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Greetings and welcome to our inaugural edition of Blueprint for Design Professionals. This newsletter will be published twice a year and it is offered to assist you in managing risk in your practice. We hope that you find the articles and information in this and upcoming editions helpful and informative. Most importantly, we want and appreciate your feedback! In order to help us provide you with content relevant to your practice, send us article ideas, risk management questions, and any other comments you might have to David Soltero at dsoltero@navg.com. While we may not be able to respond to you directly, we will do our best to incorporate the answers and ideas in future issues. We are also in the process of developing webinars that will provide continuing education credit; please let us know what topics you would be interested in, as we want to provide you with the information you need for your practice.

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Accepting as True Whatever the Architect Certifies

By David E. Barker and Niall A. Fordyce

It is common knowledge that during the course of any given project, the Architect of Record will be called on to "certify" or provide a "certification" for various items. What does it mean to "certify" or provide "certification" during the course of a project? Using certification of pay applications as an example, we will examine the often overlooked implications of this important part of the construction process, as well as point out key contract language to avoid, incorporate, and understand when "certifying" documents.

Most people understand "certify" and "certification" to imply a

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The Perils of Designing While Unlicensed

By David Soltero

Are your licenses up to date? Are you licensed in all the states where you practice? The importance of maintaining your licenses and insuring you are licensed in all the states where your design will be built cannot be stressed enough.

A Massachusetts architect who provided a design for a commercial building in Connecticut provides a cautionary tale. The architect had designed several buildings for a client for buildings to be constructed in

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"The architect advised the client that he was not licensed in Connecticut, but would immediately start the process to obtain it. The two parties signed a contract and the insured immediately began working on the design."

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guarantee, or a sense of certainty. "Certify" is typically defined as "to attest as certain," "guarantee," or "to testify to or vouch for." Strong words indeed, and not likely good for an architect on a project. Notwithstanding the general understanding of the words, steps can be taken to clarify and make "certify" and "certification" more architect-friendly.

In California, for example, the Architects Practices Act specifically defines "certify" and / or "certification" to mean "an expression of professional opinion regarding those facts or findings that are the subject of the certification, and does not constitute a warranty or guarantee, either express or implied. Nothing in this section is intended to alter the standard of care ordinarily exercised by a licensed architect."[1] Many an owner has been heard to say to an architect or design professional, "you certified it, so that means it's true, right?" This is not the case. The California Act removes the ambiguity from the architect's obligations in certifying project documents. However, be aware that owners and architects can agree to a higher standard of care, potentially exposing the architect to significant additional liability.

Not all states provide such protection, however. In Texas, there are no rules or regulations that define "certify" or "certification" of project documents by architects. According to the Texas Board of Architectural Examiners, this is purely a contract issue, and the state in no way regulates or defines the terms. Similarly, Missouri does not provide a codified explanation of "certify" and "certification." Of course, Missouri and Texas carefully regulate the practice of architecture, but neither currently addresses this specific and important issue.

So what does this mean in practical terms? Take the typical pay application process, for example. The AIA Document G702 *Application and Certificate for Payment* states:

> "In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Architect *certifies* to the Owner that to the best of the Architect's knowledge, information and belief, the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT *CERTIFIED*." (*emphasis* added).

Similarly, AIA A201 – 2007 *General Conditions of the Contract for Construction*, Sections 9.4 "Certificates for Payment" and 9.5 "Decisions to Withhold Certification" both discuss "certification." While Section 9.4 makes clear that issuance of a Certificate does not mean that the architect has made "exhaustive or continuous inspections … reviewed construction means, methods, or procedures … reviewed requisitions … or made examination to ascertain how the Contractor has used money previously paid," its explanation still leaves considerable room for ambiguity and interpretation concerning the extent of the architect's responsibilities and obligations. Section 9.5 provides that withholding a Certificate of Payment by the architect is permissible if "in the Architect's opinion the representations to the Owner required by Section 9.4.2 cannot be made." The "opinion" language speaks to the architect's reasonable standard of care, but once again, ambiguity exists.

