

AIGA | the professional association for design
164 Fifth Avenue
New York, NY 10010
www.aiga.org



Standard Form of Agreement for Design Services

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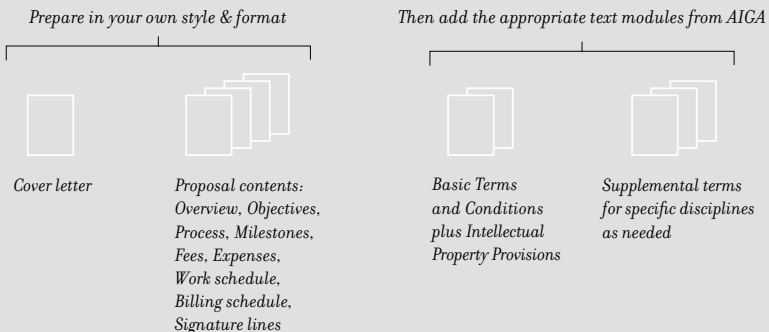
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Introduction: AIGA Standard Form of Agreement

Welcome to the latest version of the *AIGA Standard Form of Agreement for Design Services*. If you're familiar with the previous versions, you'll notice that this one is quite different. It does not take a one-size-fits-all approach, and it is not an extensive pre-printed document where you simply fill in the blanks. Instead, it acknowledges that most design firms develop their own custom proposal document for each project and are looking for an appropriate set of terms and conditions to attach to it. When put together and signed, the custom proposal document and its attached terms and conditions comprise the binding agreement with the client.

With this in mind, the new focus of the *AIGA Standard Form of Agreement* is on those terms and conditions. AIGA members are involved in many different design disciplines. Because of this, the recommended terms and conditions have been prepared in a modular format. This also helps to keep individual agreements down to a more manageable size. The first two modules, *Basic Terms and Conditions* and *Intellectual Property Provisions*, should be used for all design assignments. An additional three modules are provided as supplements that can be added to the agreement as needed: *Print-Specific Terms and Conditions*, *Interactive-Specific Terms and Conditions* and *Environmental-Specific Terms and Conditions*.



This new format for the *AIGA Standard Form of Agreement for Design Services* was developed by a team of industry experts: Don Brunsten (intellectual property attorney, Don Brunsten & Associates), Jim Faris (co-founder of The Management Innovation Group and former AIGA national board member), Linda Joy Kattwinkel (intellectual property attorney, Owen, Wickersham & Erickson), Frank Martinez (intellectual property attorney, The Martinez Group) and Shel Perkins (design management consultant, AIGA secretary and treasurer and past president of AIGA San Francisco). It is being provided as a reference to all AIGA members. However, this information is not a substitute for personalized professional advice from an attorney. If you have specific legal questions, you should always seek the services of appropriate legal counsel.

How to use it

In general, the process of drafting, negotiating and finalizing an agreement with a client will follow this sequence of activities:

- Advance preparation and information gathering about the client and the potential project
- Internal planning of budget and schedule
- Drafting a custom proposal document that the client will see
- Attaching these AIGA modules for all design projects: *Basic Terms and Conditions* and *Schedule A: Intellectual Property Provisions*
- Adding these AIGA supplements as needed: *Print-Specific Terms and Conditions*, *Interactive-Specific Terms and Conditions*, *Environmental-Specific Terms and Conditions*
- Reviewing the final AIGA checklist of options in the terms and conditions
- Presenting the agreement to the client and answering any questions
- Negotiating any modifications requested by the client
- Finalizing the agreement with authorized signatures

The following pages offer practical advice on the overall process and discuss the important legal and financial issues to be addressed in the “fine print” of any agreement. To help you with the jargon involved, basic explanations of legal terms are included. However, these notes can only serve as a brief introduction to the issues involved. Depending on the type of work that you do and the size of your projects, some of the contractual issues can become rather complex. When finalizing an agreement with a client, you will of course want to have it reviewed by your attorney. With that in mind, these notes end with some pointers on how to find the right attorney and make the best use of his or her time and expertise.

Advance preparation and project planning

A proposal is a detailed project document that defines the scope of work, the process, the schedule, and the total price (usually in the form of a fixed fee). It is a discussion document where the designer puts forward a recommended course of action for the client to consider. Many proposals go through several rounds of changes and negotiations before they are finalized. Some negotiations with the client may relate to project specifications while other discussions might focus on the legal terms and conditions. The final goal is to have one comprehensive document that, when accompanied by an appropriate set of terms and conditions and signed by both parties, serves as your agreement for the project.

INITIAL STEPS FOR YOU

Start with some general preparation that is relevant to all of the work done by your firm:

- Think about your creative process. Write down the ideal sequence of activities—phases, steps and milestones—that allows you to produce your best work. If you are active in more than one practice area, you may have several variations. Your own creative process should be the framework that you use for planning and managing projects.
- Calculate a standard hourly rate. This is an important internal tool that you need in order to sketch out initial budgets. Rates vary from firm to firm based on the amount of overhead being carried, the number of hours available to devote to client projects and the target profit margin included in the calculation. (A sample format for calculating an hourly rate can be found in the *Graphic Artists Guild Handbook: Pricing and Ethical Guidelines*.)
- Become familiar with standard terms and conditions appropriate to the type of work that you are selling.

Now you can zero in on the particular project that you are bidding on:

- Gather as much information as possible on the potential project. If the client has provided you with an RFP document (a request for proposal), review all of the details carefully. Beyond this, you may want to complete your own form of project questionnaire to make sure that no important details are overlooked. This may involve additional discussions with your client contact and possibly others at the client company in order to learn more.
- Now you're ready to prepare a preliminary project plan and budget. Even though you may be allergic to spreadsheets, it's important to get in the habit of using an internal planning worksheet to calculate a

“suggested retail” price for the project. This ballpark number has to be based on the scope of work required, your own step-by-step design and implementation process, the size of the team that will be required, an estimated number hours for each team member (valued at your standard hourly rate) and estimated outside purchases (including a standard markup). Now you have to make a judgment call: adjust the totals as needed in order to reflect market conditions and the ultimate value of the work to the client.

- You’ll also need to draft a preliminary work schedule that shows the number of work days or work weeks required (don’t forget to factor in your prior commitments to other clients). A good approach is to do this as a Gantt chart that shows blocks of time and indicates project activities that can happen concurrently. Whenever possible, it’s best to avoid locking in specific start dates, approval dates or completion deadlines, because all of them are sure to change. It’s better to plan the schedule in terms of the elapsed time necessary.

This internal preparation and planning has been just for you. The next step is to begin drafting a document that the client will see.

