

Professional Liability Perspective

Architects and Engineers

Professional Liability Insurance

A Practical Approach to the Problem of Certification

The requests seem to come from every direction—municipalities, provinces, agencies of the Federal Government, lending institutions, private clients—all seeking to reduce their risk in construction by sharing it with you. Only one concession is needed: your agreement to certify as to the acceptability of some aspect of your work or the work of others on the job.

This puts you in a difficult position. If you acquiesce, you may be assuming a level of liability that lies beyond both the standard of care required of you under the law and the coverage afforded by your professional liability insurance. If you do not, you run the risk of jeopardizing your carefully nurtured relationship with your client.

Fortunately, there are ways you can extricate yourself from this dilemma without being injured in the process. It may take some effort, but if it saves you from being drawn into a needless conflict, the effort will be well worth your while.

Understanding the Problem

It is not only that the word “certify” conveys a meaning bordering on absolute assurance, but that your status as a professional gives you a mantle of authority not granted most members of society. Thus, when you certify that a building has been constructed in accordance with your plans and specifications, the natural assumption is that the work complies with every detail in every particular way. The practical result is that liability for the construction tends to shift from the contractor to you.

That this was neither your intent, nor your responsibility in the first place, is not likely to matter in the event of a loss. There is a serious danger that your certification will be interpreted to be an authoritative verification of fact. If so, you may be held liable for the adverse consequences suffered by anyone who relies upon it. There is also the danger that it will be interpreted by your professional liability insurance carrier to be an assumption of liability under contract which, like a guarantee or a warranty, is excluded from coverage under your policy of insurance.

Searching for Solutions

Given that you are not required by law to guarantee your work, to say nothing of the work of the contractor, how do you respond when you are asked to certify that certain things are so? The simplest way might be to modify certification requirements to reflect a reasonable and insurable level of responsibility. It has been suggested that you do this by substituting “declaration” or “statement” for the word “certification” and that you incorporate language into your contracts and onto certification forms which makes it clear that you are offering your professional opinion as to the accuracy of the information provided.

It is also recommended that you carefully qualify the basis on which your representation is made. Your modified “declaration” to your clients or their lenders, for example, might read: “Based on periodic visits to the job site and general familiarity with the progress of the work, I declare that, to the best of my knowledge, information and belief, construction is proceeding in accordance with the intent of the design and in general compliance with the plans and specifications.”

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It may turn out that substituting “declaration” for “certification” is not acceptable to your client. It is likely to be the case where there are institutional barriers to procedural change. If so, there is another alternative you might try: redefine the meaning of certification wherever it appears. One such definition, suggested by a lawyer familiar with the problem, reads as follows:

The word "certify," as used in its various forms herein, is understood to be an expression of professional opinion by the architect (engineer), which is based on his or her best knowledge, information and belief. As such, it constitutes neither a guarantee nor a warranty, expressed or implied.

As every lawyer knows, there is more than one way to accomplish an objective, and your own counsel can advise you on how this particular strategy might best serve your needs.

Negotiating a Positive Outcome

In most cases, nothing short of hard negotiation on your part, backed by an ability to explain your position thoroughly and precisely, is likely to result in the changes you need to protect yourself from the assumption of unwarranted liability. Here are some of the arguments you can use that might prove persuasive to your clients and their lawyers.

Certification requirements are unreasonable

They extend liability beyond that required under the Common Law and beyond that which can reasonably be expected of any professional. Just as no doctor or lawyer is in a position to guarantee an outcome, no architect or engineer can remove all of the uncertainty from design and construction.

Certifications are uninsurable

They are an assumption of liability under contract which is excluded from coverage under every policy of professional liability insurance underwritten in Canada. It is difficult to understand how the public interest (or the interests of stockholders) can be served by a requirement that deprives you of the financial capacity to respond in the event of a loss.

Certification requirements have no economic justification

You are not in the insurance business, and you do not receive a premium for assuming someone else's risk. In exchange for your fee, your client can reasonably expect that you will perform in a professional manner and accept responsibility for your own professional acts. It is unreasonable and unfair for your client to expect more.

A Last Resort

If all of these arguments fail, there is one final option. Recognize the risk as the serious consideration that it is, agree to accept it if you must, reiterate your reservations in writing, and put your client on notice that you have accepted the requirement in the absence of choice. Should the issue arise later, you will have at least placed yourself in a position to argue that your client exercised disparate bargaining power in forcing your agreement. This may not be a strong defence, but it will give you a possible out should the issue ever be put to a serious test. A possible out is a step ahead of no out at all, and simply providing for it may make you feel better about the whole thing.

