

Protecting Your Work © 1994 Knud Hermansen

by

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A surveyor looking through subdivision plans at the county courthouse finds a subdivision with her seal and signature that she did not know about. An engineer consultant discovers that one municipality is building a bridge based on a preliminary design he provided to another municipality five years ago. A draftsman working at an architecture firm receives a call from a contractor requesting a minor change in an architect's plan. The draftsman makes the change on the original (bearing the architect's seal and signature), makes several copies, and mails them to the contractor. These and other similar situations are not uncommon. Increasingly licensed practitioners such as surveyors, engineers, and architects face liability arising from the improper use or possession of the documents they have authored. In some cases practitioners are finding their drawings modified, changed or fraudulent work prepared under their name without their knowledge or permission. In other cases, documents prepared under special conditions for a client end up in the possession of third parties who use the documents beyond the intent or original scope of conditions. High resolution copiers, scanners, minimal enforcement, and the supposedly high cost of professional services has fostered improper practices — denying the practitioner income, harming users, and creating unexpected liability.

There are several techniques a practitioner can employ that will help prevent unauthorized alterations or unauthorized use of a practitioner's documents.

1. **Do not seal and sign the original master that is kept in the office.** This will prevent employers, employees, future owners, and others from making alterations to the original document then disseminating copies without the knowledge or permission of the author of the document. Under ideal conditions, if a practitioner has left the firm and further work is required on a previous project, the employer or person in responsible charge of subsequent work should sign and seal the modified plan.

2. **Always keep your professional seal in your possession or control.** As most practitioners are aware, their seal and signature make what could be a worthless document valuable. The presence of a professional seal and signature on the document implies: 1) the document meets certain minimum professional standards, 2) the document was created under the

supervision of a knowledgeable professional, and 3) the professional is placing their reputation behind the document. Without the seal and signature, the document for all practical purposes is worthless. Unfortunately, to please the client, save time, allow for prolonged absences, or reduce burdensome repetitive tasks, many practitioners have scanned their seals and signature for inclusion on CAD drawings. In other cases, practitioners have made paste-on copies of their seal and signatures to easily affix them to documents. These and similar practices increase the unauthorized alterations or fraudulent use of the seal and signature. The application of a practitioner's seal to documents by employees invites fraudulent use and circumvents the review that responsible supervision requires.

If a digital copy is requested, do not include a scanned seal and signature on the digital copy. Instead, send a digital copy without the seal and signature together with a paper copy that does contain a seal and signature. An affidavit or note can be included to establish privity and authenticity between the digital and paper documents.

Please examine the digital plan on the disk against the paper plan enclosed in the same package. If there are any differences or discrepancies between the documents, contact the author at once.

3. Do not release possession of a master or original (at least without safeguards). As previously stated, the master or original document should remain in the possession of the author. Modifications, changes, or erasures made on the original ordinarily cannot be detected.

In some cases this is not practicable or allowed. For example, in some cases only those development plans containing the original seal and signature are accepted for recording. In this or similar cases, the practitioner should hand carry the documents through the various agencies. Where this is not practical, the practitioner should review the document before it is recorded or shortly thereafter.

4. Make it difficult to make unauthorized copies of authorized copies. This safeguard is usually accomplished by making it difficult to make legible copies or making copies easy to detect. The first safeguard may simply require making documents in off-sizes (i.e., sizes not ordinarily available on typical photocopiers). Generally any plan dimension over 450 mm will prevent ordinary photocopies by requiring sheets be spliced. However, the best method to employ is to make copies easy to detect. This is usually done by including notes on the document clearly describing

a special quality found only on authorized documents. In effect, the author is describing to the innocent user how to determine unauthorized copies. Examples used to warn potential users of unauthorized copies include the following:

Warning: Documents prepared by the ___ [engineer, surveyor, architect, etc.] are on paper bearing a watermark in the shape of a ___. To view the watermark examine the paper with a strong light placed behind the paper.

Warning: Original plans contain a purple colored professional seal.

Warning: Original plans contain a crimp or raised impression of a professional seal.

Warning: Original plans contain a signature in red ink. Please compare this signature with the signature found in deed book __, page __, __ County Record of Deeds office or call the firm of __ and an original signature will be sent to you for comparison

Just as important as placing a note on the document is to place it in such a manner that its removal will be difficult or destructive. Probably the best location for the note is across the seal or signature itself. The seal and signature will be destroyed if the note is fraudulently removed.



Warning: The original document contain a purple colored professional seal and red signature.

A handwritten signature in black ink that reads "John Smith". Below the signature, the text "John Smith, P.L.S." is printed in a smaller font.

5. Take steps to make unauthorized copies worthless or suspect. Once the practitioner has taken steps to help the user identify unauthorized copies, the practitioner should couple this with steps to make the unauthorized copies worthless or warn the user about the dangers of using unauthorized copies. Generally, this is accomplished by adding to the previous notes. Some examples include:

The seal, signature, and certification are hereby revoked or otherwise void on all unauthorized copies.

This document has been copyrighted. Anyone possessing a copy may face civil and possible criminal damages.

