



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Managing Risk in Innovative Designs

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DIFFERENT WORKS

Course Description

Clients and owners are more frequently requesting and expecting innovative design from professionals.

A thorough risk analysis and a careful review of contract language are both strategic tools to help you understand your liability and mitigate your risk.

Your Presenter

An Interview with:

Stephen Cruz

Learning Objectives

Participants will learn:

- How implementing innovative designs or materials affects the standard of care
- The Liabilities attached to the use of innovative designs and materials
- Project Agreement Strategies to Mitigate Risk in Innovative Designs and Materials
- Personal Strategies to Mitigate Risk in Innovative Designs and Materials



Part 1

Innovation in the Design Professional's World

Innovation

Designs, materials, and systems that deviate from established doctrine or practice...

“Green” Innovation

Common form of innovation

LEED Certification can be granted to certain “green” buildings and residential facilities

Desired for sustainability and financial advantages



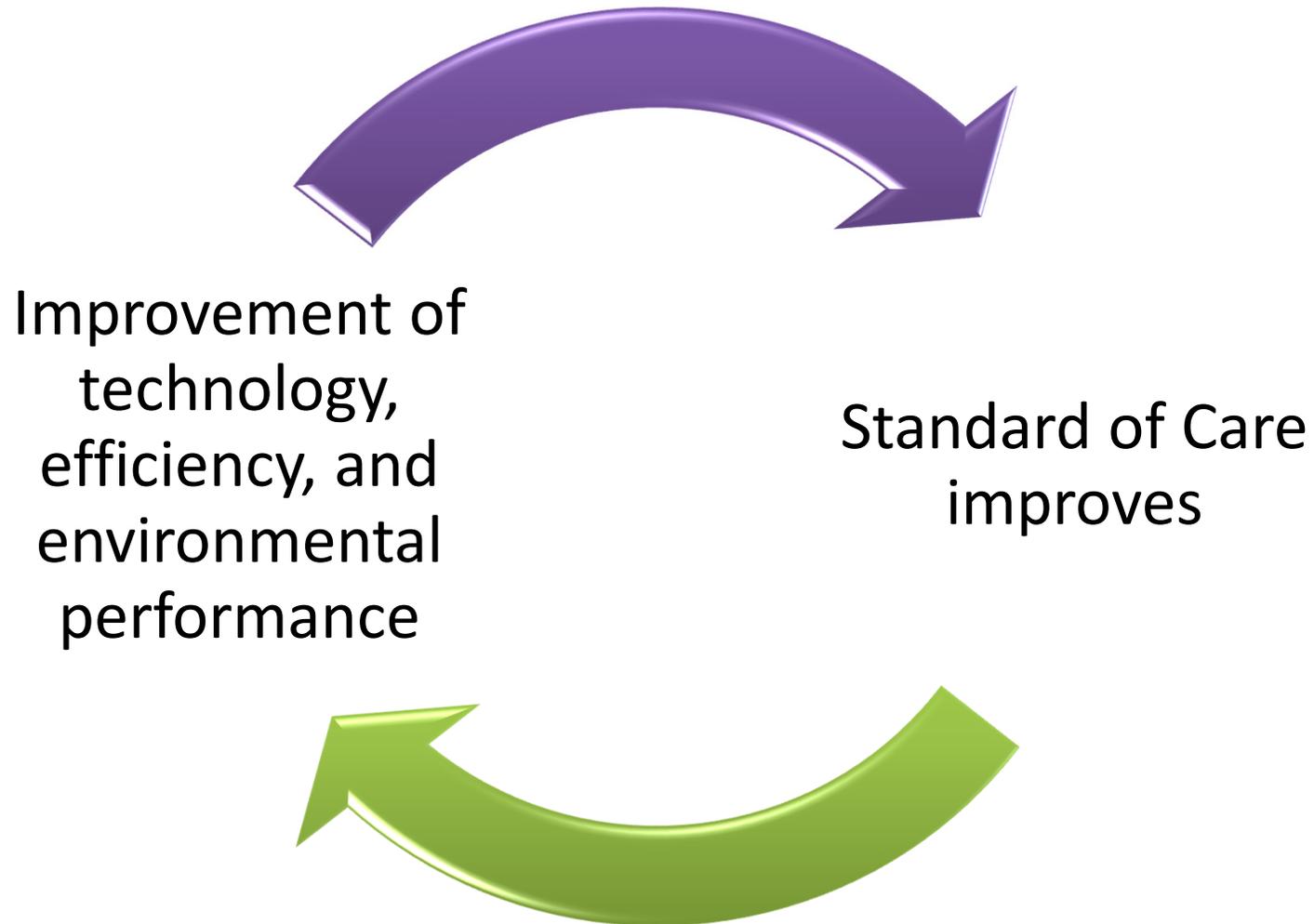
Part 2

Does Innovation Affect the Standard of Care for a Design Professional?