Proposal document

INFORMATION THAT IS SENT TO THE CLIENT

Written proposals include specific details which vary quite a bit based on the individual project and the creative firm. However, there is a fairly standard structure for the proposal document itself. Typical components include:

- An overview of the client situation (their industry and competitive challenges)
- A description of the scope of work and specific objectives for this project (the immediate need that must be addressed and the specific targets that must be achieved)
- The process that you are recommending (for each individual phase, spell out what is included and what is not — describe the sequence of steps, the deliverables and milestones, the number of creative directions that you will be showing, the number of revisions or refinements that are included, the format for delivery, the necessary timeframe and a subtotal of fees and expenses; along the way, be sure to clarify the client's responsibilities and explain how the client will be integrated into the process)
- A recap of the total timeframe, total fees and total expenses (plus any applicable taxes)
- A billing plan (a simple list of invoice amounts and when they will occur during the project — the payment terms will be explained in the terms and conditions)
- Appropriate terms and conditions (discussed in detail below)
- Two lines for authorized signatures at the end of the document (submitted by and accepted by)

You may want to include some extra items, particularly if the client's approval process involves routing the proposal to an executive who has not met you:

- Capsule bios of senior team members
- Background information on your design firm's capabilities and your credentials

When finalizing a proposal package, always include a cover letter. It will be written last. Keep it short, professional and enthusiastic. Don't repeat any of the details that are in the proposal itself. The letter is simply an invitation for a follow-up conversation and it should indicate your willingness to update or revise the scope of work if necessary.

Next, consider the best way of getting the proposal package to the client. Whenever possible, present it in person. This allows you to explain the contents, to address any concerns that the client might have, and to begin building a positive professional relationship.

Notes on basic terms and conditions

This first module of the AIGA system includes general terms and conditions that apply to all creative disciplines, addressing such essential issues as payment terms, client changes and portfolio usage. These shared issues are discussed in detail below. Some descriptions of related concepts are included as well in order to provide additional context.

Definitions

Important terms such as “Agreement” and “Deliverables” need to be used in a consistent way in both the proposal document and the attached terms and conditions. Internal conflicts in terminology will cause confusion and weaken the agreement from a legal standpoint. After a term has been defined, it will be capitalized each time that it is used.

Proposal

The terms and conditions should not restate any of the project specifications already included in the body of your proposal document, but they should include an expiration clause. This is a statement of how long the unsigned offer will remain valid. If the client sits on the proposal for a month or two, you may need to update the document to reflect changes in your pricing or availability.

Fees

If you are charging for your services on a fixed-fee basis, the total amount will be specified in the body of the proposal.

Taxes

It’s a good idea to state that the client is responsible for any applicable sales or use taxes, even if they are calculated after the fact (for example, during a subsequent audit of the designer’s tax returns).

Expenses and additional costs

Every project will involve at least a few expenses. They may be small like reimbursements for photocopies or taxi rides, or they may be large like the purchase of photography. You should spell out for the client exactly how project expenses will be handled and whether or not estimated amounts for those expenses have been included in your proposal. Some clients may want to receive photocopies of receipts for reimbursable

expenses while others may simply request the right to audit your project records if they ever feel it's necessary to do so. It's not unusual for a client to require pre-approval if a purchase exceeds a certain amount. If you are requesting a mileage reimbursement for automobile use, you may want to use the standard rate published each year by the Internal Revenue Service (available on www.irs.gov). In most design firms, out-of-pocket travel expenses for projects are passed through at cost but all other expenses are subject to a markup. State what percentage you use for your standard markup (20% is common). If a client wants to avoid a markup on a large expense, consider allowing them to purchase it directly. However, your fee for services must cover the time that you put into vendor sourcing and quality control. Many design firms do not want to take on the potential legal liabilities of brokering expensive third-party services. If something goes wrong with a third-party service such as printing, it's much safer for the designer if the client made the purchase directly.

Invoices

Your schedule for project billings should be stated in the body of the proposal. Progress billings can be based on phases or milestones, or they can be weekly or monthly. You might also want to specify that you will print hard copies in duplicate and send them via regular mail to the accounts payable address given to you by the client.

Payment terms

When you send an invoice to a client, full payment is due within a certain number of days, counting from the day that the invoice was issued. For example "Net 30" means that the client must get full payment to you within 30 days. Some corporate clients stretch this a bit by saying that the days should be counted from the date they receive the invoice. It's common for design firms to establish client payment terms of "Net 15" because client cash must be received in time for the design firm to pay for related project supplies purchased from vendors on terms of "Net 30." Related to this, you may want to put a limit on the amount of credit that you are willing to extend to a new client. This would be a judgment call based on the client's credit history and your own financial needs. You should state that a project may be put on credit hold if required payments are not made.

Late payment penalties

Most design firms charge clients interest on overdue payments. The standard rate is 1.5 percent per month (which is the equivalent of 18 percent per year). Separate invoices are not generated for the interest amounts. Instead, they appear as line items on monthly statements sent to clients to remind them of unpaid invoices. When client payments are received, the funds are applied first to the interest charges, and then to the unpaid balance on each open invoice, starting with the oldest.

Full payment

If you have agreed that you will be transferring some or all rights to your client, you should definitely make any transfer of rights contingent upon receipt of full payment from the client for your services.

Changes

It's fairly common for minor client changes to be billed on a time-and-materials basis, so your standard hourly rate(s) will be listed here. You might also want to state that your standard rates will not change without 30 days advance notice to the client. When a client requests additions or modifications, you should respond with a change order form. A change order is a document drafted by the designer to acknowledge a client request that is outside of the original scope for the project. The designer describes the amount of additional time and money required and sends the change order to the client for review and an authorized signature. It is essentially a mini-proposal. You'll want to reference the original proposal and state that the same terms and conditions will apply. Compensation for a change order can be calculated on a time-and-materials basis or as a fixed fee. As the work involved is completed, each change order should be invoiced separately. If a client requests substantial changes, however, it's sometimes cleaner and less confusing to start all over with a new proposal for the entire project. You may want to define a substantive change as being anything that exceeds a certain percentage of the original schedule or budget (such as 10 percent) or a certain dollar amount (such as \$1,000), whichever is greater.

Timing

It's paradoxical that the typical client will negotiate for a very tight schedule yet, in the middle of the project, that same client may cause serious delays by failing to provide necessary information, materials or approvals. Most design firms specify that if a client causes a lengthy delay it will result in a day-for-day extension of the project's final deadline. During that client delay, you may also have to reassign some of your resources to other projects, if you have any. You might have cleared the decks for the fast-track project by delaying or turning down other assignments. The danger for you as a businessperson is that an unexpected delay could mean that you're temporarily unable to produce billable hours. To offset this risk, some creative firms attempt to charge a delay penalty or a restart fee. You may want to raise this issue as a negotiating point. However, most clients are not very receptive to the idea.

