

# Should we or shall we? That is the question!

Or, what you don't know about codes and standards can hurt you, or help you. BY JERRY GORRELL

THERE HAS BEEN A LOT OF DISCUSSION recently in PLASA Technical Standards Program meetings about the possible difference between a document that has specific requirements (containing the word “shall”) and a recommended practice or guideline having no directed requirements (containing the word “should” but not “shall”). Short answer: Not much, if any.

## A standard consists of technical definitions, procedures, or guidelines that specify minimum requirements.

At this point, I need to tell you I am not a lawyer and have not played one on TV, on stage, or in the movies. This document is my opinion based on my experience over almost 20 years of assisting lawyers as an expert in entertainment issues, primarily involving fatalities or personal injuries.

A little known or referenced document relevant to this discussion is *The National Institute of Standards and Technology (NIST) Circular Number A-119, Revised*. Circular A-119 was created in 1998 and “establishes policies on Federal use and development of voluntary consensus standards and on conformity assessment activities.” This circular was issued by the Federal Government Office of Management and Budget, and is available at <http://www.nist.gov/standardsgov/omb119.cfm>.

A-119 defines three types of standards, which are quoted here.

The first is:

- 1) ... “standard,” or “technical standard” as cited in the Act, includes all of the following: (1) Common and repeated use of rules, conditions, guidelines, or characteristics for products or related processes and production methods, and related management systems practices. (2) The definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, designs, or operations; measurement of quality and quantity in describing materials, processes, products, systems, services, or practices; test methods and sampling procedures; or descriptions of fit and measurements of size or strength.
- b. The term “standard” does not include the following: (1) Professional standards of personal conduct. (2) Institutional codes of ethics.

In short, a standard consists of technical definitions, procedures, or guidelines that specify minimum requirements.

The second type of standard is a performance standard:

- 2) “... is a standard as defined above that states requirements in terms of required results with criteria for verifying compliance but without stating the methods for achieving required results. A performance standard may define the functional requirements for the item, operational requirements, and/or interface and interchangeability characteristics. A performance standard may be viewed in juxtaposition to a prescriptive standard which may specify design requirements, such as materials to be used, how a requirement is to be achieved, or how an item is to be fabricated or constructed.”

The third type of standard is a non-government standard:

- 3) “Non-government standard” “is a standard as defined above that is in the form of a standardization document developed by

a private sector association, organization, or technical society which plans, develops, establishes, or coordinates standards, specifications, handbooks, or related documents.

*Circular A-119*, revised, also defines voluntary consensus standards:

For purposes of this policy, “voluntary consensus standards” are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free, or reasonable royalty basis to all interested parties. For purposes of this *Circular*, “technical standards that are developed or adopted by voluntary consensus standard bodies” is an equivalent term.

## What creates liability is taking, or failing to take action, and that leads to an accident and creates a loss.

According to *A-119*, a voluntary consensus standards body is defined by the following attributes:

- (i) Openness.
- (ii) Balance of interest.
- (iii) Due process.
- (vi) An appeals process.

By this definition, the PLASA Technical Standards Program is a voluntary consensus standards body.

For purposes of this discussion the term “standard” includes standards, performance standards, and voluntary consensus standards—all the types listed in *Circular A-119*.

*Circular A-119* requires government agencies to “. . . use voluntary consensus standards, both domestic and international, in its regulatory and procurement activities in lieu of government-unique standards, unless use of such standards would be inconsistent with applicable law or otherwise impractical,” or to explain to the OMB why they cannot. Any time an agency writes “government – unique standards” they have to submit a report to the OMB.

## What you call it doesn't matter

Why all the governmental verbiage? The contents of this document may help explain the position by ANSI that what you call a document does not matter. Documents that contain guidelines and words such as “should,” “may,” and so on are all standards according to *Circular A-119*. By this definition, documents created under the

ANSI requirements by the PLASA Technical Standards Program all have the same standing and the Federal Government considers them a standard.

Codes are standards adopted by governmental jurisdictions or any authority having jurisdiction. Standards and model codes, in and of themselves, have no legally enforceable authority until they have been enacted into law by some political jurisdiction or authority having jurisdiction. Model codes are created to be adopted by political jurisdictions or authorities having jurisdiction, thus saving the adopter the time and expense of developing and maintaining their own code(s). By following certain rules, the adopting authority can alter a model code when it adopts it. Thus the ICC's International Building Code, for example, may not be adopted in the same form in all jurisdictions, even ones next to each other. Different jurisdictions may be using different editions of a model code depending on when the particular code was adopted or by choosing not to adopt the newest version. A familiar model code is the *National Electrical Code, NFPA 70*.

