



# Management Advisory

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## The Electronic Transfer of Surveyor's Information

**W**hile professional service firms see CADD as a tool to enhance design exploration, to better coordinate interprofessional services, and to minimize ambiguities or conflicts, clients often see CADD simply as producing documents that are faster, cheaper, more accurate, and reusable. Unrealistic client expectations always have been a problem; CADD use seems to exacerbate this and other difficulties and provides a whole new area of unknown risks.

From our experience with the transfer of ownership of documents to a client or any other party, we think it is important to protect the original surveyor against improper reuse of documents by the client or others. We routinely recommend that in any transfer agreement with a client, for example, it should be specifically stated that reuse without the surveyor's verification and adaptation will be at the client's sole risk. In addition, the client shall indemnify and hold harmless the surveyor for all claims and losses resulting from such reuse. This is because any reuse, such as for a future modification, alteration or renovation, may result in meritless claims against the original surveyor. Furthermore, we suggest that when the instruments of service are transferred for further use, the original surveyor should reserve the right to remove the professional seal and title block from documents.

The issue of the transfer of electronic information increases this concern for protection. We think firms must protect themselves when transferring CADD information by stating that a retained hard copy controls over any variances or changes that might be introduced in the transfer or reuse process. Some firms are able to provide information that cannot be modified by a subsequent user. Others demand separate agreements requiring indemnity for the time and costs to a firm involved in a controversy over CADD. 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.

We think it is important to state that the controlling instrument of service is the hard copy because we cannot be sure of how the information might be read under a different system, how unintended or intentional changes beyond the control of the surveyor might be introduced, or how the electronic information may degenerate over time. It should be *specifically* stated 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—controls. Some firms do this by producing two sets of hard copy 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 the same, one copy is signed and returned with a release from future claims and an obligation to indemnify the surveyor.

Since any reuse of the information, such as for a future modification, alteration or renovation, or as the basis for a different project, may result in meritless claims against the original surveyor, protective language should be used whether or not the information is transferred electronically. While insurance companies never should be thought of as being able to provide “magic” language that removes risk from insured firms, we often suggest the following language that can be adapted to situations in which the ownership of the data or the instruments of service can be transferred or licensed:

The Owner acknowledges that the Surveyor's data drawings, plans, specifications, and other similar documents are instruments of professional service and not products. Upon full payment of Surveyor's compensation for this Project, ([the ownership and copyright of the enumerated instruments of service] or [a license to use the enumerated instruments of service] or [an electronic copy and the use of the enumerated instruments of service]) shall be transferred to the Owner. The Surveyor shall not be deprived



of the right to retain original data and reproducible copies of the instruments of service and the right to reuse information contained in them in the normal course of the Surveyor's practice. The Owner recognizes that the instruments of service shall not be altered in any way or 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 Surveyor's ([relinquishment of ownership] or [approval of use of the instruments of service]), the Owner agrees to waive any claim against the Surveyor and defend, indemnify and hold the Surveyor harmless from any claim or liability for injury or loss allegedly arising from reuse of the Surveyor's design or instruments of service by the Owner or any agent of the Owner. The Owner further agrees to compensate the Surveyor for any time spent or expenses incurred by the Surveyor in defense of any such claim, in accordance with the Surveyor's prevailing fee schedule and expense reimbursement policy.

This language can be tailored to protect the surveyor while transferring differing rights in the data or instruments of service.

Language that might be used in any agreement to provide a third party with the surveyor's instruments of service probably should include an indemnity provision and a general denial of responsibility for the use of the instruments of service. Appropriate language might be as follows:

The coordinates data provided to \_\_\_\_\_ have been prepared for the Owner and are furnished to \_\_\_\_\_ for general information only. While this information is believed to be reliable, the Surveyor cannot assure the accuracy, and thus is not responsible for the accuracy of any work based on this data. \_\_\_\_\_ is advised to obtain independent verification of the accuracy of the data before applying it for any purpose. Use without independent verification will be at \_\_\_\_\_'s sole risk.

To require indemnity, the agreement might include this language:

\_\_\_\_\_ agrees to waive any claim against the Surveyor and defend, indemnify and hold the Surveyor harmless from any claim or liability for injury or loss allegedly arising from the use of the Surveyor's data. \_\_\_\_\_ further agrees to compensate the Surveyor for any time spent or expenses incurred by the Surveyor in defense of any such claim, in accordance with the Surveyor's prevailing fee schedule and expense reimbursement policy.

Information generated by a surveyor usually is retained by the surveyor and the ownership of that information is not transferred to the client. Providing the information to a third party greatly increases risk and any claims resulting from the use of the information may be excluded from coverage under the professional liability insurance policy.

In transferring the information to a third party, a surveying firm should require that the third party not only assume full responsibility for the use of the information, but also agree to indemnify the surveying firm for any expenses or damages to it resulting from the third party's use of the information. A third party, of course, can contract with the surveyor to re-establish the information and verify the use of that information. This should only be done with the full knowledge and acceptance of the surveyor's original client and, if the original client was not the project owner, of the project owner.

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