Testing and acceptance

All work that you deliver to the client should be considered accepted unless the client notifies you to the contrary within a specified period of time (usually five or 10 days).

Cure

Related to testing and acceptance is the concept of cure. If the client notifies you that the work is not acceptable, you should have the opportunity to effect a cure. This means to repair, correct or re-design any work that does not conform to the project specifications in order to make it acceptable to the client.

Client responsibilities

If a client has never purchased creative services before, they may not be aware of how extensive and important their own involvement in the process will be. You'll want to point out what is required of them in terms of information, content, schedules, decision-making and approvals.

Accreditation/promotions

This has to do with receiving proper credit for the work and being able to add it to your design portfolio. You should ask for a credit line to be included in the work itself. You should state that, once the project has been completed and introduced to the public, you will have the right to add the client's name to your client list and the right to enter the work into design competitions. You'll also want to be able to show and explain portions of the completed project to other companies when you are pitching new business. Sometimes clients who are in highly competitive industries have concerns about this. They may ask for the right to review and approve such promotional activity on a case-by-case basis. If you have licensed the final art to the client rather than making a full assignment of rights, and the work does not fall within the category of work-for-hire (defined below), you are legally entitled to show the work in your portfolio. As a professional courtesy, however, you will want to be sensitive to client concerns. (For more information about ownership and licensing, see Schedule A: Intellectual Property Provisions.)

Confidential information

In order for these terms and conditions to be complete and comprehensive, confidentiality should be included here even if you've already signed a separate confidentiality and non-disclosure agreement (perhaps during your very first meeting with the client). Depending on the type of work that you do, you may want confidentiality and non-disclosure to be mutual so that your own proprietary information is protected as well.

Relationship of the parties

Your agreement should reiterate the fact that you are not an employee of your client and you are not forming a joint venture or partnership with them. As an outside supplier of services, you are functioning as an independent contractor. You will also want the ability to bring in your own assistants or agents as needed.

Work made for hire

Discussions with your client about independent contractor status and about ownership and use of project deliverables are sometimes complicated by confusion over the related concept of work-for-hire. This phrase comes from U.S. copyright law. It refers to original work made by an employee within the scope of his or her job, in which copyright ownership automatically belongs to the employer. However, it can also refer to original work made by an independent contractor or a design firm, in which copyright ownership might automatically belong to the client. This is only true if the work meets very specific criteria — it must be specially ordered or commissioned, and it must fall within one of nine categories:

- A contribution to a collective work (such as a magazine, an anthology or an encyclopedia)
- A work that is part of a motion picture or other audiovisual work (such as a website or multimedia project)
- A translation
- A supplement prepared as an adjunct to a work created by another author (such as a foreword, an appendix, or charts)
- A compilation (a new arrangement of pre-existing works, such as a catalog)
- An instructional text (whether it is literary, pictorial or graphic)
- A test
- Answer material for a test
- An atlas

Also, a written agreement must be signed by both parties saying that it is a work made for hire. If the project doesn't meet all of these criteria, work-for-hire does not apply. Copyright will belong to you unless you assign it to your client. (More information about copyright is available in the AIGA publication "Guide to Copyright" and directly from the U.S. Copyright Office at www.copyright.gov.)

No solicitation

It doesn't happen very often, but sometimes a client is so pleased with the work of a particular member of the designer's team that they will seek to establish a direct relationship with him or her. Some people refer to this as "cherry picking." If a client recruits one of your team members away from you, you should at least be entitled to a placement fee for having made the introduction. Beyond that, you should also consider the impact on your operations. If your most experienced and productive team member is no longer available, your business may be damaged by the unexpected interruption to your activities.

No exclusivity

You may want to add that the relationship between you and the client is not an exclusive one. You sell services to a range of clients and some of them may be competitors. If a company wants to be your only client in a particular category, your pricing will have to reflect that. An exclusive relationship would require you to turn down projects from similar firms. Higher rates are necessary in order to offset that lost business.

Warranties and representations

A warranty is a promise in a contract. It is a written guarantee that the subject of the agreement is as represented. As a designer, you might warrant that your work is free from defective workmanship or that it is original and does not infringe the intellectual property of others. If some portion of the work turns out to be defective (for example, a problem with some line of custom computer code in an interactive project) then it is your responsibility to repair or replace it. Legal issues related to originality can be a bit more challenging. You can only infringe a copyright if you knowingly copy someone else's work. However, trademark, trade dress and patent rights can be infringed even if you create your work independently. Thus, it's best to limit your warranty of non-infringement to "the best of your knowledge." If you are going to provide a guarantee of non-infringement without such limitation, then at some time before the end of the project a formal search should be conducted to determine whether or not your work inadvertently resembles a third party's trademark or patent ("prior art"). It's best to place responsibility for this type of prior art search on the client. If you agree to arrange for the search, then your schedule and budget for the project must include the hiring of an attorney or legal service to actually carry it out. It's best for warranties and representations to be reciprocal. The client should make the same promises to you for any project components that they supply.

Infringement

Infringement is the unauthorized use of someone else's intellectual property. It is the opposite of seeking and receiving permission, using correct notice of ownership, and contracting for payment of a royalty or fee. Even though the infringement may be accidental (you may independently create a logo for your client that looks like someone else's trademark), there may be infringement liability, and the infringer may be responsible for paying substantial damages and stopping the use of the infringing work.

Disclaimer of warranties and use of ALL CAPS

If an agreement includes a disclaimer of any warranty, many states require by law that the disclaimer language be sufficiently "conspicuous"

in the document. It needs to stand out in such a way that any reasonable consumer would notice it. This usually means that the disclaimer must be printed in all capital letters, or in type that is larger or in a contrasting color. If you do not follow these guidelines, you run the risk of making the disclaimer invalid.

Indemnification

In the event that you breach any warranty that you have given, you agree to provide security against any hurt, loss, or damage that might occur. You would have to make the client “whole” by giving them something equal to what they have lost or protecting them from any judgments or damages that might have to be paid to third parties, along with attorney’s fees. For example, you might be asked to provide indemnity against third-party infringement claims. At the same time, however, you need to have the client indemnify you against any breach of warranties that they have made. Indemnification is a very important issue for designers because the scope of potential liability can be considerable.

Liability

Liability means legal responsibility for the consequences of your acts or omissions. Your accountability to the client may be enforced by civil remedies or criminal penalties. For example, a web developer who has agreed in writing to complete an e-commerce site by a specific date will have liability to the client if the project is not completed on time.

