
PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 07/2008: 'CADD Part 2: Contractual and Ownership Protection'

July, 2008



CADD Part 2: Contractual and Ownership Protection

Article courtesy of Professional Liability Agents Network (PLAN)



As covered in Part I of this two-part report, virtually every design firm uses computer-aided drafting and design (CADD) on its projects. Yet despite its advantages, the growth of CADD has been a mixed blessing for design firms. While CADD increases productivity and enables firms to provide a wider range of services, it also poses new challenges – and liabilities.

Part I addressed the major areas of liabilities associated with CADD and provided procedural remedies for minimizing the risks (see checklist on page 3). In this issue, we will cover protections you can build into your contracts that further limit liabilities and protect your rights of ownership of your designs.

Contractual Protection

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

On page two is a list of recommendations for inclusion in a CADD clause in your client contract. As always, work with your attorney when drafting the specific language needed to fit your unique circumstances.

CADD Part 2 (continued on page 2)

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CADD Part 2 (continued from page 1)

- Have the client agree that any CADD 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 agree that the delivery of the CADD file does not constitute a sale of the file as a product. This helps limit your product liability exposure, which is not covered by your professional liability policy. State that you are making no warranties of merchantability or fitness 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 that the client waive all claims against you for any unauthorized changes to or use of your CADD 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 CADD document.
- Have the client commit to conforming to any software and hardware specifications that you have mutually agreed to. These specifications should be listed as an addendum to the contract.
- Have the client agree to an “acceptance period” (e.g., up to 30 days after delivery of the CADD file) during which the CADD file can be reviewed and tested for performance. You should agree to correct any errors or omissions within the acceptance period without charge. The client should agree to compensate you for any additional work required to make changes to the CADD file after the acceptance period has expired.
- Have the client acknowledge that if there are any discrepancies between the CADD files and the final printed construction documents, the construction documents prevail and govern.

CADD Liability Checklist

Electronic Risks

- Software Defects
- Incompatible Hardware/Software
- Transmission Errors
- Viruses
- Limited Life of Software

Human Risks

- Programming/Inputting Errors
- Unauthorized Changes
- Unauthorized Reuse
- Misuse of Files

CADD Policy Checklist

- Set Specifications
- Identify Deliverables
- Determine Uses
- Limit Distribution
- Establish Transmission Policy
- Train Staff
- Verify Accuracy
- Make Corrections
- Refuse Seals/Signatures
- Document Delivery

(See CADD Part I in our May 2008 *Professional Liability Insurance Update* for details.) ❄

2008 FOCUS Seminars

Cavignac & Associates FOCUS Room
Bank of America Plaza
450 B Street, 18th Floor, San Diego, CA

- **Sexual Harassment Prevention Training**
Satisfies requirements under AB 1825
Friday, September 12, 2008 — 9:00 AM - 11:00 PM

All training sessions available to our clients
Reserve early / seating is limited! *

For more information about upcoming seminars:

- Visit our Web site at www.cavignac.com
- Contact Darcee Nichols at dnichols@cavignac.com or 619-744-0596

* NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

Transferring Ownership

Some clients may demand that they receive ownership of the electronic CADD 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 them 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 should be 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 CADD 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 are the result of any unauthorized use or re-use of the CADD files.



Film Fest Series Continues!

Share an evening of entertainment and intrigue at the San Diego Architectural Foundation Film Fest which will feature films that highlight architecture and design in one way, shape, form — or another. Enjoy beverages, snacks, and time to mingle.

Location: Luce Loft, 1037 J Street, San Diego
Time: Doors open at 7 pm — film begins at 8 pm
Cost: Free; a \$10 donation is suggested

Thursday, September 25, 2008

My Architect

Introduction by Keith York

Many historians consider Louis I. Kahn to have been the most important architect of the second half of the twentieth century. Although Kahn's artistic legacy was a search for truth and clarity, his personal life was secretive and chaotic. Kahn's death left behind three families—one with his wife and two others with women with whom he had long-term affairs. Kahn's only son Nathaniel, a child of one of the extra-marital relationships, sets out on a journey to reconcile the life and work of his mysterious father.

Nathaniel's personal journey reveals the haunting beauty of his father's monumental creations, takes viewers to the rarified heights of the world's celebrated architects and deep within his own divided family. His search becomes a universal investigation of identity, a celebration of art and, ultimately, of life itself.

Nominated for numerous awards, including the “Best Documentary” Oscar, Independent Spirit’s “Truer Than Fiction” and “Best Documentary” awards, and winner of the Director's Guild's “Outstanding Directorial Achievement in a Documentary” award, this film is truly a must-see!

For more information, call 619-232-1385 or e-mail info@sdarchitecture.org.