Unauthorized copies may contain fraudulent, incorrect, erroneous, or misleading information or omit important and relevant information. Do not use or rely on unauthorized copies.

6. Take steps to reduce the value of authorized copies that may be in the possession of persons not authorized or expected to have copies. It is not unusual for the practitioner to make several authorized copies for some specific purpose only later to find that some third party has obtained possession of an authorized copy and used the document for a purpose not contemplated when the original was prepared.

The document has been provided to ___ with certain caveats and verbal warnings concerning its use and reliability. This document was intended for a specific use during a specific time period. If this document is in the possession of any person other than ___ or its authorized agent the seal, signature, and certification are revoked. Reliance on the document by any person after ___ 19___ could lead to serious damages or other unexpected consequences.

7. Make it easier to identify the violator. If persons are found to have unauthorized copies or unauthorized persons have possession of authorized copies, the source can frequently be identified by numbering each authorized copy and keeping a record of the number and distribution.

Note on one Document: Edition 1: Copy 2 of 5

Notes in File:

Edition 1: Copy 1 of 5 — Client
Edition 1: Copy 2 of 5 — Client's Attorney
Edition 1: Copy 3 of 5 — Client's Builder
Edition 1: Copy 4 of 5 — Copyright Office
Edition 1: Copy 5 of 5 — File Copy

Using the above notation, several benefits are available. First, including an edition number allows the practitioner to make subsequent copy runs while keeping track of revisions and the copies made. For example, if the client requests two more copies of the document or the practitioner revises the earlier edition, the practitioner simply changes the edition number and makes additional copies.

Note on one Document: Edition 2: Copy 1 of 2

Notes in File:

Edition 2: Copy 1 of 2 — Client
Edition 2: Copy 2 of 2 — Client

Second, by numbering each copy and keeping track of the dissemination, the practitioner is able to identify the person who has made unauthorized copies or given an unauthorized person an authorized copy. For example, if the practitioner discovers a third party has obtained a copy of "Edition 1: Copy 2 of 5" a call and warning to the person who was given the authorized copy may prevent a repeat and cause the copy to be returned.

Finally, the total number of copies made are shown. By examining any copy, the practitioner or client knows how many authorized copies are available.

8. Warn the public about unauthorized or fraudulent work that is discovered. Despite the precautions and care a practitioner may exercise, occasionally unauthorized or fraudulent work finds its way into the possession of unsuspecting users. In other cases, fraudulent or altered documents are recorded allowing all persons to use them. A practitioner may be liable for failing to take steps to warn innocent reliant parties once unauthorized alterations or fraudulent work is discovered by the practitioner.

Probably the first recourse is to simply ask that all unauthorized work be returned. Obviously this is not always a practicable or trustworthy approach.

A special lawsuit known as a *quia timet* is another recourse. *Quia timet* is an equitable remedy that allows a potentially aggrieved party to obtain prejudgment relief in order to prevent anticipated injury. In this equitable action, the author of the document sues all persons known or unknown who have unauthorized alterations or fraudulent copies. They are required to return, destroy, or litigate their reason for retaining the copies. Unfortunately, litigation can be slow and expensive and therefore is seldom favored.

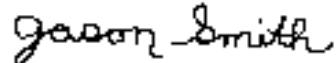
A third option is to record an affidavit in the municipal office or county courthouse to put the public on notice. In preparing an affidavit, it is important for the practitioner to only state truthful facts. In some cases, the facts may be followed by a professional opinion relating to the reliability of the document, design, or improvement based on the facts stated. The professional opinion should be reasonable. In other words,

other competent practitioners in a similar situation would more likely than not have the same opinion. The practitioner should be aware that recording of an affidavit may jeopardize the title to the property, frequently harming innocent or unsuspecting persons. With the guilty party long gone, blame is placed on the messenger or affiant in this case.

Affidavit

I, Jason Smith, a professional engineer in the State of Zena (PE #24571-E) being duly sworn, deposes and says the on-site sanitary septic system design I prepared for Lionel DeCrook dated 23 June 1994, and submitted for municipal and state permits has been altered by persons unknown and that the alterations were not made under my direction, with my knowledge, or with my permission. Furthermore, it is my professional opinion that the alterations change the scope, character, and purpose of the design to the extent that the reliability and safety of the system that was installed are suspect and prone to premature failure.

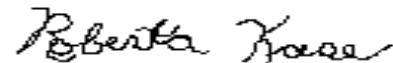
Dated at Yaruma, State of Zena, this 14th Day of September 1994



Jason Smith

State of Zena
Yaribia County, ss

Personally appeared the above named Jason Smith and made oath to the truth of the foregoing statements and also acknowledged this instrument to be his free act and deed.