Limitations on liability and use of ALL CAPS

Again, if an agreement includes a limitation on liability, many states require by law that the limitation language be sufficiently “conspicuous” in the document. It needs to stand out in such a way that any reasonable consumer would notice it. This usually means that the limitation must be printed in all capital letters, or in type that is larger or in a contrasting color. If you do not follow these guidelines, you run the risk of making the limitation invalid. It’s smart for a designer to ask a client to agree that they may not recover any damages from you in excess of the total amount of money agreed to in the proposal. While it’s possible for you to limit the amount that each of you might owe to the other in this way, you should keep in mind that you cannot contract away the rights of any third party to make a claim.

Remedy

A remedy is the legal recourse available to an injured party. It may be stipulated in an agreement or a court may order it. A remedy might require that a certain act be performed or prohibited, or it might involve the payment of money.

Damages

Damages are financial compensation for loss or injury suffered by a plaintiff (the person suing). The amount of money awarded in a lawsuit can vary greatly. There are several different categories of damages, including the following: actual damages, such as loss of money due on a contract; general damages, which are more subjective and might relate to loss of reputation or anticipated business; and punitive damages, which may be awarded if the defendant acted in a fraudulent way.

Term and termination

The normal term of a project will begin with the signing of a written agreement and end with the client's acceptance of your completed services. If something happens in the meantime to make cancellation necessary, the agreement must describe in advance the process for doing that, from notification through calculation of your final invoice. That final billing might cover time and materials for actual services performed through the date of cancellation, or it might be a lump-sum cancellation fee, or perhaps a combination of the two. Cancellation also raises questions about ownership of the unfinished work. Typically the designer will retain all preliminary art, including any studies and comps already rejected by the client, while the client might receive the most recent approved version of the work in process.

General items

Most of the legal issues addressed in this section of the terms and conditions are fairly self-explanatory. However, the following information may be helpful.

Force majeure

This is a French term that means "superior force." It refers to any event or effect that cannot be reasonably anticipated or controlled. If such an event occurs (for example, a war, a labor strike, extreme weather or an earthquake) it may delay or terminate the project without putting the designer or client at fault.

Governing law

This has to do with jurisdiction. You must identify the state whose laws will govern the signed agreement. Your client will usually request the state where their main office is located.

Dispute resolution

There are three standard types of dispute resolution. Here is a brief description of each one:

- Mediation is a non-binding intervention between parties in an informal setting in order to promote resolution of a dispute. It involves the active participation of a third party (a mediator) who facilitates discussion in order to clarify issues, find points of agreement and encourage cooperation. A commitment to mediation is often included in contracts. There are professional mediators and lawyers who offer mediation services.
- The next step beyond mediation is arbitration, in which an impartial third party (an arbitrator) hears both sides of the dispute in an out-of-court setting. The arbitrator is an attorney who acts much like a judge, listening to both sides of the story but not actively participating in discussion. You and your opponent will have the opportunity to present evidence and witnesses. After hearing the facts, the arbitrator will make a decision. In your contract, you will specify whether the decision of the arbitrator is binding or non-binding. Binding arbitration imposes a legal obligation on the parties to abide by the decision and accept it as final. Arbitration proceedings are held in an attempt to avoid a court trial. However, contract-required arbitration may later be converted into a legal judgment on petition to the court. The fees involved might be large (depending on the dispute, they could easily range from \$3,000 to \$20,000 or more), but usually they are less than those involved in pursuing a lawsuit. For the sake of convenience, many contracts identify a large, national arbitration service to be used in the event of a dispute. However, it may be preferable for you to replace this national name with a local name, particularly if you can find a service that is geared toward the arts.
- Litigation means that you are pursuing a lawsuit through the court system in order to resolve a dispute. The time and expense involved may be considerable.

Attorneys' fees

When a decision has been reached concerning a dispute, either through arbitration or litigation, the losing side may be liable to pay the winning side's costs and attorneys' fees. Under copyright law, a winning plaintiff is entitled to recover his or her attorneys' fees if the copyright was registered before the infringement occurred. For other types of liability, the obligation to pay the prevailing party's legal expenses must be established in your contract.

Notes on schedule A: Intellectual property provisions

Every designer produces original work that is covered by copyright protection, and additional work that could possibly be registered under trademark or patent laws. Because of this, every design contract needs to address the issues of ownership and usage of intellectual property. These can be negotiated in a variety of ways, based on the nature of the work and the specific needs of the client.

Preliminary art versus final art

There is an important distinction to be made between preliminary and final art. Early in each project, a designer may produce a lot of discussion materials (such as sketches, rough layouts, visualizations or comps). These are prepared solely for the purpose of demonstrating an idea or a message to the client for acceptance. Normally the client does not receive legal title to or permanent possession of these items, so it's important for your contract to be clear on this point. Many preliminary concepts will later be modified or rejected entirely. Usually only one concept will be taken through to completion and it is only the approved and finished final art that will be delivered to the client.

Third-party materials

If intellectual property owned by a third party is to be used in a project (for example, an illustration or a photograph), the designer should state that the client is responsible for respecting any usage limitations placed on the property. You may even want the client to negotiate usage rights with the third party and make payments directly to them.

Trademarks

Issues related to trademarks are discussed in the warranties and infringement sections above.

Designer tools

This deals with the issue of background technology. If any code that is proprietary to the designer is necessary to develop, run, display or use the final deliverables, then the designer needs to retain ownership of it while granting a non-exclusive license for the client to copy and use it. This way you can use that same technology on any other clients' projects.

License

A license is a limited grant by a designer to a client of rights to use the intellectual property comprising the final art in a specified way.

Scope of license

The extent of the license that you grant will vary based on the type of work involved. The rights may be limited to use on certain products, in particular media, in a certain territory, and/or for a specified time period. Other basic limitations include whether or not you will allow the client to modify your work in any way, or to turn around and license the work to a third party without your permission. If the client later decides that they need additional rights, they will have to come back to you, renegotiate and pay additional fees.

Exclusive license

If a license is exclusive it means that even though you have retained ownership of the work, you will not be giving permission to anyone else to use it. This means that you will not be able to generate additional licensing income from other sources. Because of this, designers need to negotiate higher prices for exclusive licenses.

Liquidation for unlicensed use

When licensing rights, you may want to consider agreeing in advance on the amount of damages that would be payable by the client upon a breach of contract. These are called liquidated damages. At some point in the future, the client may be tempted to exceed the original scope of the license that you have granted. Instead of coming back and renegotiating with you as they should, they might just begin unlicensed usage. (It's a challenge that is faced all the time by stock photography businesses and illustrators.) Since you can't know in advance the extent of the actual damages that would be caused by the unlicensed usage, the amount of money to be paid is calculated as a multiple of the original contract price (300 percent is common). An agreement on liquidated damages can help to avoid potential lawsuits and serve as an incentive for the client not to exceed the scope of the license. However, you'll want to weigh your other options carefully. If you reserve the right to sue for breach of contract or infringement, it's conceivable that the amount of money awarded to you in a lawsuit could be higher.

