

Professional Ethics While Driving The Economy of Transportation



67th Roads & Streets Conference 2018

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P. Douglas Folk, Attorney

Construction Practice Group
Clark Hill PLC
14850 N. Scottsdale Road, Suite 500
Scottsdale, Arizona 85254
dfolk@clarkhill.com
www.clarkhill.com

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Program Agenda

- Review legal trends in western states – new laws, Board rules, and court cases
- Test your knowledge of ethical rules with scenarios drawn from daily experience
- Answer your questions as we go
- Provide two PDH's for engineers licensed in New Mexico – our major focus will be Arizona practice, but we will also reference New Mexico rules of professional practice

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Western States Legal Trends

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Threats to professional licensing continue....

- ALEC legislative initiatives to eliminate or restrict occupational licensing are converging with a push for greater oversight by elected officials following *North Carolina Board of Dental Examiners v. FTC* decision of 2013
- Impact:
 - Arizona passed “Right to Earn a Living Act” (SB1437) granting new rights to challenge licensing board actions by persons denied registration or dissatisfied with Board disciplinary action
 - Arizona EO 2017-03 requires BTR to report on cost and burdens of application and regulation process as compared to other states
 - SCR1037—if adopted—would put before voters a constitutional amendment declaring the practice of an occupation or profession a “fundamental right” that cannot be limited or prohibited unless license board proves its rule “is clearly necessary to protect the public health and safety”.
- Similar measures considered or enacted in Idaho, Nevada, Utah, and other states undercut national reciprocity for professionals; can cripple licensing boards with threats of litigation or marginalization
- Lack of respect for professionalism of boards and registrants

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Statute of repose bars government claims in Arizona

- **Ariz.Rev.Stat. § 12-552** bars design and construction defect claims based on contract or warranty eight years post-completion (plus one year if flaw discovered in eighth year)
- State and local government claims are not subject to statutes of limitation
- **Ariz.Rev.Stat. § 12-510** and *nullum tempus* doctrine shields government from delay in asserting claims
 - Deceased construction worker who allegedly contracted mesothelioma from long-term (20+ years) exposure to asbestos while installing and repairing water pipes sued the City of Phoenix
 - City of Phoenix filed indemnity claim against contractors and developers who installed pipe under joint development agreements and city permits
 - Arizona Supreme Court held: Statute of repose bars city's contractual indemnity claims against contractors who installed pipe but does not bar claims against developers required to indemnify city under their construction permits

City of Phoenix v. Glenayre Electronics, Inc., 242 Ariz. 139, 393 P.3d 919 (2017)

HB2116 (pending): Statutory fix for private developers who build and then dedicate improvements for public use; statute of repose will also bar government indemnity claims based on permits or ordinances

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California: contractors liable for unpaid subcontractor wages

- **California Labor Code § 218.7** effective 1 January 2018
 - "Direct contractors" on private works of improvements are liable to pay "any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under or for the direct contractor." (Labor Code § 218.7(a)(1))
 - If subcontractor fails to pay employees' wages or union trust fund contributions, general contractor required to pay directly, even if subcontractor paid in full
 - Labor Commissioner can enforce claims for unpaid wages and interest against the direct contractor through administrative action, civil action, or citation. Third party union trust funds or benefit plans may also sue general contractor to enforce the subcontractor's obligation to its employees
 - Direct contractor may request proof of payment, but not a defense to liability for unpaid wages/benefits
- Engineers who approve or administer contractor pay applications should consider:
 - Requiring subcontractors to submit time cards, pay stubs, and proof of payment to confirm wages/benefits were paid
 - Require subcontractors to indemnify the direct contractor and project design professional from claims for unpaid wages or benefits under Labor Code §281.7
 - Require subcontractor payment bonds for key trades or risk retention

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Implied Warranties And Attorneys' Fees Awards

- Arizona Supreme Court held implied warranty of habitability and good workmanship for contractors also entitles injured homeowner to recover attorneys' fees under **Ariz.Rev.Stat. § 12-341.01**
- Court also disapproved prior decisions that held attorneys' fee statute was not applicable to implied warranty claims against design professionals
- Future impact unclear; homebuilding industry has introduced several bills to overrule *Sirrah* decision so that attorneys' fees are not awarded in implied warranty cases
- Bigger questions for design professionals:
Is "implied warranty of design" different than professional standard of care?
Does Sirrah logic also apply to third party claims?

