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Why “Best Practice”

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One of the hallmarks of a profession is a set of standards that governs its members’ practice. Should the Actuarial Standards Board codify “best practice”? And even if it has the authority, is it always clear what practices are best?

THE RECENT ADOPTION OF A NEW INTRODUCTION to the Actuarial Standards of Practice created an opportunity to explain the laws that govern the operations of the Actuarial Standards Board. Of particular interest is the ASB’s practice of issuing standards that, in most cases, codify “generally accepted actuarial practice,” i.e., “practices that are broadly accepted by qualified actuaries as appropriate to the proper performance of a particular type of professional assignment or aspect of professional practice.”

Some actuaries believe the ASB should try to elevate actuarial practice by issuing standards that articulate “best practice.” However, the ASB’s activities are governed by practical considerations and legal requirements that shape not only its procedures but the content of the standards themselves.

BEHOLDER

Standards of Practice May Not Be Best

The ASB's Mandate

The ASB has broad authority not only to decide if and when to issue standards but to determine what the content of those standards will be. The ASB gives careful thought to the level at which it sets each individual standard. The ultimate purpose of the ASB's standards is, of course, to provide actuaries with useful guidance in their professional work. Consequently, the ASB sets its standards at a level it considers most likely to provide meaningful assistance to practicing actuaries in most work situations.

The ASB normally codifies generally accepted practice in its standards, recognizing that the actuarial profession is usually best equipped to determine what practices are acceptable and, therefore, generally accepted with respect to a particular assignment. Actuarial practice varies widely from situation to situation, and a practice that might seem questionable in one context can be entirely acceptable in another. The ASB believes it would be unreasonable, and an inappropriate incursion on the actuary's professional judgment, to adopt standards that prevent actuaries from using otherwise acceptable methods in situations where multiple approaches can be expected to lead to an appropriate result.

In many instances, deciding which of several possible practices is best is a matter of professional opinion. As the *Introduction* to the Actuarial Standards of Practice recognizes, actuaries are professionals who exercise their judgment on their principals' behalf and who can and do differ in their preferred techniques, methods, and assumptions. The ASB cannot, and does not attempt to, determine which practice is best in every instance.

Rather, the ASB looks to the practicing actuary to evaluate each professional service in practical terms, balancing factors such as the difficulty of the assignment, the levels of uncertainty involved, the availability and reliability of data and other relevant information, and responsible use of the principal's resources. The actuary then uses the Actuarial Standards of Practice to produce high-quality work.

This leaves the actuary, as the author of the work product, free to determine his or her own best practice under the circumstances, within the framework of guidance the standards provide.

(Note that the ASB doesn't prohibit actuaries from going beyond the requirements of its standards to elevate their work to "best practice" if they deem it appropriate to do so. Indeed, the ASB even permits actuaries to deviate from the requirements of a standard in some circumstances.)

This is not to suggest that the ASB always codifies common practice, regardless of its quality. Most actuaries practice with both integrity and competence so that "generally accepted" practice is also acceptable practice. However, actuarial science evolves over time, and, as the science improves, acceptable practice improves with it. If the ASB identifies inappropriate practices, the ASB does not incorporate them into a standard even if they are in common use. Rather, the ASB codifies acceptable practice even if, in doing so, it raises the bar to a reasonable degree. In this way, the ASB ensures that its standards call for actuaries to engage in appropriate practice whenever they provide professional services.

Thus, the ASB's standards strike a balance, permitting innovative and traditional practices that are acceptable but not prohibiting actuaries from using generally accepted practices that are good, while not necessarily "best."

The Laws That Govern Standard-Setting

In addition to the practical considerations described above, the ASB is obliged to comply with legal duties of due process that apply to any body, private or governmental, that issues laws, regulations, or, in this case, standards for a profession. There are two aspects to due process: procedural due process and substantive due process. By law, both must be satisfied.

Procedural due process requires a standard-setting body, at a minimum, to provide individuals who will be required to satisfy a proposed standard with *notice* of the proposed standard and a *meaningful opportunity to comment* on it before it's adopted. This means the comment period should be of reasonable length; it should be reasonably easy to comment; the standard-setting body should grant comments fair consideration and make changes to a proposed standard if appropriate; and dissenting comments should be addressed when the standard is adopted.

Substantive due process is an equally important concept,

essentially a requirement that the standard-setting process be equitable. The standard-setting body should be honest in describing its proposal, open-minded in evaluating comments, willing to change a proposed standard in response to persuasive comments, and straightforward in responding to comments.

Substantive due process speaks to the intent of the standard-setting body and its willingness to engage in meaningful dialogue with its constituents. To determine whether substantive due process was granted, a court will usually examine the standard-setting body's conduct. It will particularly evaluate whether the body appears to have carefully considered and addressed comments. If a standard-setting body appears to have ignored commentators' legitimate concerns or to have misrepresented its purpose or goals in preparing a standard, a court may infer that

scribed above are evaluated by the courts under the "rule of reason." The court weighs the circumstances of the case and determines whether the anticompetitive effects of a standard are outweighed by its benefits. Among the recognized benefits of setting standards (assuming that those standards restrain practitioners only to a reasonable degree) are maintaining a high level of quality in professional services, encouraging innovation, and increasing competition. Thus, for example, a standard that required an architect to design all buildings to satisfy building safety codes would restrict architects' practice to the extent that it would prevent them from designing unsafe buildings but would most likely survive legal challenge because of the public benefits involved.