Assignment of rights

An assignment is a full transfer of intellectual property rights to your client. It might include copyright, patent, trademark, trade dress, or other types of intellectual property. For example, when a new corporate identity is developed and sold to a client, the sale typically includes an assignment of all rights. The client will go on to complete U.S. and international registration of copyright, trademark, patent and other rights in its own name. Designers should charge a higher fee for any project that involves a full assignment of rights.

Notes on supplements

Beyond the basic issues discussed above, additional language may be needed in the agreement to clarify issues that are specific to a particular design discipline. For example, web developers have particular concerns that are different from those of packaging designers. Out of the many possible variations, we have focused in on three areas that we feel will be most relevant to the majority of AIGA members. Most of the items in the supplements are fairly self-explanatory. However, the following information may be helpful.

SUPPLEMENT 1: PRINT-SPECIFIC TERMS AND CONDITIONS

Samples

You will want to specify the number of printed samples to be provided to you.

Finished work

In the printing industry, it's not unusual to encounter slight variations of specifications or materials (for example, substitution of a comparable paper stock due to limited availability) as well as a variance of plus or minus 10 percent on the final, delivered quantity. These should be considered normal and acceptable. Much more information is available about standard trade practices in the printing industry from organizations such as the PIA (Printing Industries of America) and the Graphic Arts Technical Foundation.

SUPPLEMENT 2: INTERACTIVE-SPECIFIC TERMS AND CONDITIONS

Support services

If you're bidding on a website and the scope of services described in your proposal includes testing, hosting and/or maintenance, you are taking on additional legal responsibilities that need to be described in the agreement. Try to limit any additional liability as much as possible. On all interactive projects, you'll want to be very specific about how much support or maintenance you will provide after delivery, and whether or not those services will be billed in addition to the original contract price.

Compliance with laws

Section 508 of the Workforce Investment Act of 1998 is of particular importance to user interface designers as well as software and hardware developers. This law requires electronic and information technology purchased by the U.S. government to be accessible for people with disabilities. It sets accessibility and usability requirements for any websites, video equipment, kiosks, computers, copiers, fax machines

and the like that may be procured by the government, thereby essentially affecting all such products in the American market. (The United Kingdom and Japan have also put accessibility guidelines into place.)

SUPPLEMENT 3: ENVIRONMENTAL-SPECIFIC TERMS AND CONDITIONS

Photographs of the project

After completion of an environmental/3-D project (such as a signage system, a trade show booth, a retail interior or an exhibit) you need the right to photograph the result. This involves being able to access it and take your photographs under optimal circumstances.

Additional client responsibilities

Environmental design projects often require various types of government approval, such as building permits or zoning reviews. Be sure to state that the client is responsible for these.

Engineering and implementation

You will be providing specifications for materials and construction details that will be interpreted by other professionals, such as architects, engineers and contractors. Typically the client will contract and pay for such implementation services directly. Your agreement should include a disclaimer that you are not licensed in those fields and that responsibility for the quality, safety, timeliness and cost of such work is the responsibility of the client and the architect, engineer or contractor involved. The client should indemnify you against any claims in this regard.

Compliance with laws

Your project may be subject to the Americans with Disabilities Act (ADA), which is a civil rights act that affects private businesses as well as governmental organizations. ADA requirements are of particular importance to industrial designers, interior designers and architects.

Client insurance

Ask your client to provide you with proof that they have adequate insurance coverage in place for the duration of the project (one million dollars is a common minimum amount).

Final checklist

Before you send the draft agreement to the client, look through it one more time for quality control purposes. In the terms and conditions pages, there are several blanks that need to be filled in and some very important options need to be selected.

Basic Terms and Conditions

2. Number of days that the unsigned proposal will remain valid.
 - 3.2 Standard markup percentage for expenses (and perhaps standard rate for mileage reimbursement).
 - 3.4 Number of days allowed for payment of invoices.
 - 4.1 Hourly billing rate to be used for general client changes.
 - 4.2 Percentage of original project schedule or budget that will be used to determine whether or not changes are substantive instead of general.
 - 12.5 Name of state identified for governing law.
 - 12.8 Identify which supplements are attached, if any.
- Last Add your name, signature and date.

Schedule A: Intellectual Property Provisions

Choose only one of these three options:

IP 2.A (1) (a) and IP 2.1

- A license for limited usage, client may not modify the work.
- Indicate whether it is for print, interactive or environmental.
- Describe the category, medium, duration, territory and size of initial press run.
- Indicate whether the license is exclusive or nonexclusive.

IP 2.A (1) (b) and IP 2.2

- A license for unlimited usage, client may not modify the work.
- Indicate whether it is for print, interactive or environmental/3D.
- (This license is exclusive).

IP 2.A (1) (c) and IP 2.3

- A license for unlimited usage, client may modify the work.
- Indicate whether it is for print, interactive or environmental/3D.
- (This license is exclusive).

And, with any of the three options above, be sure to include the following liquidation clause just in case the client later exceeds the usage rights that you have granted:

IP 2.A (2) and IP 2.4

Fill in the percentage that will be used to calculate the amount of additional compensation.

Or skip all of the above and go directly to:

IP 2.B and 2.5

This assigns all rights to the client, with no limitations.

Supplement 1: Print-Specific Terms and Conditions

P 1. Enter the number of printed samples that you want to receive.

Supplement 2: Interactive-Specific Terms and Conditions

11.1 Enter the number of months in the warranty period and enter the number of support hours to be provided at no additional cost.

11.2 Enter the number of months in the maintenance period and enter the flat fee to be charged per month, or the hourly billing rate for maintenance.

Supplement 3: Environmental-Specific Terms and Conditions

3D 6. Insurance requirement for the client: enter a dollar amount.

Negotiating

Present the draft agreement to the client in person, if possible, so that you can explain the contents and answer any questions. Don't be surprised if they ask for modifications or additional items to be included. Here are some of the issues that may come up:

Pricing

Often the initial client response will be to ask for a lower price. It's best for you to avoid getting into a discussion of standard hourly rates. Discuss the scope of work instead. Focus on the main objectives. Can portions of the project be scaled back? Are there components that can be broken out as later projects? Reducing the scope of work will reduce the overall price.