Sirrah Enterprises, LLC v. Wunderlich, 242 Ariz. 542, 399 P.3d 89 (2017)

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Short life (and likely rebirth) of Arizona BTR SPS 17

BTR Substantive Policy Statement No. 17. Whether acting as an expert witness constitutes "engineering practice"

This substantive policy statement is advisory only. ... "Engineering Practice" is defined in pertinent part by Arizona Revised Statutes § 32-101 as: ...any professional service or creative work requiring engineering education, training and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work as consultation, research investigation, evaluation, planning, surveying as defined in paragraph 20, subdivisions (d) and (e) of this subsection, design, location, development, and review of construction for conformance with contract documents and design, in connection with any public or private utility, structure, building, machine, equipment, process, work or project."

SUBSTANTIVE POLICY STATEMENT

The Board interprets the definition of "professional service or creative work" as used in the definition of "Engineering Practice" to include acting as an expert witness as defined by Rule 702 of the Arizona Rules of Evidence.

Applicable Law: Arizona Revised Statutes § 32-101(11)
 Issued: 10/24/2017
 Effective: 10/24/2017
 Filed with the Arizona Secretary of State's Office: 10/25/2017
 Rescinded: 2/28/18

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Wins and losses with contractual indemnities – Part I

- Arizona Supreme Court refused to require equitable indemnity for claimant who paid claim in good faith but without legal duty to do so
- Complicated facts arising from motor vehicle accident
 - Car rental agency failed to have driver initial contract to decline supplemental liability insurance (SLI)
 - Motorist injured by driver obtained consent judgment for \$8 million and assignment of claims against car rental agency and SLI insurer who refused to defend claim
 - SLI insurer paid policy limit of \$970,000 for assignment of motorist's claim against car rental agency and sued agency, claiming right to equitable indemnity for agency's failure to obtain written declination of the SLI coverage
 - Arizona Supreme Court rejected insurer's claim for equitable indemnification because it was not jointly and severally liable to original claimant, injured motorist
 - Held: SLI insurer never obligated to indemnify rental car driver – SLI coverage never purchased
 - Court will not require indemnification for "supposed obligation" discharged "in good faith"; inconsistent with precedent requiring that indemnitor and indemnitee be jointly liable to claimant
- **Impact:** Reduces exposure to collusive settlements between clients of design professionals and third parties to whom design professional owes no duty

Knightsbrook Insurance Company v. Payless Car Rental System, Inc. 2018 WL 769295 (2018)

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Wins and losses with contractual indemnities – Part II

- Case illustrates magnitude of loss caused by badly-worded contractual indemnity
 - Arizona Court of Appeals affirmed judgment against subcontractor for contractor's damages and defense costs even though subcontractor not found at fault
 - Substantial share of settlements and arbitration awards against general contractor in residential construction defect cases shifted to grading contractor by contractual indemnity
 - Subcontractor defended contractor in these cases; argued general contractor must prove that subcontractor was negligent and negligence caused the damages awarded before indemnification required
 - Court of Appeals affirmed trial court's decision for the general contractor, holding: Contractual indemnity required for claims "*arising out of or in connection with [subcontractor's] work performed for [general contractor] ... regardless of any active and/or passive negligent act or omission of [general contractor]*"
 - Indemnity only excluded liability for claims arising out of the general contractor's sole negligence or willful misconduct. General contractor did not need to prove either negligence or causation to recover on this indemnity

Amberwood Development, Inc. v. Swann's Grading, Inc., 2017 WL 712269 (Ct. App. 2017)

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Wins and losses with contractual indemnities – Part III

