



GUEST ESSAYS

Certification - Bane of the Design Professional

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From a myriad of sources the American public has been taught that virtually every product or service should be guaranteed or warranted; that all users of products and all recipients of services should not suffer physical harm or monetary loss. In a phrase, we have become a "risk free society". This is reinforced by laws and regulations at every level of government. The Courts reinforce the concept which in recent years does not necessarily seek the determination of strict negligence or fault, but a remedy to reimburse the unfortunate, many times looking more towards resources to pay than wrongdoing.

Understanding this societal "mind set" should eliminate any surprise that owners, lenders, and their attorneys seek to have design professionals guarantee their work. Call it a certification, or warranty; the intent is the same - a guarantee of accuracy of your work, the justification for the requirement couched in the rationale that you should be responsible for your work product, and stand behind it.

Is Certification Really Risky?

Design professionals are just that - professionals who seek to perform their services in a professional manner, and stand behind what they do. Does it really matter if you certify or warrant your work as tangible evidence of your professionalism? To answer that question, we need to examine what the law requires of you as a professional, how the Courts interpret the certification document, and how your Professional Liability insurance company reacts to it.

As a starting point, let's look at what the law requires of you as a design professional. Under common law, you are required to perform at a level of care consistent with the professional skill and competence normally exercised by others practicing your profession in your community. The law does not require you to perform to the highest standards of the profession, or are you required to be perfect. The law holds you liable only insofar as it can be proved that you were negligent in providing a reasonable degree of professional care. The law does not require you to guarantee anything, it only requires that you not be negligent.

The word "certify" suggests a meaning close to an absolute guarantee of accuracy. When a Lender, Owner, or Surety asks that you "certify" that the contractor's work in place is equal to his progress billings, in accordance with the plan and specifications, meets all laws, codes and regulations, all utilities, structures, easements and boundaries are precisely located on "as builts", plat plans or the like, you are being asked in effect to guarantee the accuracy of your work and possibly theirs. (One not so obvious problem being your reliance on marked up drawings by Contractors, or information on old drawings furnished by the Owner or others, for incorporation in your work product.)

As far as the Courts are concerned, the inaccuracy of information you "inherited" from others is not withstanding. You "certify" the information or document which in the eyes of the Court means the party to whom you certify has reason to rely on the correctness of the information.

Why Worry? The Consultant Is Insured

Regrettably it is the mistaken belief by Owners, Lenders, and their attorneys, and unfortunately a number of uninformed design professionals, that an "in force" Professional Liability Insurance Policy will respond to any problems resulting from certification. To the Author's knowledge, every professional Liability Policy presently available in the marketplace excludes coverage for claims arising from express warranties or guarantees, either by direct exclusion, or other policy language. This being the case, it puts the design professional in the position of substantially self insuring the certification.

Negotiating A Solution

Owners or Lenders may be adamant about requiring certification of your work. Their attorney may have advised them that such assurance is necessary to fully protect their interest. To further complicate the problem, Owners and Lenders may resist your request not to certify by reminding you that your competitors willingly certify their work, and if you refuse, they will easily solve their problem by getting someone else who is willing to.

This is the time to advance some cogent reasons why a certification requirement may not be in everyone's best interest.

1. Certification is an unreasonable requirement for the design professional as it extends your liability beyond that which is required of you under common law, and beyond responsibility that is reasonably expected of any professional providing equivalent services.
2. Certification increases your risk exposure beyond what your normal fee contemplates. Certification by you represents a transfer of risk by the Owner or Lender and in effect makes you their insurer. You are not receiving an "insurance premium" for assuming a risk that is normally not yours.
3. Certifications or warranties are excluded by Professional Liability Policies written for Architects, Engineers, and Surveyors, so your policy isn't going to stand behind your certification in all likelihood.

Argument 3 has the greatest potential in removing the certification requirement. It is not well known by Owners, Lenders, and their attorneys that certification voids the design professional's Liability Policy. In reality, most attorneys want to make you as responsible as possible, short of voiding your insurance. Advising them of this result makes them aware that your firm must stand behind the certification without the advantage of your insurance coverage.

A Fall Back Position

The preferred response to a certification requirement is to eliminate it. Failing that, the next choice is to substitute the phrase "I hereby state to the best of my knowledge, information and belief etc. etc." for the phrase "I hereby certify". If the Owner or Lender won't accept this alternate wording, the final tactic may be to go ahead with the certification and then define the term "certify". A suggested definition may be: "the term certify as used in this statement, is understood to be the professional opinion of the Architect/Engineer which is formulated on his/her best knowledge information and belief, and as such, it does not constitute a guarantee or warranty, either expressed or implied. Furthermore, the Architect/Engineer does not assume responsibility and shall not be liable for claims arising from erroneous



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or incorrect information furnished by the Owner, Lender, or Owner's Contractor or others, which is used as a basis to formulate the Architect/Engineer's opinion.

If the Owner or Lender refuses to accept your compromise solution and you have no other choice but to certify without qualification, then it becomes a business decision on your part to accept the risks associated with the project, knowing that you most likely are not insured, or refuse the work. If you undertake the work, a final suggested strategy is to write a "Letter of Protest" to the Owner or Lender, and state that you reluctantly accept the certification obligation, as you have no other choice. If you end up in Court, your defense may be to argue disparate bargaining power, and hope the Court will take sympathy. This may not be a forceful argument, but it may well be better than nothing.

Dan F. Middleton, CPCU, ARM completed a 38-year career as Vice President, Construction, of the Ohio office of Willis-Torroon Corporation, one of the World's largest international insurance brokerages. He specialized in risk management and insurance for design firms and major construction companies. During his active insurance career, Mr. Middleton authored several published articles on insurance for design firms, was a frequent lecturer at the Ohio State University School of Architecture, served as a member of the advisory board of the Midwest Construction Institute, conducted numerous loss prevention seminars throughout the State of Ohio and participated as a guest speaker at numerous construction association affairs. He has served as the Executive Director of **ae ProNet** since 1993.

NOTE: The information in this essay is not intended to be legal advice. In any situation where you are faced with the obligation to Certify your work, check first with your attorney and your insurance professional to review the contract obligations. You may discuss the suggested strategies in this essay with your attorney and insurance professional to see if they are appropriate and effective in your legal jurisdiction and acceptable with your insurance company.