Deposits

Whenever possible, you should ask for a deposit at the beginning of a project. There are different approaches to this. Some designers apply the deposit to the first progress billing (making it essentially a pre-payment of phase 1). Others state that the deposit will be held until the end of project and applied to the final billing. If that's the case, point out that no interest will be paid while it is being held. If the project is cancelled, the deposit will be refunded less any amounts due to the designer.

Product liability

If you are working on the development of a product that will eventually be sold to the public, this will be an important issue. Your client may ask to have it included in the agreement. Product liability refers to the legal responsibility of product designers, manufacturers, distributors and sellers to deliver products to the public that are free of any defects that could harm people. If a product is defective, the purchaser will probably sue the seller, who may then bring the distributor or manufacturer or product designer into the lawsuit. Any one of the parties may be liable for damages or may have to contribute toward a judgment.

Designer insurance

Large clients often specify minimum insurance levels for the designer's business. Standard business requirements include general liability, workers comp and automobile coverage. In addition, you may need to carry professional liability insurance to cover such things as intellectual property infringement or errors and omissions. You'll need to analyze your own needs in this area and do some research with an independent insurance agent. Certain types of professional liability coverage may be limited in scope and rather expensive. If designer insurance requirements are added to the agreement, you must provide proof of coverage in the form of a certificate of insurance that is sent from your insurance agent directly to the client.

ADDENDUM TO THE AGREEMENT

There are two ways to record the changes that result from your negotiations with the client. The most direct is to go back into the body of the agreement and change the original language. This is, in fact, what you should do for all changes that relate to the scope and specifications in the proposal document at the front of the agreement. However, things can become quite confusing if you start to rewrite the attached terms and conditions. It is sometimes better to list negotiated changes to the terms and conditions on a separate sheet, called an addendum. The addendum must clearly describe exactly what is being changed and it must not create any contradictions or ambiguities. If you do you go back into the original terms and conditions and make the changes directly, then you must be cautious when you are drafting your next client agreement. If you're in a hurry, it's all too easy to copy the modified terms by mistake. Be sure that you always go back to the standard language and not your most recent adaptation. The original text must always be your starting point — otherwise you can stray quite far from the original intent.

Terms and conditions can be negotiated separately for each and every project, or they can be negotiated just once for the entire relationship. If you start with a complete set and state that it will apply to all projects, then future proposals can just refer back to it. This can save on paper-work, time and legal expenses for both you and your client.

Finding and working with an attorney

It can be a challenge to find the right attorney and to use his or her time in an efficient way. Most attorneys specialize in a single category of law, such as real estate or labor law. As a creative professional, you need to find an attorney who specializes in issues related to intellectual property (copyrights, trademarks, patents, trade secrets and moral rights). Attorneys are licensed state by state, so you need to find one in your own area. Start your search by visiting these online directories:

- Volunteer Lawyers for the Arts
www.vlany.org
(A nonprofit listing of legal resources for artists in 25 states in the United States, plus Canada and Australia)
- Martindale-Hubbell
www.lawyers.com
(A commercial directory of U.S. and Canadian attorneys that you can search by specialty and location)
- FindLaw
www.findlaw.com
(A searchable commercial database of attorneys, along with articles on various legal topics)

It's a good idea to look for an attorney who has other designers as clients. Speak with established members of your own design community — one of them may be able to provide you with a local recommendation. Seek out an appropriate attorney when you are first establishing your business. Getting preventative advice on basic issues is much better than waiting until you're already in some sort of legal difficulty.

Initial discounts are sometimes available through groups such as Volunteer Lawyers for the Arts, but in general legal services are not inexpensive. Attorneys may charge a flat fee for assisting with certain basic transactions such as setting up an LLC, but for the most part services are billed on a time-and-materials basis. For this reason, you need to be efficient in the way that you interact. Make the best use of your attorney's time by being very well prepared. Bring copies of any

correspondence that you have already received from or sent to the client. Gather sample documents from your industry and become familiar with the basic legal issues relevant to the creative services that you offer. You may be able to use one of these reference documents as a draft for further discussion with your attorney. Be completely honest and ask questions about anything that is not clear to you. Together you will then craft a final version to send to your client.

If your client is a small business, they may respond with some basic questions that you will have no trouble answering. With large clients though, you may find that your document is routed to an in-house legal department. If questions come to you from an in-house attorney, consider having that person negotiate the fine points directly with your own lawyer. If the in-house counsel is a specialist in some other area of law, your intellectual property attorney can explain the context for the agreement language that you are requesting. Attorney-to-attorney negotiation creates additional expense, but if the resulting terms and conditions can be accepted as the basis of an ongoing relationship, then you won't have to go through the process a second time.

Basic Terms & Conditions

1. DEFINITIONS

As used herein and throughout this Agreement:

1.1 "*Agreement*" means the entire content of this Basic Terms and Conditions document, the Proposal document(s), Schedule A, together with any other Supplements designated below, together with any exhibits, schedules or attachments hereto.

1.2 "*Client Content*" means all materials, information, photography, writings and other creative content provided by Client for use in the preparation of and/or incorporation in the Deliverables.

1.3 "*Copyrights*" means the property rights in original works of authorship, expressed in a tangible medium of expression, as defined and enforceable under U.S. Copyright Law.

1.4 "*Deliverables*" means the services and work product specified in the Proposal to be delivered by Designer to Client, in the form and media specified in the Proposal.

1.5 "*Designer Tools*" means all design tools developed and/or utilized by Designer in performing the Services, including without limitation pre-existing and newly developed software including source code, Web authoring tools, type fonts, and application tools, together with any other software, or other inventions whether or not patentable, and general non-copyrightable concepts such as Web site design, architecture, layout, navigational and functional elements.

1.6 "*Final Art*" means all creative content developed or created by Designer, or commissioned by Designer, exclusively for the Project and incorporated into and delivered as part of the Final Deliverables, including and by way of example, not limitation, any and all visual designs, visual elements, graphic design, illustration, photography, animation, sounds, typographic treatments and text, modifications to Client Content, and Designer's selection, arrangement and coordination of such elements together with Client Content and/or Third Party Materials.

- 1.7 *"Final Deliverables"* means the final versions of Deliverables provided by Designer and accepted by Client.
- 1.8 *"Preliminary Works"* means all artwork including, but not limited to, concepts, sketches, visual presentations, or other alternate or preliminary designs and documents developed by Designer and which may or may not be shown and or delivered to Client for consideration but do not form part of the Final Art.
- 1.9 *"Project"* means the scope and purpose of the Client's identified usage of the work product as described in the Proposal.
- 1.10 *"Services"* means all services and the work product to be provided to Client by Designer as described and otherwise further defined in the Proposal.
- 1.11 *"Third Party Materials"* means proprietary third party materials which are incorporated into the Final Deliverables, including without limitation stock photography or illustration.
- 1.12 *"Trademarks"* means trade names, words, symbols, designs, logos or other devices or designs used in the Final Deliverables to designate the origin or source of the goods or services of Client.

