The Seven "Dirty Words" in Marketing and Contracts.

By Bill Quatman, General Counsel

Many of us remember when George Carlin had a comedy routine about the seven "dirty words" that could not be said on television. Long before cable television and pay-per-view, network censors blocked these words from being broadcast. Much like network censors, we need to be careful about certain words being used in marketing proposals and contracts that have a specific legal meaning. Court cases can cost thousands of dollars simply over the meaning of just one word in a contract. A term that may seem harmless in a proposal takes on a whole new meaning when that proposal gets attached as "Exhibit A" to our contract. So here are the seven words that should not be used in proposals or contracts, or which need to be carefully reviewed before they are used:

1. Ensure (also "Assure" or "Insure")
2. Warrant or Warranty (also "Warrantee")
3. Guaranty ("Guarantee" too)
4. Certify
5. Expert ("Expertise" too)
6. Best
7. Highest (especially in reference to "Standard of Care")

What Is the Concern?

The dictionary shows us that many of these terms have the same meaning. To "ensure" a result is, in effect, to "warrant or guaranty" that outcome. To say you are "the best" or an "expert" may mean you are held to the "highest" standard of care, the cutting edge, best in class firms. This may be an uninsurable standard that costs our company dearly, simply due to a poor choice of words. In professional service contracts the courts hold professionals to a standard of "reasonable care and skill." This is true for architects, engineers, doctors, lawyers and accountants. A doctor cannot guarantee the surgery will cure you, nor can a lawyer predict the outcome of a lawsuit. However, a client can maintain a claim for "breach of warranty" if the professional gives *an express warranty or guarantee* in the contract. However, in the absence of such an express guarantee, a breach of warranty claim is generally not permitted. As design professionals, we need to be very careful about making statements that might be construed as a "warranty" or "guarantee" because claims based on an express warranty are almost always excluded from coverage under professional liability insurance policies.

A warranty assures the person to whom it is given that something will happen or that a specific result will be achieved. This is different from the negligence standard of care, which does not assure a result by the design professional but, rather, that reasonable care will be used in the process. Proposed contract language should be carefully reviewed for any express warranties. Watch for the words "guarantee" or "guaranty", "warrants", "assures", "insures" or "ensures" and even the word "certifies", any of which might create an uninsurable warranty in the wrong context.

The Professional Standard of Care.

Courts have established a "standard of care" for design professionals, one of reasonable care and skill. This duty of care and skill does not require perfection. The professional's conduct is judged by how other professionals would perform under the same or similar situations. This usually requires expert

testimony as to the accepted standard of care within the defendant's profession. Probably the most often quoted Missouri case is the Federal Court of Appeals' decision in *Aetna Insurance Co. v. Hellmuth Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968). In that case, the court stated that,

> "an architect is not a guarantor or an insurer but as a member of a learned and skilled profession he is under a duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation"
>
> "The standards of reasonable care, which apply to the conduct of architects, are the same as those applying to lawyers, doctors, engineers, and like professional men engaged in furnishing skilled services for compensation . . ."

The legal term "negligent" or "negligence" as used in court means the failure to use that degree of skill and learning "ordinarily used under the same or similar circumstances by the members of defendant's profession." Even licensing boards have regulations that define the professional standard of care. For example in Missouri the regulations state that when practicing, design professionals:

> "shall act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by registered architects, professional engineers or land surveyors of good standing, practicing in Missouri."

This does not prohibit, however, a professional from contracting to a higher standard. For instance a professional may agree to perform to the "highest level of care" or warrant a specific result. In those cases, evidence of what the typical architect or engineer would have done is no defense, because the bar has been raised to require proof of what *the best* architects and engineers would have done.

Definitions of the Seven Dirty Words.

"in·sure" is a transitive verb, which means "to make certain especially by taking necessary measures and precautions." It is synonymous with the words "assure, ensure, guarantee, guaranty." An example might be, "Engineer will **insure** that Contractor's work conforms with the plans." What does this mean? Did the engineer agree to become the contractor's surety, or insurer? What this the intent? Even if spelled with an "E" or an "A" the definitions are the same. Webster's tells us that **"en·sure"** means "to make sure, certain, or safe; guarantee" and that **"as·sure"** means "to make safe (as from risks); to insure" or, alternatively, "to make sure or certain; guarantee."