Crawford/CH2MHill court cases imposed liability for owner's defense costs

- Contractual indemnities required a defense, but tender was refused
- Jury found indemnitors not at fault, but court required payment of indemnitee's defense costs
- Held: Duty to defend upon receipt of tender and reimburse costs was required by **Cal.Civ.Code §2778(3) to (5)**
 - Indemnity “embraces ... costs of defense”
 - Indemnitor “bound, on request ... to defend”
 - If tender declined, “recovery against [indemnitee] suffered by him in good faith, is conclusive ... against indemnitor”
- Challenge for engineering professionals – Uninsurable contractual obligation to defend even if indemnity silent on defense obligation

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California Solved “Duty To Defend” Problem

•SB496 amends Cal.Civ.Code §2782.8

- Applies to all contracts (except state level agencies) signed on or after 1/1/2018
- Duty to defend is unenforceable “except to the extent that the claims against the indemnitee arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional”
- Defense costs reimbursed in proportion to share of fault—If no fault, then no duty to reimburse defense costs
- If one or more defendants cannot pay their allocated share of defense costs, remaining defendants directed to “meet and confer about unpaid defense costs”
- Not applicable where project-specific general liability policy insures “all project participants” and “covers all design professionals for their legal liability arising out of their professional services on a primary basis”
- Does not apply to design professionals in a written design-build joint venture agreement

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Western States That Prohibit Duty To Defend

•Alternative: Reimburse defense costs to extent of fault

- Arizona: A.R.S. §34-226, § 41-2586
 - Scope of indemnity of public agency limited to “negligence, recklessness or intentional wrongful conduct” of A/E or contractor
 - Requirement of defense or indemnity for public agency’s fault is void
 - Preempts local ordinances
 - Applicable to all state, county and municipal contracts
- Colorado: C.R.S. §13-50.2-102(8) is similar
 - Scope of indemnity limited to extent of A/E’s fault
 - Duty to defend is void and unenforceable
 - Defense cost reimbursement decided after fault determined
- Utah: HB279 enacted U.C.A §13-8-7, effective 5/8/18
 - Creates duty to reimburse to extent of engineer’s fault, rather than duty to defend; plus, defines customary standard of care
 - But, drafting error may render ineffective—currently says “An indemnification provision is void.” without tying to balance of statute

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Professional Ethics Scenarios

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Teaming + Complexity = Ethics Challenges

- Tight budgets and shift to design-build and even more advanced P3 delivery models including operations and maintenance responsibilities intensify ethics challenges for PE's
- Innovative design and construction methods test professional skills and shared responsibilities for project safety
- Disqualification or rejection of the team's proposal for an ethics violation can cause significant financial loss, disputes within the team, and litigation over failed or abandoned proposals
- Great care must be taken in negotiating the teaming agreement to account for the risks that team members will be disqualified, or cause a disqualification or rejection of the proposal

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Our Top Ten List of Professional Ethics Hazards

As registered engineers, your practice is regulated by **federal law**, **state law**, your **licensing board**, your **contract**, and the community **standard of professional care**.

1. Unauthorized practice
2. Aiding and abetting
3. Conflict of interests
4. Gifts and Gratuities (Pay to Play)
5. Failure to make prompt payment of subconsultants
6. Breach of standard of care
7. Breach of contractual reps and warranties
8. Tortious interference with contract
9. Breach of fiduciary duty
10. Breach of laws unrelated to professional practice that could lead to disqualification or loss of licensure

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Ethics Scenario #1*

Rahul's engineering firm is growing rapidly and seeking business in new markets. He is invited to a meeting in Tucson to discuss a new Arizona P3 project, a state in which he is not currently licensed. He expects to discuss his proposed fee and scope of services at this meeting.

Q: May Rahul attend this meeting?

Q: Should Rahul discuss scope and fee at this meeting?

Q: What should Rahul do to avoid an unauthorized practice charge in the State of Arizona?

*These ethics scenarios are loosely adapted from reported disciplinary cases, news reports, and every day experience. Any resemblance to actual persons or circumstances is purely coincidental.