2. PROPOSAL

The terms of the Proposal shall be effective for _____ days after presentation to Client. In the event this Agreement is not executed by Client within the time identified, the Proposal, together with any related terms and conditions and deliverables, may be subject to amendment, change or substitution.

3. FEES AND CHARGES

- 3.1 *Fees.* In consideration of the Services to be performed by Designer, Client shall pay to Designer fees in the amounts and according to the payment schedule set forth in the Proposal, and all applicable sales, use or value added taxes, even if calculated or assessed subsequent to the payment schedule.
- 3.2 *Expenses.* Client shall pay Designer's expenses incurred in connection with this Agreement as follows: (a) incidental and out-of-pocket expenses including but not limited to costs for telephone calls, postage, shipping, overnight courier, service bureaus, typesetting, blueprints, models, presentation materials, photocopies, computer expenses, parking fees and tolls, and taxis at cost plus Designer's standard markup of _____ percent (___%), and, if applicable, a mileage reimbursement at ____ per mile; and (b) travel expenses

including transportation, meals, and lodging, incurred by Designer with Client's prior approval.

3.3 *Additional Costs.* The Project pricing includes Designer's fee only. Any and all outside costs including, but not limited to, equipment rental, photographer's costs and fees, photography and/or artwork licenses, prototype production costs, talent fees, music licenses, and online access or hosting fees, will be billed to Client unless specifically otherwise provided for in the Proposal.

3.4 *Invoices.* All invoices are payable within _____ () days of receipt. A 1.5 percent monthly service charge is payable on all overdue balances. Payments will be credited first to late payment charges and next to the unpaid balance. Client shall be responsible for all collection or legal fees necessitated by late or default in payment. Designer reserves the right to withhold delivery and any transfer of ownership of any current work if accounts are not current or overdue invoices are not paid in full. All grants of any license to use or transfer of ownership of any intellectual property rights under this Agreement are conditioned upon receipt of payment in full which shall be inclusive of any and all outstanding Additional Costs, Taxes, Expenses and Fees, Charges or the costs of Changes.

4. CHANGES

4.1 *General Changes.* Unless otherwise provided in the Proposal, and except as otherwise provided for herein, Client shall pay additional charges for changes requested by Client which are outside the scope of the Services on a time and materials basis, at Designer's standard hourly rate of _____ per hour. Such charges shall be in addition to all other amounts payable under the Proposal, despite any maximum budget, contract price or final price identified therein. Designer may extend or modify any delivery schedule or deadlines in the Proposal and Deliverables as may be required by such Changes.

4.2 *Substantive Changes.* If Client requests or instructs Changes that amount to a revision in or near excess of ____ percent (____%) of the time required to produce the Deliverables, and or the value or scope of the Services, Designer shall be entitled to submit a new and separate Proposal to Client for written approval. Work shall not begin on the revised services until a fully signed revised Proposal and, if required, any additional retainer fees are received by Designer.

4.3 *Timing.* Designer will prioritize performance of the Services as may be necessary or as identified in the Proposal, and will undertake commercially reasonable efforts to perform the Services within the time(s) identified in the Proposal. Client agrees to review Deliverables

within the time identified for such reviews and to promptly either, (i) approve the Deliverables in writing or (ii) provide written comments and/or corrections sufficient to identify the Client's concerns, objections or corrections to Designer. The Designer shall be entitled to request written clarification of any concern, objection or correction. Client acknowledges and agrees that Designer's ability to meet any and all schedules is entirely dependent upon Client's prompt performance of its obligations to provide materials and written approvals and/or instructions pursuant to the Proposal and that any delays in Client's performance or Changes in the Services or Deliverables requested by Client may delay delivery of the Deliverables. Any such delay caused by Client shall not constitute a breach of any term, condition or Designer's obligations under this Agreement.

4.4 *Testing and Acceptance.* Designer will exercise commercially reasonable efforts to test Deliverables requiring testing and to make all necessary corrections prior to providing Deliverables to Client. Client, within five (5) business days of receipt of each Deliverable, shall notify Designer, in writing, of any failure of such Deliverable to comply with the specifications set forth in the Proposal, or of any other objections, corrections, changes or amendments Client wishes made to such Deliverable. Any such written notice shall be sufficient to identify with clarity any objection, correction or change or amendment, and Designer will undertake to make the same in a commercially timely manner. Any and all objections, corrections, changes or amendments shall be subject to the terms and conditions of this Agreement. In the absence of such notice from Client, the Deliverable shall be deemed accepted.

5. CLIENT RESPONSIBILITIES

Client acknowledges that it shall be responsible for performing the following in a reasonable and timely manner:

- (a) coordination of any decision-making with parties other than the Designer;
- (b) provision of Client Content in a form suitable for reproduction or incorporation into the Deliverables without further preparation, unless otherwise expressly provided in the Proposal; and
- (c) final proofreading and in the event that Client has approved Deliverables but errors, such as, by way of example, not limitation, typographic errors or misspellings, remain in the finished product, Client shall incur the cost of correcting such errors.

6. ACCREDITATION/PROMOTIONS

All displays or publications of the Deliverables shall bear accreditation and/or copyright notice in Designer's name in the form, size and location as incorporated by Designer in the Deliverables, or as otherwise directed by Designer. Designer retains the right to reproduce, publish and display the Deliverables in Designer's portfolios and websites, and in galleries, design periodicals and other media or exhibits for the purposes of recognition of creative excellence or professional advancement, and to be credited with authorship of the Deliverables in connection with such uses. Either party, subject to the other's reasonable approval, may describe its role in relation to the Project and, if applicable, the services provided to the other party on its website and in other promotional materials, and, if not expressly objected to, include a link to the other party's website.

7. CONFIDENTIAL INFORMATION

Each party acknowledges that in connection with this Agreement it may receive certain confidential or proprietary technical and business information and materials of the other party, including without limitation Preliminary Works ("Confidential Information"). Each party, its agents and employees shall hold and maintain in strict confidence all Confidential Information, shall not disclose Confidential Information to any third party, and shall not use any Confidential Information except as may be necessary to perform its obligations under the Proposal except as may be required by a court or governmental authority. Notwithstanding the foregoing, Confidential Information shall not include any information that is in the public domain or becomes publicly known through no fault of the receiving party, or is otherwise properly received from a third party without an obligation of confidentiality.

