of the public and shall strive to comply with the principles of sustainable development in the performance of their professional duties."[43] This canon must be the guiding principle to our design professional as it is the ethical duty, and compliance can also stave off liability. Consequently, failure to act under a heightened standard of care and placing the safety, health, and welfare of the public in jeopardy constitutes an ethical violation.

Similarly, the National Society of Professional Engineers states that engineers, in the fulfillment of their professional duties, shall "hold paramount the safety, health, and welfare of the public."[44] The Society also requires engineers to "perform services only in their areas of competence."[45] Under this ethical standard, the lack of knowledge of potential risks or threats by natural disasters, and the failure to obtain such information by simply reviewing flood maps, is an ethical violation.

Conclusion

As the global climate changes and natural disasters appear to be increasing in severity, frequency, and in areas not previously prone to such disasters, design professionals may be held to an enhanced standard of care to consider the foreseeable risk of damages that result from failure to properly design and plan for such disasters. Not only does it behoove design professionals to be aware of their exposure for liability in a legal sense, but they should also be aware of these evolving standards as part of their ethical obligations inherent in their profession. By considering the risk of natural disasters in their planning, design professionals can reduce their risk of liability, and at the same time, increase the community's level of resiliency. By acting proactively to

43. *Code of Ethics*, American Society of Civil Engineers, https://www.asce.org/ethics/.

44. *Code of Ethics*, National Society of Professional Engineers, https://www.nspe.org/resources/ethics/code-ethics.

45. *Id*.

increase the safety and durability of public buildings and infrastructures, design professionals contribute greatly to the stability of the community overall. When the next disaster hits, the community will be prepared and the result will be far better than a wave of litigation alleging faulty design.