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Unauthorized Practice of Engineering Is An Ethics Violation

- Most jurisdictions, like Arizona , prosecute, deny registration, or impose fines and penalties on non-registrants who:
 - Practice, offer to practice or imply that qualification to practice a regulated profession
 - Advertise or display any card, sign or other device stating that the person is registered or qualified to practice any regulated profession
 - Use a protected title such as "certified", "professional certified", "professional", "PE", "registered", "registered professional" or "professional registered"
 - Use the registration of another, an expired or revoked registration.
 - Presents false evidence to the board with the intent to obtain registration.
- "Flying under the radar" is not worth the risk—**A.R.S. § 32-145**

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Ethics Scenario #2

Lisa's engineering firm completed a feasibility study for a proposed extension of the City's light rail line to the football stadium. The City decided to use the design-build method to construct this line extension. Big Wheels Builders wants to add Lisa as the lead design engineer on its pursuit team, and compete for this project.

Q: Would Lisa have a conflict of interest in competing for this project?

Q: May Lisa use the information and analysis done for her firm's feasibility study in developing Big Wheels' technical proposal?

Q: Can Lisa take any other steps to avoid disqualification for conflict of interest?

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Penalties For Conflict Of Interest

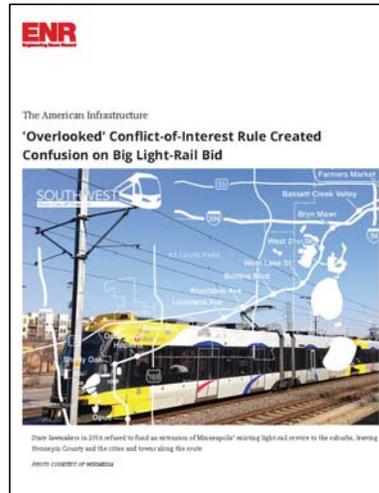
A contract entered into by a public agency in violation of the Arizona conflict of interest laws is voidable at the will of the agency. [A.R.S. §38-506](#)

The state, its political subdivisions or any department or agency of either may, within 3 years after execution, cancel any contract without penalty if any person significantly involved in initiating, negotiating, securing, drafting, or creating the contract on behalf of the state [etc.] is an employee or agent of any other party to the contract, or serving as a consultant with respect to the subject matter of the contract. [A.R.S. § 38-511](#)

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Experience Shows These Are Not Hypothetical Risks

- Minneapolis Metropolitan Council has strict conflict of interest rules
- Engineers or subcontractors engaged in any aspect of project design were disqualified from award of contracts for construction
- Bidders were notified of conflicts rule—but it had not been strictly enforced in past
- Authority rejected proposals of all four teams competing on project because **36 disqualified** subcontractors on their teams had worked on design & planning
- Contractors and engineers claimed agency was overly strict in applying conflicts rules for no public benefit:
 - **Project was re-bid, causing delay**
 - **Primes had to use out-of-state sub contractors to avoid conflicts**
 - **Costs to public increased due to conflicts avoidance**



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Ethics Scenario #3

Engineer Carly learns that the County's project manager on a road improvement project is asking contractors to do side work at the PM's cabin with their "surplus" materials from the county contract. The PM also asked Carly's firm to hire on a nephew who recently graduated from college. Carly's firm is dependent on the County contract for a major share of its billings each year

Q: Should Carly say or do anything about the contractor's side jobs?

Q: Should Carly employ the PM's nephew?

Q: If Carly intends to refuse the PM's request, what reason should she give for doing so?

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ADOT Gift Policy PER-6.03

“State employees shall not:

(1) permit themselves to be placed under any kind of personal obligation which could lead any person to expect official favors;

(2) Accept or solicit, directly or indirectly, anything of economic value as a gift, gratuity, favor, or loan, which is , or may appear to be, designed to influence the employee’s official conduct.

This provision does not prohibit acceptance of ... food, refreshments, or unsolicited advertising or promotional material of nominal value [but] even such nominal gifts <\$10 value] are forbidden if they are designed to influence a state employee’s conduct.”

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Maricopa County Gift Policy

Soliciting or accepting gifts, favors, or gratuities generally is prohibited. A.R.S. § 41-773(B); A.A.C. R2-5-501(C)(4). It has long been Maricopa County’s policy that employees may not accept any gifts or favors that would lead toward favoritism or the appearance of favoritism.

