

ELECTRONIC INFORMATION TRANSFER ISSUES

In 1989, Victor O. Schinnerer & Company, Inc., the largest insurer of design professionals in the world, published one of the first comprehensive examinations of professional liability and practice management issues facing design professionals intrinsic in the use of CADD and the transfer of information electronically. Since then, the concerns of design professionals over the ownership, use and transfer of instruments of professional service seem to have intensified.

Now, architects and engineers are faced with issues such as the use of CADD information by contractors that was never intended for such use, the integration of CADD-based instruments of service into facilities management programs, and the reuse of an electronic form of design documentation far beyond its original purpose or time of service. The incorporation of CADD into the daily operations of a firm presents organizational challenges. The electronic transfer of information complicates the practice management considerations of a firm interested in both protecting its intellectual property and managing its professional liability risks.

While professional service firms see CADD as a tool to enhance design exploration, to better coordinate interprofessional services, and to minimize design conflicts. Clients often see CADD simply as a tool to produce documents that are faster, cheaper, more accurate and reusable. Unrealistic client expectations always have been a problem; CADD use seems to exacerbate this and provide a whole new area of unknown risks.

Protection from Inappropriate Reuse

Based on our experience, we think it is important to protect the design professional against the improper reuse of documents by the client or others, especially when the transfer of ownership and use of documents is involved. We routinely recommend that any transfer agreement should specifically state that reuse without the design professional's verification and adaptation will be at the client's sole risk. The transfer agreement should also state that the client shall indemnify and hold harmless the design professional for all claims and losses resulting from such reuse. Indemnity is necessary because any reuse, such as for a future modification, alteration or renovation, may result in meritless claims against the original design professional.

Furthermore, we suggest that when the instruments of service are transferred, the design professional should reserve the right to remove the professional seal and title block from documents turned over to the client. While some design professionals may see this as an unnecessary reduction in the acknowledgment of creativity, the removal of firm-specific information—while site-specific information remains—can reduce the likelihood of meritless claims.

Increased Concerns with Electronic Information

The issue of the transfer of information by electronic media increases the need for protection whenever the design professional shares the intellectual property created for a project. We think a firm must protect itself regarding the transfer of CADD information by stating that a hard copy retains control over any changes that might be introduced in the transfer or reuse process.

Technological safeguards for file security provide little real protection. Some firms are able to provide information that cannot be modified by a subsequent user, or can program the file to clearly indicate that a modification has occurred. For the most part, once the information is released, control over the information is impossible. Some firms, however, look beyond technological protections to legal remedies. Firms often demand separate agreements requiring indemnity for the time and costs to a firm involved in a controversy over CADD information. This is in

addition to affirmatively stating in the contract or on the transferred documents that any reuse is at the sole risk of the client or user.

It is important to state that the controlling instruments of service are the hard copies of what was transferred via CADD. We cannot be sure of how the information might read under a different system, how unintended or intentional changes beyond the control of the design professional might be introduced, or how the electronic information may degenerate over time.

Therefore, it should *specifically* state in any transfer agreement that if a conflict exists between the hard copy and the transferred CADD information, or if a variance is introduced in the CADD information from any source, the hard copy—usually the sealed drawings—governs. Some firms do this by producing two hard copy sets of the transferred files and requiring the recipient to compare their reading of the CADD file to the hard copy. Once the recipient is satisfied that the electronic and graphic versions are equivalent, one of the hard copy sets is signed and returned with a release from future claims. An obligation to indemnify the design professional for any future expenses to the design professional resulting from use of the information is often included.

Claims and Cautions

There is no significant claims experience resulting from the use of CADD or the transfer of electronic information. Our advice is based on our analysis of possible problem areas. We consistently examine claims experience, talk with design professionals, contractors and clients, and study case law to ascertain where significant exposures may arise. Clearly, there are many unknowns in the use and transfer of electronic information. We have been trying to look forward to the liability issues that might be generated by a more seamless transfer of information among the parties to a project. For now, we see the need to treat electronic information as a secondary source to archival hard copies.

In general, if five major issues are addressed on each project involving electronic information, claims involving the transfer of electronic information should not become a factor in the management of a professional practice. These issues are the following:

- 1) The information contained in the signed and sealed documents should be deemed to be correct and superior to electronic information.
- 2) Electronic information is a component of the instruments of service and is only for the client's benefit on the specific project and for a specific use.
- 3) There is no representation of the suitability of the electronic information for other purposes or of the durability of the information or the medium in or on which the information is furnished.
- 4) Any use for a purpose other than that for which the information is intended shall be at the transferee's risk, and the transferee shall protect and indemnify the transferor from any claims, costs, losses or damages.
- 5) Transfer of the information does not transfer any license to use the underlying software or extinguish the rights of the transferor to reuse the information in the general course of a professional practice.

Other Document Transfer Issues

There are other issues involved in allowing a client to reuse documents—the documents, as instruments of the design professional's service, are not products. Allowing reuse on an uncontrolled basis may cause the documents to be treated as products generated by the design professional, and may cause product liability exposures to the original design professional. No design professional is insured against such product liability risks. Therefore, it may be necessary to include disclaimer language to prevent the possibility of the application of product warranties or guarantees, such as the warranties of fitness for use and merchantability. In addition, if other design professionals

use the documents as the basis for other projects, the subsequent design professional may be in a position where both professional ethics and registration law constraints are endangered.

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Victor O. Schinnerer & Company, Inc.

Two Wisconsin Circle Chevy Chase, MD, 20815-7022 Attn: Client Services Liaison
Phone: (301) 951-9746 Fax: (301) 951-5444 Email: vos.info@schinnerer.com www.schinnerer.com www.PlanetAEC.com