Any standard or part of one can become a code if it is adopted by a political jurisdiction or authority having jurisdiction. A standard, or part of one, can have legal standing by being included by reference in a code. Once a standard, or part of one, is adopted into a code, an engineer, designer, contractor, or other person(s) performing work covered by the code are legally required to comply with the standard (or parts) incorporated into the code. Failure to comply with a code may result in prosecution.

There are also regulations. A regulation is a legal norm intended to shape conduct. A regulation may be used to prescribe or proscribe conduct, to create incentives or to change preferences. It is generally a written document containing rules having the force of law. In general, regulations are written by executive agencies as a way to enforce laws passed by a legislative body or authority having jurisdiction. The OSHA regulations are an example of a regulation.

## Liability

I believe, part of the concerns fueling the “should versus shall” discussions are about that magic word “*liability*.” Many people feel that using “should” rather than “shall” can reduce or eliminate their liability. My experience in civil litigation is this is not true. In civil litigation things like standard of care, industry standards, and best practices all carry a great deal of importance.

Look at it this way: If you should have done something in a place where you were not required by a “shall” to do it, what is the difference, as a practical matter, if the failure to do the “should” resulted in a bad outcome? By themselves neither the word “should” or “shall” create liability. What creates liability is taking or failing to take action and that leads to an accident and creates a loss. According to the attorneys in a major case I worked on, my testimony about the failure of the defendant to do something not

required by any standard, code, or regulation, but widely written about and generally understood to be “a standard of care”<sup>1</sup>, resulted in a win for the plaintiff before the case went to the jury.

“Liability” is a legal term. Settlements can, and usually, are reached prior to a trial without anyone admitting to liability. Outside of the courts or regulatory actions I believe the correct term is actually *responsibility*.

## Know and understand all standards, codes, and regulations that apply to the work you do.

### How to prevent accidents

Most accidents are preventable. How do you prevent accidents?

First, have the “competent person”<sup>2</sup> required by many standards and OSHA regulations on the work site at all times. The competent person needs to be watching what is happening. The lack of a person watching for unsafe work practices and improper or defective equipment were frequently major factors in accidents I have reviewed. The competent person **must** be prepared to take prompt corrective action and have the support of management.

Second, know and understand all standards, codes, and regulations that apply to the work you do. Create policies and procedures that allow you to operate safely. Train staff and workers on the policies and procedures; repeat training as often as necessary. Some standards, codes, and regulations require retraining at defined intervals. Document the training. Do not permit shortcuts; establish an organizational culture of working safely. Take five minutes before work begins each day to discuss the day’s operations and cover any possible problems and unusual conditions.

An important factor in several recent cases has been failure to properly inspect and maintain equipment. Inspection, maintenance, and removal from service for equipment should be part of policies and procedures.

I know many will say all this costs too much, but accidents are expensive. I have seen studies that suggest that uninsured costs can be four to five times the insured costs. That is, if your profit margin is 5% you would have to book \$20 dollars in new business to cover every dollar in uninsured costs.

In addition to all this, there is what Jay Glerum referred to as the “mirror factor.” If you are responsible—even partially—for an accident that injures or kills a fellow worker, you have to look at yourself in the mirror each morning.

### If things go wrong

If you follow what is outlined above something can still go wrong, but you will be able to establish that your operations met the standard of care, met codes and standards, and were appropriate. Standards and guidelines, if followed, establish that you met an appropriate standard of care if you followed the relevant standard, guideline, or recommend practice. Anytime there is the possibility of legal action or legal advice is needed, consult an attorney.

I would not get much work from lawyers if my reports listed what was done correctly. However, I am frequently asked to evaluate a case and offer an opinion as to whether or not there is a case. Often there is not.

### Workers, too

For the workers reading this, lost in the focus on employers, is the fact that OSHA regulations and *NFPA 70E*, to name only two, require that workers work properly and safely. So knowing the codes, standards, and regulations is important to everyone in the entertainment industry. ■

End note definitions:

1 **Standard of Care:** The watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would exercise.

2 **Competent Person:** One who is capable of identifying existing or predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous, and who has authorization to take prompt corrective action to eliminate the hazards.



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