Standard of Care

...the degree of care and skill ordinarily exercised by members of the same profession practicing under similar circumstances.

SoC as a Moving Target



Standard of Care

Ways to Stay Up To Date:

- **Subscribe to and read industry publications**
- **Associate with others in your profession**
- **Attend seminars, workshops, and other continuing education offerings**
- **Examine the work of others in your field**
- **Teach courses, give talks, and write articles**



Part 3

**With Innovation, Should I Be Worried
About Additional Liabilities?**

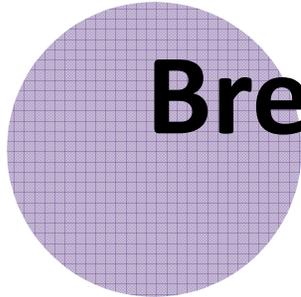
Liability

Inherent uncertainties

Review local regulations and geographic conditions

General liabilities for design professional always apply

Client/Owner Liability



Breach of Contract



Failure to Disclose

Failure to Disclose Example

Newly
manufactured
material for
walkways

The Design
Professional
explains
advantages

Design
Professional
doesn't
explain
disadvantages

Walkway is too
slippery to walk
on

Design
Professional
was aware of
risk

Third Party Liability

Economic Loss to Third Parties

Injuries to Foreseeable Plaintiffs

Third Party Plaintiff Example

Goal is "Gold"
LEED
Certification

Newly
manufactured
windows

Freezing
temperatures
and snow

Unusually
dangerous
snow
accumulation
on window
ledges

People
walking by are
hit by piles of
snow

Helpful Tip

Note: You should always keep Professional Liability in mind as it relates to innovative designs and materials



Part 4

Strategies For Mitigating Risk in Innovation

Mitigating Risk in Innovation



Project Agreement Strategies

- **NO Assurances or Warranties**
- **Make Carve-Outs for Innovative Designs and Materials**
- **Scheduling and Budget Considerations**

No Assurances or Warranties

Owners will want to include express or implied warranties to mitigate inherent uncertainties with innovation

Assurances and Warranties open the design professional up to more risk

Professional Insurance does not cover heightened Standards of Care

Possible Language

Helpful Language:

- “The insured makes no warranties, either express or implied, with respect to services provided under this Agreement.”

Language To Be Careful Of:

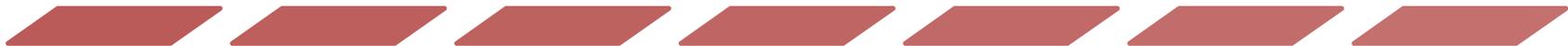
- “represents and warrants”
- “in strict conformity”
- “comprehensive and complete”
- “assure”
- “ensure”
- “fitness for purpose”

LEED Certification Warranties

LEED assurances and warranties create more risk for you



Clients will want to include LEED-certification guarantees



But certification is largely out of your control



LEED certification guarantees can lead to serious consequences



Possible Language

- “The insured does not warrant LEED certification or any benefits conditioned upon LEED certification, including but not limited to performance, cost saving, and maintenance.”
- “The insured will use reasonable care to design in accordance with LEED.”