Roberta Kase
Notary Public

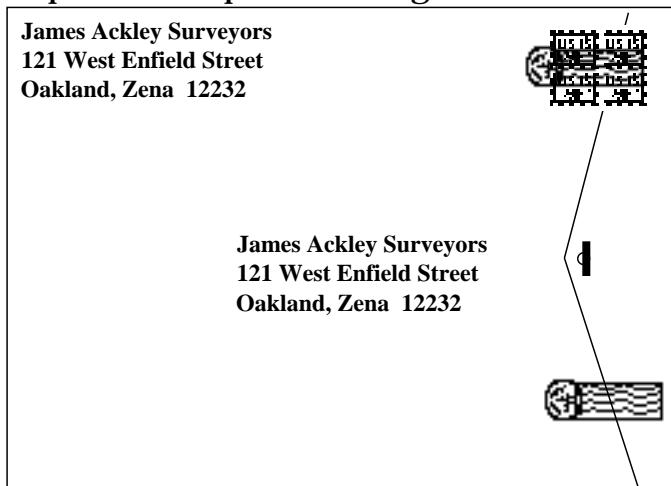
If the affidavit is recorded or made a part of the municipal record, the practitioner should plan to amend the record. Obviously an innocent person who corrects the problem would like to set the record straight so it does not impede the value or title to their property. Amending the record usually entails recording another affidavit stating in factual format the changes or alterations that have been made in the design, construction, etc., and that they have been approved by the practitioner. This is followed by an opinion that the system, improvement, etc. is better or substantially in the same condition as it would have been had the unauthorized or fraudulent authorizations not be made.

9. Give yourself an edge when it's your word against theirs. When alterations are discovered, usually someone will suffer damages, accusations traded, and threats of lawsuit made. The ultimate question is

were errors made by the author or alterations made on the document after it left the possession of the author? Producing a correct original does not always alleviate the accusations. The original author will be accused of making revisions to correct the original the night before. Obviously having a neutral third party vouch for details on the original supplied some time ago would be ideal. There is a method to use the United States Postal Mails for this service.

As illustrated by the subsequent diagram, the practitioner should take the following steps to preserve an unimpeachable copy of his or her original work.

- a. At the time the original work is conveyed to the client, take an envelope and place a copy of all material sent to the client inside the envelope.
- b. Seal the envelope tightly for long term storage.
- c. Place your address on the "wrong" side of the envelope along with your own return address and proper postage. Place the postage across the envelope seal.
- d. Bring the envelope to the post office and have the postal personnel hand cancel the stamps using a dated stamp. If possible, place a "cancel" stamp at other points along the seal.



- e. Place the envelope in the mail for return to your office. When it arrives at your office be sure the envelope is not opened. It should be placed in storage where it can be found and will remain unopened (e.g., client folder).
- f. If the contents and authenticity of the original work are ever called into question, the envelope can be produced and opened in the presence of a neutral third-party witness.

Sometimes it is also helpful to make a record that the material has been mailed to a particular person. While certified or registered mail is probably the best method to employ; for day to day practice, the practitioner can make a copy of the properly addressed envelope containing the correct postage and store that in their records. The law presumes that a properly addressed envelope, affixed with the correct postage, and placed in a mailbox is delivered.

10. Give yourself extra clubs. In spite of all the precautions, unauthorized persons will obtain copies or unauthorized alterations of documents will occur. In certain cases, having extra remedies or clubs to seek redress is helpful and comforting. Probably the most helpful remedy regarding documents is to copyright the documents. Federal copyright protection affords relief in the Federal courts with substantial damages in some cases.

Other avenues of redress can be provided by contract between the practitioner and client. Four situations are typically covered by contract. First, the ownership and possession of the documents can be dealt with. This should establish the respective rights regarding the documents. In some cases it is desirable for the practitioner to retain ownership and possession of the original. In other cases where information may be sensitive the client may retain the ownership of the document while the practitioner retains the right to exclusive possession of the original document.

All original documents prepared in the course of service for the Client will be retained by and under the exclusive control of the Practitioner.

Second, the number, source, dissemination, and cost of subsequent copies can be addressed.

Within five years of the completion of the services, Client may request up to 10 additional copies of the plan for the use of the Client or its employees and agents at a cost of \$5.00 per plan.

Third, any restrictions on documents can be clarified. Restrictions can include making copies, alterations, transfer to third parties, and recording.

Client and Practitioner hereby agree that copies containing the seal, signature, and certification of the Practitioner shall not be provided to third parties unless both parties agree, one party is directed by competent authority, or the seal, signature, and certification are defaced or removed.

Client and Practitioner hereby agree that no alterations, changes, omissions, or modifications shall be made to the plan without express permission of the Client and Practitioner.

Practitioner shall record a copy of the plan at the completion of services in the _____ County Registry of Deeds.

Fourth and finally, a contract can include relief, remedies, and damages dealing with unauthorized copies or unauthorized persons in possession of authorized copies.

Client and Practitioner agree to indemnify or otherwise hold the other harmless for any damages and costs to include attorney fees and court costs for the other party to remove, seize, obtain, and/or destroy unauthorized copies or authorized copies in the possession of third parties brought about or caused by their negligence or intentional actions.

This is not an exhaustive list of suggestions and considerations in protecting documents. In some cases these options may not be appropriate or practical. They should be considered and discussed with counsel to determine which option is appropriate for the business or circumstances.

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