Some words to consider as an alternative might include:

• Prepare • Provide • Keep abreast • See that • Evaluate	• Conduct • Coordinate • Monitor • Review • Update

"war·rant" a verb which means "to guarantee." What is a warranty? To a layman, or even a court, this is a "guarantee" of a specific result, which has a margin of error of zero. It is, in effect, a perfection standard. If your car has a warranty, or your microwave, you take it back and they fix it. We don't have to call experts to establish the standard of care; we just show it did not work and the manufacturer has to fix or replace it. The same is true if we use the terms "**war·ran·ty" (or "warran·tee")** which the dictionary define as "collateral undertaking *that a fact* regarding the subject of a contract is or will be as it is expressly or by implication *declared or promised to be*" or "a usually written *guarantee of the integrity of a product* and of the maker's responsibility for the repair or replacement of defective parts"

"gua·ran·ty" can be a verb or a noun, defined as "to guarantee." This leads us to **"gua·ran·tee"** which is defined as "an *assurance for the fulfillment of a condition*" or "an *assurance of the quality* of or of the length of use to be expected from a product offered for sale often with a promise of reimbursement." Be very careful about making statements (oral or written) that might be construed as a "warranty" or "guarantee" as these are different from the negligence standard of care. If we write in a proposal, "We guarantee that this project can be built within your budget," this is an express warranty. If the bids come in high, we might be asked to cover the damages. One 1982 Massachusetts court case held that, "An architect may provide *an express warranty* of a certain result. In that event, the plaintiff may maintain an action for breach of *express warranty*." Klein v. Catalano, 437 N.E.2d 514 (Mass. 1982). In other words, if you say it, your client can sue for it.

Courts will not protect us from using sloppy language. As one 1984 Kansas court case said, "Though professionals are liable for malpractice for breach of a legal duty, *that does not preclude them from contracting* to perform a duty higher than the one imposed by law." Tamarac Dev. Co. v. Delamater Freund & Assoc., 675 P.2d 361 (Kan. 1984). The insurance industry understands the risk of giving an express guaranty to a client, since there is no margin of error. Standard insurance policies for architects and engineers include an exclusion against "express warranties or guarantees." We pay a lot of money each year to insurers for protection. *Don't Give Our Insurer A Way To Deny Coverage!*

"cer·ti·fy" a transitive verb which means "to attest authoritatively; to confirm" "*to attest as being true* or as represented or as *meeting a standard*" "to inform with certainty." Tying all these terms together, Webster also defines "certify" as "*to assure.*"

"ex·pert" Middle English from Anglo-French & Latin *expertus* and this word can be used as an adjective, verb or noun. Webster's says that an expert is someone "having, involving, or displaying special skill or knowledge derived from training or experience." The derivative word **"ex·pert·ise"** means "expert opinion; the skill of an expert."

So what happens when a professional holds himself or herself out as an "expert"? According to one 1991 Georgia case, this raises the standard of care. That court said, "The law imposes upon persons of professional standing performing ... skilled services, pursuant to their contracts made with their clients, an obligation to exercise a reasonable degree of care, skill and ability, such as is ordinarily exercised under similar conditions and like circumstances by persons employed in the same or similar professions. Hence, while a [professional] who holds himself out as possessing expertise over and above that possessed by the average [professional] may be held, relative to the non-expert . . ., to a higher standard of care than the non-expert." The court went on to say, "nonetheless the standard of care as to the expert is that of ordinary care employed by like experts." *Moseley v. Coastal Plains Gin Co., Inc.,* 404 S.E.2d 123,

127 (Ga. App.1991). So an "expert" is not held to the normal professional standard, but to a standard of other "experts."

"best" an adjective meaning *"superlative of* good" "excelling all others" "offering or producing the greatest advantage, utility, or satisfaction." In layman's terms, the top tier of the profession. Likewise, when contracting to use the **"high·est"** level of skill, this means "the most lofty or exalted in quality or character" "nothing higher." For example, consider this clause: "Engineer will perform to the highest standards of the profession as exercised by the best engineering firms." Spot any problems here? If not, you have not been paying attention.

Fixing The Dirty Words

The Problem	The Solution
1. "Engineer *will ensure* that Contractor complies with the Plans."	Try: "Engineer *will monitor* Contractor's work *for compliance* with the Plans."
2. "Engineer *warrants/guarantees* that its design will comply with all laws and regulations."	Try: "Engineer *shall use reasonable care* to comply with all applicable laws and regulations in effect at time of design."
3. "Engineer *will certify* that Contractor complies with the Plans."	Try: "Engineer *will certify* that *to the best of its knowledge, information and belief*, Contractor's work complies with the Plans."
4. "Engineer shall have sufficient *expertise* to perform the Services required."	Try: "Engineer shall have sufficient *experience* to perform the Services required."
5. "Our company's engineers *are the best in the business* to meet your needs for this Project, we are the *experts* in this area."	Try: "Our company's engineers *are fully qualified* to meet your needs for this Project, we have the *right experience and qualifications* in this area."
6. "Engineer shall comply with *the highest* standard of care in the industry."	Try: "Engineer shall perform consistent with the standard of care *required by applicable law*."

Questions? Contact any lawyer in the Burns & McDonnell legal department for help.