Carve-Outs for Innovation

“Use of Innovative Design and Technology”
Provision in agreement/contract

System for approval of innovative designs,
processes, and materials

Addendum to agreement/contract incorporating
any changes during project to use new product,
technology, or process

Possible Language

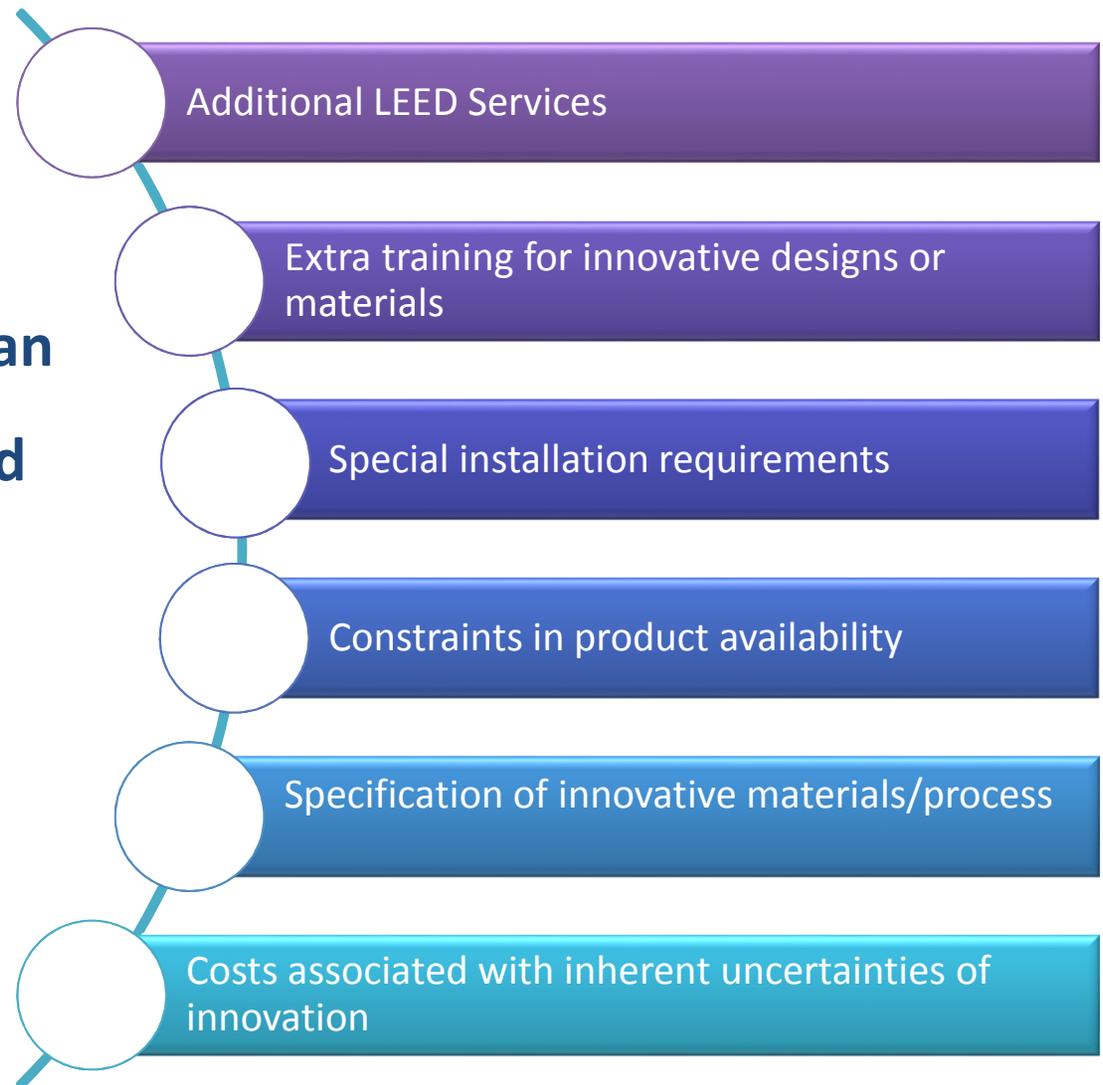
- “Unless otherwise permitted in writing by County, Consultant **shall not specify or recommend unique, innovative, proprietary or sole source equipment, systems or materials.**”
- “In the event Consultant requests to specify or recommend a proprietary or sole source design or equipment, Consultant shall provide County with a **written evaluation of whether all periodic maintenance and replacement of parts, equipment or systems, can be performed normally and without excessive cost or time.** County will consider such evaluation in making its decision.”

