



AIA Best Practices: But words will never hurt me

Marketing must balance enticement against precision

Contributed by Thomas S. Townes, AIA, FSMPS, CPSM and Andrew J. Carlowicz, Jr.

Summary

We may believe that liability applies only to our performance or standard of care, but it is important from the outset to promise only what you can deliver; even materials marketing your firm or pursuing a project can expose you to litigation.

Why we market our services

We market to promote our products. Why they are great. Why people should buy them. In the architecture, engineering and construction industry (AEC), we provide a service, not a raw material or an object that people can touch and feel. AEC services are not commodity driven, even though it may sometimes feel that way. Marketing a service-driven operation requires the promotion and sale of your service or brand. Successful marketing determines the needs of customers and ultimately satisfies them. To prevent litigation, though, marketing pledges are as critical as are the details in our drawings. This article is intended to help architects remain mindful of what is written and how it is conveyed. Marketing ultimately must generate a reaction to win a project, but it also must avoid potential problems over how you communicate your skills and experiences.

"Standard of Care"

In most states, the standard of care for professional design services guides us. The AIA Standard Form of Agreement between the Owner and Architect defines it this way:

"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."

Abiding by this standard is the best way to minimize and defend exposure to potential lawsuits during the design and construction process. With this in mind, do not jeopardize the "Standard of Care" with promises and commitments that you cannot fulfill. Communications and obligations do not start with a signed

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contract. They begin long before an agreement has been reached. They can be made in a qualification package or a letter meant to sell your services.

This presents a dilemma: Architects need to protect against liability, yet they also need to pursue and compete for work. A marketers' task, often directed by the architect, is to differentiate the firm from the competition. The proposal has to stand out. Superiority has to be visible when prospective clients compare and evaluate a plan. Marketing pitches often cite the excellence of a firm's qualifications with phrases like "We are the best," "We are second to none," or "Your work is our highest priority."

Making wrong word choices can put your firm at risk by adding elements to the "Standard of Care" beyond what your insurance underwriter can, or will, be able to protect. A legal challenge can arise if your marketing materials establish an opportunity for the owner's legal professionals to challenge your contract obligations.

The scope of your legal obligations on a project come from four predominant sources: the requirements imposed by regulatory authorities; applicable "tort" law, both statutory and case law; your contract; and the "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 proposals can add legal burdens

Design professionals often agree to have his or her proposal "incorporated" into a contract for services. This is not a prudent practice. If a provision in the proposal is already in the contract, there is no reason to state it twice. If a similar – but materially different – provision is in the proposal and appears in the contract, you have created a conflict in the agreement. Most importantly, your proposal may often "tout" your expertise or qualifications. This can actually expand the standard of care, and thus, increase your potential exposure to liability based on the argument that you made a promise upon which the owner reasonably relied. Therefore, implicitly incorporating this type of "promise" into your contract exacerbates this problem.

Balancing marketing and risk

Risk management dictates that you never promise, suggest or contract to provide services of a quality above and beyond the "Standard of Care." It is fair to ask, however, how can you secure a project by advertising and marketing your firm as one that delivers services "ordinarily provided by architects." Indeed, marketing is the promotion of a service or product. This is the fundamental tension between risk management and marketing. How do you balance them?

Words can never hurt you?

Watch your word choice. While a word list can be debated and will never be complete, pay close attention to the eight words below in contract documents and in marketing materials. Remember this: what you promise may not prove deliverable and result in unwanted litigation. It is not just about the words chosen for our specifications or contractual agreements that can create problems. You cannot exaggerate your firm's abilities and strengths. That ultimately misrepresents your organization and places added risks on your actual contract. Superlatives 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. This is why it is important to think carefully when using the following words in marketing or contract documents:

- Supervise
- Certify (under some circumstances)
- Guarantee
- Warranty/warrant
- Highest level
- Best
- Ensure
- Maximize/minimize

Certainly, these are words to remember. But we also must pay close attention to the misuse of words or phrases that can result in legal problems. Have you ever used the phrase: “We always deliver our projects on time and never over budget” in your work? 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

How then do we balance 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 solved similar problems for others, but keep the focus on the work you are trying to win. To win a contract avoid hyperbole and word choices that can harm you later. It is extremely important to remember that every project is different and every client is different. This is how you focus on your client.

About the contributor

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