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Ethics Violations Resulting in BTR Disciplinary Action

R4-30-301. Rules of Professional Conduct

All registrants shall comply with the following rules of professional conduct:

3. A registrant shall not commit bribery of a public servant as proscribed in A.R.S. § 13-2602, commit commercial bribery as proscribed in A.R.S. § 13-2605, or violate any federal statute concerning bribery.
4. A registrant shall comply with state, municipal, and county laws, codes, ordinances, and regulations pertaining to the registrant's area of practice.
5. A registrant shall not violate any state or federal criminal statute involving dishonesty, fraud, misrepresentation, embezzlement, theft, forgery, perjury, bribery, or breach of fiduciary duty, if the violation is reasonably related to the registrant's area of practice.

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Ethics Violations Will Also Lead To BPLPES Disciplinary Action in New Mexico

NMAC §16.39.8.9.D Professional relationships with employer or client. NMAC §16.39.8.9.E (2) Solicitation of professional employment

A Licensee shall

- (1) Act as a fiduciary and shall avoid conflicts of interest; shall disclose all known or potential conflicts of interest.
- (2) Not accept compensation from more than one party on same project without full disclosure and consent.
- (3) Not solicit or accept gratuity from contractors, agents, or others dealing with their client
- (4) Not participate in deliberations or actions of governmental agency where conflict of interest with licensee's organization
- (5) Not solicit or accept contract from governmental agency on which a principal serves a member except with full disclosure and consent of agency
- (6) Not reveal facts, data or information obtained in professional capacity without prior consent from client
- (7) **Not offer, give, solicit, or receive a commission, gift or other valuation consideration to secure or influence the award of work, or make political contribution in amount intended to influence the award of a contract**

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Ethics Scenario #4

A municipality hires Robert's firm to assess the feasibility of enlarging the city's existing waste-to-energy plant to burn more garbage while meeting newer EPA clean air requirements. Robert is directed to use data provided by the manufacturer of the waste reactor vessel to complete his cost/benefit analysis of the project. Robert knows the City is already carrying significant debt-financing on the project.

Q: What ethical obligation does Robert have in performing this study?

Q: May Robert use and rely on data supplied by the equipment manufacturer?

Q: If the data suggests that enlargement of the plant is risky or may not be cost-effective, may Robert help the City develop a justification for making the additional investment?

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Lack of Independence Or Technical Competence Can Trigger BTR Violation

R4-30-301. Rules of Professional Conduct

All registrants shall comply with the following rules of professional conduct:

2. A registrant shall not engage in fraud, deceit, misrepresentation or concealment of material facts in advertising, soliciting, or providing professional services to members of the public.

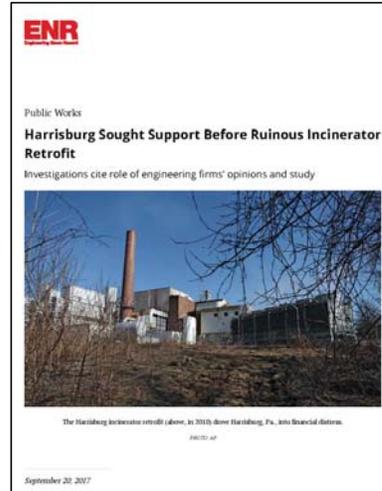
6. A registrant shall apply the technical knowledge and skill that would be applied by other qualified registrants who practice the same profession in the same area and at the same time.

11. If a registrant's professional judgment is overruled or not adhered to under circumstances where a serious threat to the public health, safety, or welfare may result, the registrant shall immediately notify the responsible party, appropriate building official, or agency, and the Board of the specific nature of the public threat.

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Once Again, These Risks Are Not Hypothetical

- Harrisburg, PA incinerator was modified to generate power from burning waste
- Costly updates or replacement needed to meet EPA clean air rules
- City received and shelved one report concluding that upgrade was risky due to complexity of project and debt the city would assume
- New engineer hired to evaluate upgrade used data from boiler manufacturer to conclude “in the worst-case scenario, the project will pay for itself.”
- Technology had only been used for 50-100 TPD operations; had never been tried for projected 800 TPD operation
- Boiler could not handle larger quantity of mixed waste
- \$300M debt on failed project drove City into bankruptcy



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How Do We Judge The
Standard of Care?