Federal laws prohibiting restraint of trade apply to private or-

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the body acted in bad faith, violating the requirements of substantive due process.

The ASB is careful to meet the requirements of procedural due process, providing actuaries with meaningful notice of proposed standards and opportunity to comment on exposure drafts before their adoption. The ASB and its operating committees are also careful to comply with the requirements of substantive due process, giving full and fair consideration to comments received and revising standards as appropriate. These steps are important not only to meet the requirements of law but also to ensure that members' concerns are carefully considered and addressed as standards are developed.

Federal law also prevents private standard-setting bodies from imposing unreasonable restraints on practitioners' professional activities. A literal interpretation of the law would entirely prohibit private standard setting, because all standards restrict the practitioner's freedom to practice to at least some degree. The law entirely prohibits standards that require any of the following:

- **Price fixing:** agreement on the prices charged for goods or services.
- **Market division:** agreement to divide the market for goods or services, either by geography or by class of potential customer.
- **Group boycott:** agreement to refuse to deal with providers of goods or services.
- **Tying:** agreement to refuse to offer particular goods or services unless customers also agree to purchase other goods or services.

Standards that don't involve any of the per se violations de-

scribed above are evaluated by the courts under the "rule of reason." The court weighs the circumstances of the case and determines whether the anticompetitive effects of a standard are outweighed by its benefits. Among the recognized benefits of setting standards (assuming that those standards restrain practitioners only to a reasonable degree) are maintaining a high level of quality in professional services, encouraging innovation, and increasing competition. Thus, for example, a standard that required an architect to design all buildings to satisfy building safety codes would restrict architects' practice to the extent that it would prevent them from designing unsafe buildings but would most likely survive legal challenge because of the public benefits involved.

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ganizations, not to government. Consequently, lawmakers can significantly restrain actuaries' ability to practice without running afoul of the law, even though the ASB might be held liable if it attempted to impose the same restraints through its standards. The government frequently prohibits actuarial practices that might otherwise be generally used. For example, state law establishes a complex statutory and regulatory framework governing the annual valuation of insurance company reserves, preventing the actuary from opining that the reserves are adequate unless specified conditions are met. Where such a prohibition exists, the ASB recognizes and accommodates the prohibition when drafting standards for practice under the law that creates it but doesn't impose the prohibition itself.

If the ASB were to codify "best practice" in its standards, it could create significant legal problems. Most of the ASB's standards are fairly broad, requiring the actuary to select appropriate methods and assumptions but neither dictating what those methods or assumptions should be nor prohibiting acceptable methods that are in common use. If several acceptable practices exist to accomplish a particular professional assignment, designating one as "best practice" and thereby prohibiting the others would likely constitute an unreasonable restraint of actuaries' freedom to practice.

The ASB also recognizes the role its standards play in the courts. A malpractice claim against a professional typically involves several elements, but the one most relevant here is whether the professional complied with "generally accepted practice." Courts frequently look to professional standards as *prima facie*

evidence of what practices are “generally accepted” within a profession, especially if a significant majority of the members of the profession are required to comply with those standards.

The Code of Professional Conduct requires the members of the five U.S.-based actuarial organizations to satisfy the ASB’s standards whenever they provide professional services in the United States. The membership of the five organizations accounts for nearly all of the actuaries in the United States. Thus, the ASB’s standards effectively *become* the codification of generally accepted practice when they take effect, regardless of what practices may previously have been in use. Consequently, it’s almost inevitable that the ASB’s standards will be used in malpractice suits to establish the standard of care applicable to actuaries practicing in the United States.

Finally, standard setters must act with due care. Courts generally agree that standard-setting bodies owe a duty of care to the individuals who are bound by their standards, and careless preparation of a standard can lead to a negligence claim.

Determining what constitutes negligent adoption of a standard can be challenging. Failure to satisfy due process or to sub-

stantially comply with established procedures might well be considered negligence. However, if the ASB were to adopt a standard with seriously flawed content, it’s not inconceivable that a court could conclude, on the basis of expert testimony, that the ASB had been negligent.

For example, a standard that unreasonably restricted actuaries’ right to practice, a standard that set such minimal requirements that it gave the actuary insufficient guidance, or a standard that failed to discuss a critical element of practice in a particular situation, could conceivably be determined by a court to have been negligently promulgated. The ASB, therefore, considers carefully the content of its standards to provide an appropriate codification of generally accepted practice. Ultimately, the law and the ASB’s policies work together to ensure that actuaries receive useful and reasonable guidance from the ASB’s standards.

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