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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.

Treatment in AIA Document B141

The American Institute of Architects (AIA), in the 1997 edition of AIA Document B141, *Standard Form of Agreement Between Owner and Architect*, does not provide significant guidance on the use and transfer of electronic information. While the new "Instruments of Service" provisions in the B141 terms and conditions clearly include documents "in electronic form" as instruments of service, B141 leaves this issue open. Subparagraph 1.3.2.4 of B141 states the following:

Prior to the Architect providing to the Owner any Instruments of Service in electronic form or the Owner providing to the Architect any electronic data for incorporation into the Instruments of Service, the Owner and the Architect shall by separate written agreement set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations or licenses not otherwise provided in this Agreement.

The AIA does address the issues of the transfer of ownership and use of CADD information in AIA Document B511, *Guide for Amendments to AIA Owner-Architect Agreements*, a supplemental publication that includes suggestions for modifications to the standard owner-architect agreement forms published by the AIA. The language in the 2001 edition is as follows:

Reuse of Documents. The Owner shall not use or authorize any other person to use the Drawings, Specifications, electronic data and other Instruments of Service on other projects, for additions to this Project or completion of this Project by others so long as the Architect is not adjudged to be in default under this Agreement. Reuse without the Architect's professional involvement will be at the Owner's sole risk and without liability to the Architect. The Owner shall indemnify and hold harmless the Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of unauthorized reuse of Drawings, Specifications, electronic data or other Instruments of Service.

AIA Document B511 can be downloaded free from the AIA national website at www.aia.org/documents.

Comprehensive Treatment by EJCDC

The Engineers Joint Contract Documents Committee (EJCDC) also has excellent language on the ownership and reuse of plans in its standard agreement 1910-1, *Standard Form of Agreement Between Owner and Engineer for Professional Services*. The use of documents provision in the EJCDC agreement states that electronic information provided by the client or to the client is furnished “*only for convenience*,” and the client, or engineer, uses the information at its own risk. EJCDC also uses the acceptance period idea and disclaims long-term reliability. The provisions in the EJCDC document state the following:

6.04 D. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the party delivering the electronic files. ENGINEER shall not be responsible to maintain documents stored in electronic media format after acceptance by OWNER.

6.04 E. When transferring documents in electronic media format, ENGINEER makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by ENGINEER at the beginning of this Project.

EJCDC also positively states the reliance on an archival hard copy of the information by the following provision:

6.04 G. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

Preventing Meritless Claims

It is clear that since any reuse of documents, such as for a future modification, alteration or renovation, may

result in meritless claims against the original design professional, protective language should be used whether or not information is transferred electronically. While insurance companies should never be thought of as being able to provide “magic” language that removes risk from insured firms, we often suggest the following language, which can be adapted to situations where the ownership of the design or the instruments of service can be transferred or licensed. This language can be tailored to protect the design professional while transferring differing rights in the instruments of service:

The Owner acknowledges that the Design Professional's drawings, plans, specifications, and other similar documents are instruments of professional service and not products. Upon full payment of Design Professional's compensation for this Project, ([the ownership and copyright of the instruments of service and copyright to the design] or [a license to use the instruments of service] or [an electronic copy and the use of the instruments of service]) shall be transferred to the Owner. The Design Professional shall not be deprived of the right to retain reproducible copies of the instruments of service and the right to reuse information contained in them in the normal course of the Design Professional's practice. The Owner recognizes that the instruments of service shall not be reused for additions, modifications or renovations on this Project or for any new project without an evaluation of the documents in relation to applicable codes and standards by a legally competent agent of the Owner. In return for the Design Professional's ([relinquishment of ownership] or [approval of future use of the instruments of service]), the Owner agrees to waive any claim against the Design Professional and defend, indemnify and hold the Design Professional harmless from any claim or liability for injury or loss allegedly arising from reuse of the Design Professional's design or instruments of service by the Owner or any agent of the Owner. The Owner further agrees to compensate the Design Professional for any time spent or expenses incurred by the Design Professional in defense of any such claim, in accordance with the Design Professional's prevailing fee schedule and expense reimbursement policy.

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.

Web-Based Project Information Transfer

The sharing of instruments of service over the Internet adds another level of confusion regarding the proper allocation of risk. In most cases, the sharing of design documents and the constant stream of project communication through email or a project-specific website should not increase the risk to the design professional. If the system appropriately tracks communication and records unalterable information, a project-based electronic transfer system may assist in the documentation that should be accomplished on any project. Dangers remain, however, since many of the concerns with unauthorized or inadvertent changes to documents, improper or improperly recorded communication, and detrimental reliance on inappropriate documents may result.

Often, design firms will not share information electronically unless protections and documentation protocols are in place. Some firms also require assurances from the client or the coordinator of the project website that the shared information will carry disclaimers as to its accuracy, purpose and timeliness so that reliance on the information will not extend beyond the intended use by the intended parties.

While there is no history of claims related to Internet transfer of the information of design professionals, a prudent design professional should carefully assess the risk of any specific use. As in the situation where information is transferred electronically to contractors, questions as to the appropriate level of reliance should be addressed. With web-based project management systems, the issue of detrimental reliance is exacerbated by the ease of the contractor or other parties to demand immediate answers to questions and immediate decisions on changes. Without a thoughtful consideration of the underlying issues, the speed and informality of electronic communication can result in “self-inflicted” liability.

Transferring Information to Contractors

The transfer of electronic information to contractors or subcontractors raises many additional questions. The four major questions seem to be the following:

- ✓ For whose benefit are the files being shared or transferred?
- ✓ Does the design professional have the legal right to transfer such information since by contract or operation of law the information may be owned by the client?
- ✓ Does the contractor have direct rights generated by a transfer agreement or the argument of detrimental reliance should the information in the electronic file be incorrect or inadequate for the purposes of the contractor?
- ✓ Does the design professional have any responsibility for providing updated electronic information to the contractor or subcontractors?

We have been cautioning firms that it might be worthwhile to include a note on the documents, the transfer medium or the electronic information such as the following:

The delivery of this drawing in electronic format is for the benefit of the client for whom the design services have been performed. This delivery constitutes a nonexclusive, limited license for the recipient to use the information in the electronic file for the specific purpose of responding to the requirements of the Contract Documents for this Project. Nothing in this transfer should be construed to create any right of the contractor to rely on the information provided or that the use of this electronic information implies the review and approval by the design professional of any drawing based on the information. It is our professional opinion that this electronic information provides design information current as of the date of its release. Any use of this information is at the sole risk and liability of the user who retains the responsibility of meeting the requirements of the Contract Documents. The recipient is also solely responsible for updating the information to reflect any changes in the design following the preparation date of this information.

The Business Context of Information Transfer

Design professionals provide their services within a business context—to a certain extent, that business context can be managed and become the basis for additional services. Sources of additional revenue for a firm may occur when the client wants the information for other uses. In the case of CADD files, such additional services may involve “delaying” the information, using the CADD information as the basis for a record set of documents, or otherwise adapting the information to meet facilities management needs. Thus, if a client intends to use the electronic information for facility management systems, the client should understand that basic CADD information is inappropriate for such use and that additional services may be needed to produce a facilities management set.

For a client to think, however, that it can simply reuse design solutions or documents, without appropriate professional participation, the client is ignoring the risks to itself, the public and design professionals intrinsic in such a determination.