- Note to the contractor that the CADD 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 CADD files and the signed or sealed construction documents, the construction documents shall govern.
- Note that providing the CADD files 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.
- Note that delivery of the CADD files shall not be deemed a sale and that you make no warranties of merchantability or fitness for any particular purpose.



Maintain at least two copies of the final CADD 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 CADD files. ✨

***Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

CADD Part 2 (continued from page 3)

- Note 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. The Act specifically prohibits unauthorized construction of buildings depicted in copyrighted drawings created on or after December 1, 1990. However, it 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 are not.

These 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, take the necessary steps to remove unnecessary CADD 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.

The San Diego Chapter of the Society for Design Administration (SDA) is hosting this year's Western States Regional Conference on September 26-27, 2008. Join administrators from all over the country and Canada in America's Finest City to network, attend seminars, and advance your knowledge of the A/E/C industry. The conference will take place at the beautiful Marriott Courtyard Hotel in the former San Diego Trust Bank building in Downtown San Diego.

SDA offers AIA Continuing Education Credits on all of our seminars. Seminar topics and speakers include "Successful Marketing in Leaner Times" by Charles Reilly and Tyler Blik, "Business Continuity and Disaster Recovery" by Greg Glasgow of LANSolutions, "Creating an Optimal Work Environment with Feng Shui" by expert Cathleen McCandless, and "Simple Green," a case study of a LEED Gold Certified Project by Kotaro Nakamura.

Single Day and Single Seminar Registration is available. For a complete list of seminars, or for more information, visit our website at www.sdasanidiego.org.





AIA San Diego
The American Institute of Architects

Upcoming Events August, 2008

Women in Architecture

Two Topic Evening!

- ✧ *Passive Energy Design in Persian Vernacular Architecture*
- ✧ *Envisioning Women in Architecture in 2009*

It's time for socializing, learning—and thinking BIG!

WHERE Razavian Residence
6352 La Jolla Blvd, La Jolla, Ca 92037

WHEN Monday, August 4, 2008 — 6:15 pm to 8:15 pm

EATS Potluck

COST Free to All

Young Architects Commission (YAC) Meeting

Meetings encompass a variety of educational and social events for students and emerging professionals, including Praxis, ARE Seminars, and Barstool. All are welcome.

WHERE Offices of Architects Delawie Wilkes
Rodrigues Barker
2265 India Street, San Diego, CA 92101

WHEN 1st Tuesday of each month — 6:00 pm to 7:00 pm

Lunchtime Learning — August 2008

Decorative Concrete — an AIA San Diego Chapter CES program

WHERE Cavnac & Associates FOCUS Room
450 B Street, Suite 1800, San Diego, CA 92101
Downtown San Diego (enter from A Street)

WHEN Wednesday, August 6, 2008
12:00 pm to 1:30 pm

SPONSOR T.B. Penick & Sons

PRESENTOR Frank Klemaske, T.B. Penick & Sons

With more than 25 years of first-hand, worldwide experience as a specialty concrete contractor, Frank has in-depth knowledge of concrete surface applications and product systems. He thoroughly understands creative techniques in coloration, graphics and finishing applications from design conception through completion.

RSVP \$5 charge for NOT registering online — Online at
<http://www.acteva.com/booking.cfm?bevaaid=161692>

COST AIA Members—Free Non-Members—\$10

FOR MORE INFORMATION AND EVENTS, VISIT:

<http://www.aiasandiego.org/>



Community Bulletin Board

'Neighbors helping neighbors in San Diego'



ATTENTION!

**A NEW Windmill Thrift Shop
Location Is Now Open in City Heights!**

Tell your
Family,
Friends
and
Colleagues!

The East Village Store has moved to:

**4611 University Avenue
San Diego, CA 92105**

(Between 46th Street and Menlo Avenue)

**Hours 10 am—6 pm
Open 7 Days a Week**

Call
(619) 291-2415
to schedule
a pickup
(large items only)

- ✧ Don't know what to do with your old television?
- ✧ Are those unused cookbooks collecting dust?
- ✧ Need to get rid of your summer clothes to make room for your new fall wardrobe?
- ✧ Have your kids outgrown their toys?

If you answered yes to any of these questions, head over to the Windmill Thrift Shop in City Heights and donate your gently used items.

While you're there, check out their wide selection of merchandise, including:

✧ Home Furnishings ✧ Electronics ✧ Appliances
✧ Toys ✧ Clothes ✧ Books ✧ Jewelry

All Thrift Store proceeds benefit Senior Community Centers and Vista Hill

For more information about Windmill Thrift Stores or San Diego Senior Community Centers, visit:

<http://www.serving seniors.org/>