Without a mutual understanding as to what "certify" and "certification" mean, the possibility for conflict, blame, and ultimately, a lawsuit, looms large. Where no statutory or code-based definition of "certify" or "certification" exists, the project participants must agree beforehand on a mutually acceptable definition of these terms. It will be critically important for the design professionals to ensure that any definition agreed upon does not obligate them to a higher standard of care than the California Act. It is key that the owner/client understands that by certifying the pay application,

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the architect is merely indicating that the work reviewed is in general conformance with the contract documents – it is not a guarantee or warranty that the work is error free. Indeed, all design professionals must use caution when contemplating entering into contracts that contain express warranties or require performance to a heightened standard of care. Thus, it is of the utmost importance that all terms are defined *before* construction begins. During the fast-paced and often hectic construction phase of a project, it can be a source of considerable conflict and eat up a great deal of time to be arguing over interpretation of the pay application process and contract terms. A little time spent at the front end of the project can save much headache and strife at the back end.

In no way, shape, or form should this article be construed as suggesting that architects do not have an obligation to stand behind their work - far from it. But the architect is not obligated, absent a contractual provision to the contrary, to warranty or guarantee all documents they "certify." A clear and mutual understanding of the architect's role with respect to the project documents will make every project participant's life easier, and the project run better. And as always, if you have any questions or concerns about the contract, consult your attorney.

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Massachusetts. The client was expanding its Connecticut operations and asked the architect to provide a design for a similar structure in Connecticut in a short time frame. The architect advised the client that he was not licensed in Connecticut, but would immediately start the process to obtain it. The two parties signed a contract and the insured immediately began working on the design. Right after signing the contract, the architect began the process of obtaining his required Connecticut license. The process took longer than he had anticipated, and his Connecticut license was not approved until after several review submissions had been made to the Building Department. He was licensed in time to stamp the final design.

Although the insured invoiced the client on a regular basis, the client failed to pay the majority of the architect's invoices. By the time the design was completed and the architect had received his license and stamped the drawings, a large design fee was due. The client began construction and advised the insured that there were delays and design problems that needed to be rectified. The client refused to pay the architect's outstanding invoices, now totaling in excess of $100,000. The architect refused to perform more services and the client terminated him. The architect, faced with the choice of either writing off the fees or pursuing a lawsuit, filed a lawsuit. In response, the client counter-claimed that the contract was void and, also, filed a complaint with the Connecticut Department of Consumer Protection. The substance of the client's claim was that the contract with the architect was invalid since the architect was not licensed in Connecticut at the time the contract was executed. As a result, the client claimed that not only did he not owe the architect any fees, the architect had to return all sums he was paid for this project.

This is clearly not equitable - the architect provided significant services, was licensed by the time the drawings were finalized, and should be paid for them. The so-called "design issues" were minor at best. In addition, the client knew the architect was not licensed in Connecticut. Failing to collect on its fee meant a devastating loss to this small architectural firm. The client would be rewarded for this technical and temporary deficiency if its counterclaim was successful. It would appear that all arguments favor the design firm. Not so fast…

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Connecticut, like all states, regulates the practice of architecture as necessary for public safety. As such, timing is everything - here, although the architect was licensed prior to stamping the drawings, the architect was not licensed at the time he entered the contract. Section 20-290 of the Connecticut General Statutes states that:

> **Use of title "architect".** In order to safeguard life, health and property, no person shall practice architecture in this state, except as provided in this chapter, or use the title "architect", or display or use any words, letters, figures, title, sign, seal, advertisement or other device to indicate that such person practices or offers to practice architecture, unless such person has obtained a license as provided in this chapter.

This broad statute would on its face prohibit even the use of the word “architect” in a contract entered into in the State of Connecticut for architectural services when one is not licensed there. The penalties for violating the above and/or other sections of this statute include a fine and, potentially, criminal sanctions. In addition, the case law in Connecticut interpreting the licensing statute provides no respite to the architect seeking fairness. The courts have found that any contract for architectural services in which the design professional is in violation of the statute is thus null and void – the architect cannot enforce the agreed terms. Moreover, in cases involving direct misrepresentation about the status of licensure, there is some authority from other professional licensure cases in Connecticut holding that a professional could be required to reimburse any fees paid under the terms of the contract.

Applying this after-the-fact acquired knowledge to his circumstance, the architect, rather than face the probable defeat of his fee claim, a possible reprimand (or worse) against his newly acquired license, and even more losses by way of extensive attorneys’ fees needed to fight this battle, decided to withdraw his claim for fees. The costs and risks were prohibitive.

Other states have licensing statutes similar to Connecticut’s. It is imperative that you are properly licensed in the states where you provide designs, and that you obtain the licenses before you sign the contract or begin the work. Do you have a protocol in place for the licensing and maintenance of licenses for the members of your firm? An ancillary issue is, does your firm have to be separately licensed from individuals in any state where you practice? If so, is it licensed? Knowing the answers to these questions could save you and your practice money and heartache.

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