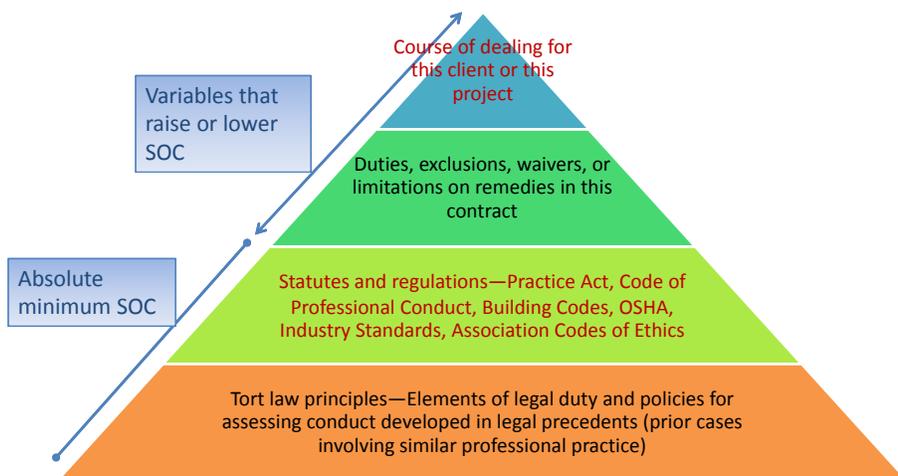
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Defining The Standard Of Care

- The duty to perform with ordinary competence—gained from education, skill, prudence, experience, and diligence—that is comparable to that of similarly situated professionals performing the same services in your “community”
- The standard of care is not a warranty of “perfect plans”
- What constitutes “due care” will vary with the circumstances of the professional’s discipline, the nature of project or services, and the probable dangers associated with the services
- In most cases, expert testimony is required to establish the standard of care and liability for its breach

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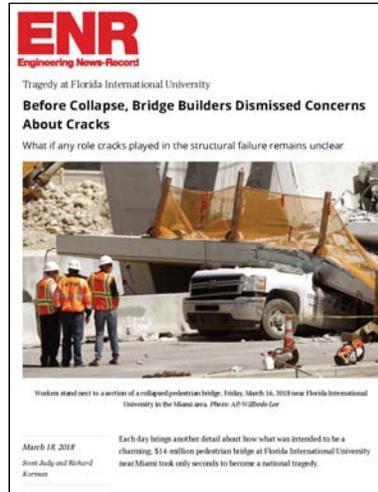
Components Of The Standard Of Care (SOC) — Absolute Minimums And Variables Based On Specialty Or Services



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Final Q&A Period and Open Discussion

What must the ethical engineer do to avoid becoming the wrong kind of front page news?



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P. DOUGLAS FOLK is a member of Clark Hill's national construction law practice group. He represents design professionals across the country in connection with design, engineering, procurement, and construction, including the defense of professional liability claims. His experience includes work in nearly all project types, including mining and process engineering, and EPC and P3 delivery methods.

- Past Public Member, Arizona Board of Technical Registration
- Past Chair and Member, ACEC Legal Counsel Forum
- Member, ACEC Risk Management Committee
- Past Chair, State Bar of Arizona Construction Law Section
- Co-editor, *ABA Design Professional and Construction Manager Law* (2007)
- Co-Author, *Arizona Construction Law Practice Manual* (3d ed. 2016)
- *Best Lawyers in America*®, 2018, Construction Law and Litigation
- 2018 Scottsdale Construction Law "Lawyer of the Year", and Scottsdale Litigation - Construction "Lawyer of the Year"
- *Arizona Super Lawyers*®, 2018, Construction Litigation and Professional Liability Defense

CLARK HILL PLC
14850 N. Scottsdale Road
Suite 500
Scottsdale, Arizona 85254

480-684-1127

dfolk@clarkhill.com
[@designbuildlaw](https://www.linkedin.com/company/designbuildlaw)
www.linkedin.com/in/folklawaz



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