Possible Language

- **“If the Plans prepared by Professional require the use of newly developed innovative equipment, material or systems,** Professional shall ensure that the specifications require the applicable vendors and/or manufacturers to furnish Owner and Professional with copies of available test results and guarantees and warranties issued by the manufacturer of such equipment, materials or systems, as well as the results of Professional’s research and **Professional’s written explanation of its reasons for inclusion of the said equipment, materials or systems in its drawings or specifications** as well as available alternative guarantees and warranties for all such innovative equipment, materials and systems specified by Professional or its consultants. Professional shall recommend additional testing if necessary to supplement available data.”

Scheduling and Budget Considerations

These considerations can be directly incorporated into the agreement:



Personal Practices Strategies:

- **Communication**
- **Independent Research & Professional Consultants**
- **LEED Points**
- **Micro-Climate, Location, and Geography**

Communication

Communicate
With The Owner
Throughout The
Whole Process



Conducting Independent Research

Research manufacturer's warranties and guarantees

Seek consultation with independent professionals

Pay a firm to test the materials, designs, or systems

Research costs for implementation and maintenance

Document the research, testing results, and any additional findings

LEED Points Strategies

Realize owner's
desired level of
certification

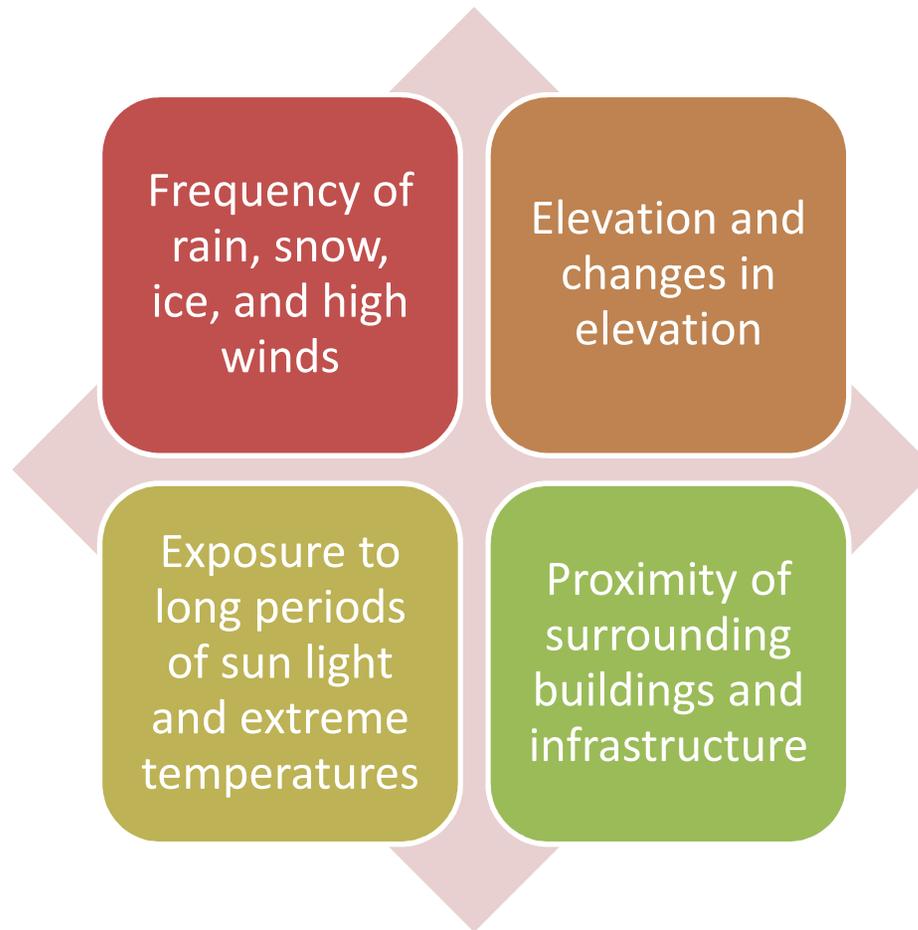
Independent
Research and
Consultation

Communicate
your process for
achieving
desired level

Aim for more
points than you
need

Micro-Climate

Understand Micro-Climate and Location



Wrap-Up

- Innovation improves the standard of care over time.
- Innovation doesn't specifically create more liability, but it does create more uncertainty.
- You can mitigate your risk by addressing innovation directly in your agreement.
- You can mitigate your risk in innovation every day through good personal practices.

Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects
Continuing Education Systems Program

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