

A/E RISK REVIEW

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CAD Part 2: Contractual and Ownership Protection

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

The benefits of computer-aided design (CAD) in terms of increased productivity, efficiency and accuracy continue to grow as CAD developers introduce technological advances year after year. Yet despite its many advantages, CAD also poses substantial challenges, particularly in the area of professional liability.

Part I of this two-part report addressed the major liabilities associated with CAD and addressed the primary areas that require attention to minimize risks (see chart on page 3). In this issue, we will share safeguards you can build into your contracts with clients and others to further limit liabilities and protect your rights of ownership of your electronic designs.

Contractual Protection

There are several areas in your standard service contracts where you can address CAD issues. For example, you can address CAD in the “Scope of Services” or “Ownership of Instruments or Services” provisions. Better yet, you can add a specific CAD clause to your client contracts.

Following is a list of areas to address in a CAD clause in your client contract. As always, work with your attorney when drafting the specific language needed to fit your unique circumstances:

- Have the client agree that any CAD file you deliver is an “instrument of service,” and that you remain the author and retain all legal rights, including copyrights, to the work.
- Have the client acknowledge that the delivery of the CAD file does not constitute a sale of the file as a “product.” This helps limit your product liability exposure, which is likely not covered by your professional liability insurance policy. The contract should state that you make no warranties of merchantability or fitness of the file for any particular purpose.
- Require that the client agree not to reuse your electronic files, in whole or in part, for any purpose not related to this specific project.
- Prohibit the client from transferring the file to any other party without your written consent.
- Require the client to waive all claims against you for any unauthorized changes to or use of your CAD files. Also have the client indemnify you against all damages and costs, including indirect or consequential damages, arising from any unauthorized changes made to the CAD document.
- Have the client commit to conforming to any software and hardware specifications you have mutually agreed to. These specifications should be listed in the CAD clause or as an addendum to the contract.
- Have the client agree to an “acceptance period” (e.g., up to 30 days after delivery of the CAD file) during which the CAD file can be reviewed and tested for performance. You should agree to correct without charge any errors or omissions discovered by the client during the acceptance period. The client should agree to compensate you for any additional work required to make

changes to the CAD file after the acceptance period has expired.

- Have the client acknowledge that if there are any discrepancies between the CAD files and the final printed construction documents, the construction documents prevail and govern.

Transferring Ownership

Some clients may demand ownership of the electronic CAD files. In such cases, discover why the client wants ownership of the design documents. If the client is concerned about proprietary issues, perhaps a confidentiality agreement would suffice instead. If the client wants ownership of the file for maintenance purposes, suggest that an as-built document would be a better option. Or, you could grant your client a license to use your copyrighted design for a specific purpose.

When all else fails, you can agree to this ownership transfer as long as you put extra protections in place within your contract. For example:

- Require that the files be transferred only upon full and final payment of your fees.
- Prohibit the client from reusing or making any modifications to the drawings and specifications without your written authorization.
- Again, refer to the files as “instruments of service.” This will help protect against potential product defect claims.
- Remove all of your electronic seals, signatures, logos, or other identifying marks from the files.

Providing Files to Contractors

If you are required to provide your electronic files directly to contractors for their use in preparing shop drawings, protect yourself with a letter of agreement. In light of the added risk, you should also demand an appropriate fee for providing this service.

When working with your attorney to draft a letter of agreement for the contractor, consider these terms and conditions:

- State that the files are instruments of service and cannot be used for any purpose other than when preparing shop drawings for the referenced project.
- Note that you make no representation as to the compatibility of the CAD files with the contractor’s software and hardware beyond any compatibility requirements specified in your agreement with your client.
- Require that the contractor hold you harmless and make no claims against you from any damages that result from unauthorized use or reuse of your CAD files.
- Remind the contractor that the CAD files are not construction documents and that you make no representation as to their accuracy or completeness. State that if there are any discrepancies between the CAD files and the signed or sealed construction documents, the construction documents shall govern.
- Note that providing the CAD files to the contractor does not relieve the contractor from its duty to fully comply with the contract documents and carry out all necessary checks and measures required to meet full compliance.
- Reserve your right to remove all indicia of ownership and/or involvement from each electronic display.
- Specify that delivery of the CAD files shall not be deemed a sale and that you make no warranties of merchantability or fitness for any particular purpose.
- State that you shall not be liable for any loss of profit or any consequential damages as the result of the contractor’s use or reuse of the files.

Copyright Basics

Prior to 1990, design professionals had only limited protection under copyright laws. Basic copyright law defines "architectural work" as the design of a building as expressed in plans or drawings. The owner of a copyright to an architectural work has the exclusive right to reproduce the plans and drawings, to make derivative works from them, to grant licenses to others to use the work or to sell the work outright. In general these rights last 50 years beyond the life of the owner.

The 1990 Architectural Works Copyright Protection Act extended ownership rights for design professionals to designs embodied in the constructed building itself. The Act also specifically prohibits unauthorized construction of buildings depicted in copyrighted drawings created on or after December 1, 1990. However, it has been argued that the Act only applies to architectural works intended for human use or occupancy. Thus, while residential or commercial buildings are covered, structures such as roads, bridges and dams may not be covered.

Architectural copyrights come into effect as soon as your plans and drawings are created. However, it is advisable to state your intentions of retaining ownership of these rights in your contracts.

Closing Out Liabilities

Once a project is closed out, it is advisable to remove unnecessary versions of the CAD files from your computer system. This can go a long way to limiting liabilities. It's also a good idea to clean up unnecessary emails containing outdated versions of the designs. However, speak with your attorney regarding the removal of any files or emails that pertain to any dispute and possible future legal action by the client or third parties.

Maintain at least two copies of the final CAD files. Keep one at the office and one offsite in a secure location. If you must provide a copy for your client or the contractor, be sure to spell out the rights of all parties. Specify who owns the files and who has the right to use, reuse or modify the files. Finally, identify any signed and sealed construction documents that may supersede the CAD files.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.