



UNC School of the Arts New Library, Winston-Salem, NC.
Architect: Clark Nexsen. Photography: © Mark Herboth

But Words Will Never Hurt Me

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As architects, we're guided to focus on the right details and the completeness of our overall design package. As marketers, our goal is to promote the abilities and talents of our A/E/C firms. It's necessary to differentiate ourselves from other A/E/C firms with the ultimate intent to win a client or a project, but at what cost? While we may believe that our liability lies only with our performance or standard of care, we must be careful not to cross the line with what we promise the client, even in the words we choose in marketing our firm or pursuing a particular project.

Why We Market Our Services

We market to promote why our product is great or why people should buy our services. In the A/E/C industry, we provide a service and not a raw material or object people can touch and feel. A/E/C services are not commodity-driven, even though some days it may feel that way. The marketing of a service-driven operation requires communicating your service or brand by promoting or selling it. To prevent litigation, what we state in our marketing efforts can be as critical as what or how much detail we place on our drawings.

Architects and engineers must be mindful of what is written or said when expertise and experience are communicated through marketing.

Standard of Care

In most of our 50 states, we are guided by the Standard of Care for professional design services. This is defined in the American Institute of Architects' Standard Form of Agreement between the owner and architect as:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

This is the standard we must live up to if we are to minimize and defend our exposure to potential lawsuits during the design and construction process. With this in mind, we cannot jeopardize this Standard of Care by making promises through our choice of words and committing

to something we can never fulfill. Communications and obligations do not always start with the signing of a contract. They can happen long before an agreement has been completed. They can begin with a qualification package or with a letter that helps sell your services.

So here's the dilemma. Architects need to protect their liability, yet they need to pursue work and compete for that work. A marketer's task, which can often be directed by the architect and engineer, is to differentiate the firm from the competition and stand out or be visible when it comes time for comparisons and evaluations by prospective clients. The natural marketing approach is to write those differences in our proposals and qualifications by creating phrases such as "we are the best," "we are second to none," or "your work is our highest priority." Making the wrong word choices can create risk for your firm by placing the Standard of Care above what your insurance underwriter can or will be able to protect. It can create a legal challenge during litigation when your marketing promises have established the opportunity for the owner's legal professionals to challenge your contract obligations.



Wake Technical Community College, Northern Wake
Campus Building E, Raleigh, NC. Architect: Clark Nexsen.
Photography: © Mark Herboth

The scope of your legal obligations on a project come from four predominant sources: professional regulations, applicable tort law (both case law and statutes), your contract, and promises or representations you make to a potential client and/or the outside world or public at large. You cannot do much to alter the first two, but you do have some control over the third and assuredly the fourth.

How a Proposal Can Add to the Legal Duty Owed by an A/E Firm

Often, a design professional agrees to have his or her proposal incorporated into the contract for services. This is not a prudent practice. If a provision in the proposal is also in the form of a contract, there is no reason to put it there twice. If a similar—but materially different—provision in the proposal is also in the form of contract, then you have created conflicting parts of your agreement. Most important, your proposal may often tout your expertise or qualifications. This can actually increase your potential exposure to liability based on the argument that you made a promise the owner reasonably relied on. Expressly incorporating this type of promise into the contract only exacerbates this problem.

The Tension Between Marketing Efforts and Risk Management Concerns

Risk management considerations dictate you never promise, suggest, or contract

to provide services of a quality above and beyond the Standard of Care discussed previously. However, how many projects will you secure by advertising and marketing that will provide a level of service that is ordinarily provided by architects, when in fact the definition of marketing is the promotion of a service or product? Thus, internal tension exists between risk management considerations and marketing considerations. How do you balance them?

Words Can Never Hurt You or Can They?

Watch your word choice ... or you could end up biting your tongue. While the list can be debated and will never be complete, here are eight words to pay close attention to in your contract documents, but also in your marketing material. Remember this: What you promise may not prove deliverable, with the potential end result being litigation. It is not just about the words we choose in our specifications or contractual agreements that can create problems. You cannot exaggerate your firm's abilities and strengths, which ultimately misrepresents your organization and places undue and added risks on your actual contract. Certain words create expectations, and expectations are not always met. While they sound impressive, they can exceed your "Standard of Care" to provide services that are consistent with the professional skill and care ordinarily provided by architects. So think carefully

when using these words in your marketing and contract documents:

1. Supervise
2. Certify (under some circumstance)
3. Guarantee
4. Warranty/Warrant
5. Highest Level
6. Best
7. Ensure
8. Maximize/Minimize

While these are certainly words to remember on a regular basis, we must also pay close attention to the misuse of words or phrases that can result in future legal problems. Have you ever used the phrase, "We always deliver our projects on time and never over budget"? Admit it, you have! And do you know the difference between ensure, assure, and insure? Use them in the wrong context and see what damage they can create.

Client-Focused Market

So how do we balance our risks and marketing considerations? How do we highlight our firm's relevant skills and experience? Knowing the marketing process should be client-driven, your marketing efforts need to focus on how to provide a solution to a problem or a need. Establish the solution to the client's problem and support it with examples of how you've solved similar problems for others, but keep the focus on the potential client. Every project is different and every client is different. This is how you focus on your client and win work. If you want to win work, focus on that potential client and do not use hyperbole and word choices that can harm you later. ■