

Electronic Transfer of Documents

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I. What's at stake?

Clients, contractors and subconsultants frequently request that your work product be supplied in an electronic format. Such a request may require that you transfer an image file of the documents or that you distribute an “intelligent” version of the CADD file to other project participants. Such requests raise a variety of liability issues. The transfer of work product electronically – particularly as changeable CADD files – creates increased potential for errors, delays, misuse of the work product, copyright infringement and other liabilities. What's more, it is often more difficult to detect errors and discover their source than with traditional hard-copy work products. Properly addressing the transfer and use of electronic documents can avoid these liability issues and increase the potential for a successful project.

II. Key issues

Purpose and Limitations on Use – It is essential that you define the purpose for which the electronic documents may be used. Any limitations inherent in the electronic documents must be reflected in the permitted uses.

Procedures – It is critical that you and the recipient of the documents reach a common understanding on the technical requirements for the delivery and use of the files. Equally important, you should create a method for verifying the content of the files at the time of transfer. That verification process is essential to avoid errors and omissions going forward. Furthermore, in the event of a future dispute or litigation, it enables the parties to confirm the nature of the file's content at the time of transfer.

Ownership of Intellectual Property – Your copyrights in your instruments of service as defined in your agreement with the client should be reaffirmed and applied to any documents transferred electronically. The ultimate recipient should not have any greater rights in your instruments of service than those the recipient would have obtained as the result of a traditional distribution of those materials. Furthermore, if you are the recipient of an electronic file, you need to exercise reasonable care to ensure that the party providing you the file possesses the rights necessary to enable you to use them as intended and conveys those rights to you.

Restrictions on Your Liability – When transferring work product electronically, it is essential that you do not create liabilities that are broader than those that would exist as the result of the production and delivery of documents in a traditional manner. When you supply electronic documents for the convenience of the recipient, you should not eliminate any of the recipient's existing obligations under its contract. Doing so could cause you to assume liability that otherwise rested with the recipient and these liabilities may not be insurable.

III. Negotiating tips

Written Agreement – You should address the agreement of the parties in regard to the electronic transfer of documents in writing. To minimize your administrative burden in a project that is likely to have frequent electronic transfers among parties, the agreement can be incorporated into the project specifications. Then, each transfer only needs to make reference to those terms and provide a detailed itemization of the files being transferred. The agreement should set forth:

- The identity of the recipient, the scope and duration of the rights granted, and the restriction on further transfer
- The permitted use of the transferred files
- Any obligation on your part to update the files
- A description of what is being transferred, including the name, date and size of the file, and the document name and version to which the file corresponds

- The format and media to be used and the amount of time that the recipient has to determine that the files are intact and represent what was to be delivered
- The legal protections to which you are entitled in connection with the recipient's use of the transferred file

Parties – Ideally, you should avoid the creation of a new contractual relationship as the result of electronic transfer of documents. Therefore, transfers to contractors or others outside your design team should occur through your client.

Restrictions on Your Obligations and on the Permitted Uses – This is perhaps the most critical element of the transaction. The parties must agree on the intended use of the electronically transferred files and on any obligation on your part to update the materials supplied.

For example, are the electronic documents intended to function for the construction of the project or are they provided in electronic form merely as a convenience to the recipient to be used for some other purpose? If the documents are to be supplied for construction use, many of the liability concerns raised here can be resolved by providing the documents in a “read-only” image format that cannot be manipulated.

However, if the documents are to be distributed for some other purpose, particularly if they are in a format that enables the recipient to alter the files, the purpose and limitations on use must be defined by reflecting the inherent limitations in the documents. If, for example, the documents are not final, are not drawn to scale or do not contain all of the elements of the project, those limitations should be identified and the permitted uses appropriately restricted.

If you are requested to supply documents for a previously completed project, the fact that your documents are construction drawings and not record drawings and/or do not reflect alterations that may have occurred subsequent to completion of the project should be made clear to the recipient.

Where electronic documents are not supplied for construction purposes, there must be a clear statement that the printed copies of the documents are for the project and control in the event of any conflict. Typically, where the documents are transferred to a contractor or other project participant, there is a desire that they be used in the submittal process so as to eliminate the contractor's need to “redraw” an element. That limited purpose should be specifically defined and the contractor's responsibility for the completeness and accuracy of the resulting submittal should be reconfirmed.

Finally, it is essential that the traditional exclusions of liability for construction means and methods and for jobsite safety are not eliminated because of the electronic transfer of documents. All of the restrictions on your liability for the preparation of construction documents as set forth in your agreement with your client should be incorporated in the transfer.

Release and Indemnification – Where the electronic distribution is not a project deliverable, but is provided as a convenience to other parties for their use in satisfying their own contractual obligations, it is essential that you obtain a release and indemnification from the recipient for claims that arise from the use of the electronic files. While a broad release and indemnity from all claims related to the use of the files by the recipient is ideal, attempts to be released and indemnified against the consequences of your own negligent performance may be invalid in some states. Applicable state law must be reviewed to determine if statutes that restrict or prohibit the use of indemnifications by design professionals apply. Furthermore, the intended protections must be carefully drafted to address only the liabilities that result from the electronic transfer rather than from the performance of the services themselves.

While electronic documents can be a quicker, more efficient way to move a design project forward, having the right controls around their usage and transfer are critical to minimizing liability, and bringing a successful project to fruition.

** Powell Trachtman Logan Carrle & Lombardo, P.C. was formed in 1988. A substantial portion of their practice is devoted to the representation of design professionals. Powell, Trachtman, Logan, Carrle & Lombardo, P.C. represents businesses and individuals throughout much of Pennsylvania, New Jersey, and Delaware.*



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