8. RELATIONSHIP OF THE PARTIES

8.1 *Independent Contractor.* Designer is an independent contractor, not an employee of Client or any company affiliated with Client. Designer shall provide the Services under the general direction of Client, but Designer shall determine, in Designer's sole discretion, the manner and means by which the Services are accomplished. This Agreement does not create a partnership or joint venture and neither party is authorized to act as agent or bind the other party except as expressly stated in this Agreement. Designer and the work product or Deliverables prepared by Designer shall not be deemed a work for hire as that term is defined under Copyright Law. All rights, if any, granted to Client are contractual in nature and are wholly defined by the express written agreement of the parties and the various terms and conditions of this Agreement.

8.2 *Designer Agents.* Designer shall be permitted to engage and/or use third party designers or other service providers as independent contractors in connection with the Services (“Design Agents”). Notwithstanding, Designer shall remain fully responsible for such Design Agents’ compliance with the various terms and conditions of this Agreement.

8.3 *No Solicitation.* During the term of this Agreement, and for a period of six (6) months after expiration or termination of this Agreement, Client agrees not to solicit, recruit, engage, or otherwise employ or retain, on a full-time, part-time, consulting, work-for-hire, or any other kind of basis, any Designer, employee or Design Agent of Designer, whether or not said person has been assigned to perform tasks under this Agreement. In the event such employment, consultation or work-for-hire event occurs, Client agrees that Designer shall be entitled to an agency commission to be the greater of, either (a) 25 percent of said person’s starting salary with Client, or (b) 25 percent of fees paid to said person if engaged by Client as an independent contractor. In the event of (a) above, payment of the commission will be due within 30 days of the employment starting date. In the event of (b) above, payment will be due at the end of any month during which the independent contractor performed services for Client. Designer, in the event of nonpayment and in connection with this section, shall be entitled to seek all remedies under law and equity.

8.4 *No Exclusivity.* The parties expressly acknowledge that this Agreement does not create an exclusive relationship between the parties. Client is free to engage others to perform services of the same or similar nature to those provided by Designer, and Designer shall be entitled to offer and provide design services to others, solicit other clients and otherwise advertise the services offered by Designer.

9. WARRANTIES AND REPRESENTATIONS

9.1 *By Client.* Client represents, warrants and covenants to Designer that (a) Client owns all right, title, and interest in, or otherwise has full right and authority to permit the use of the Client Content, (b) to the best of Client’s knowledge, the Client Content does not infringe the rights of any third party, and use of the Client Content as well as any Trademarks in connection with the Project does not and will not violate the rights of any third parties, (c) Client shall comply with the terms and conditions of any licensing agreements which govern the use of Third Party Materials, and (d) Client shall comply with all laws and regulations as they relate to the Services and Deliverables.

9.2 *By Designer*

(a) Designer hereby represents, warrants and covenants to Client that Designer will provide the Services identified in the Agreement in a professional and workmanlike manner and in accordance with all reasonable professional standards for such services.

(b) Designer further represents, warrants and covenants to Client that (i) except for Third Party Materials and Client Content, the Final Deliverables shall be the original work of Designer and/or its independent contractors, (ii) in the event that the Final Deliverables include the work of independent contractors commissioned for the Project by Designer, Designer shall have secure agreements from such contractors granting all necessary rights, title, and interest in and to the Final Deliverables sufficient for Designer to grant the intellectual property rights provided in this Agreement, and (iii) to the best of Designer's knowledge, the Final Art provided by Designer and Designer's subcontractors does not infringe the rights of any party, and use of same in connection with the Project will not violate the rights of any third parties. In the event Client or third parties modify or otherwise use the Deliverables outside of the scope or for any purpose not identified in the Proposal or this Agreement or contrary to the terms and conditions noted herein, all representations and warranties of Designer shall be void.

(c) EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES STATED IN THIS AGREEMENT, DESIGNER MAKES NO WARRANTIES WHATSOEVER. DESIGNER EXPLICITLY DISCLAIMS ANY OTHER WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR COMPLIANCE WITH LAWS OR GOVERNMENT RULES OR REGULATIONS APPLICABLE TO THE PROJECT.

10. INDEMNIFICATION/LIABILITY

10.1 *By Client.* Client agrees to indemnify, save and hold harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party arising out of any breach of Client's responsibilities or obligations, representations or warranties under this Agreement. Under such circumstances Designer shall promptly notify Client in writing of any claim or suit; (a) Client has sole control of the defense and all related settlement negotiations; and (b) Designer provides Client with commercially reasonable assistance, information and authority necessary to perform Client's obligations under this section. Client will reimburse the reasonable out-of-pocket expenses incurred by Designer in providing such assistance.

10.2 *By Designer.* Subject to the terms, conditions, express representations and warranties provided in this Agreement, Designer agrees to indemnify, save and hold harmless Client from any and all damages, liabilities, costs, losses or expenses arising out of any finding of

fact which is inconsistent with Designer's representations and warranties made herein, except in the event any such claims, damages, liabilities, costs, losses or expenses arise directly as a result of gross negligence or misconduct of Client provided that (a) Client promptly notifies Designer in writing of the claim; (b) Designer shall have sole control of the defense and all related settlement negotiations; and (c) Client shall provide Designer with the assistance, information and authority necessary to perform Designer's obligations under this section. Notwithstanding the foregoing, Designer shall have no obligation to defend or otherwise indemnify Client for any claim or adverse finding of fact arising out of or due to Client Content, any unauthorized content, improper or illegal use, or the failure to update or maintain any Deliverables provided by Designer.

10.3 *Limitation of Liability.* THE SERVICES AND THE WORK PRODUCT OF DESIGNER ARE SOLD "AS IS." IN ALL CIRCUMSTANCES, THE MAXIMUM LIABILITY OF DESIGNER, ITS DIRECTORS, OFFICERS, EMPLOYEES, DESIGN AGENTS AND AFFILIATES ("DESIGNER PARTIES"), TO CLIENT FOR DAMAGES FOR ANY AND ALL CAUSES WHATSOEVER, AND CLIENT'S MAXIMUM REMEDY, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT OR OTHERWISE, SHALL BE LIMITED TO THE NET PROFIT OF DESIGNER. IN NO EVENT SHALL DESIGNER BE LIABLE FOR ANY LOST DATA OR CONTENT, LOST PROFITS, BUSINESS INTERRUPTION OR FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THE MATERIALS OR THE SERVICES PROVIDED BY DESIGNER, EVEN IF DESIGNER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

11. TERM AND TERMINATION

11.1 This Agreement shall commence upon the Effective Date and shall remain effective until the Services are completed and delivered.

11.2 This Agreement may be terminated at any time by either party effective immediately upon notice, or the mutual agreement of the parties, or if any party:

- (a) becomes insolvent, files a petition in bankruptcy, makes an assignment for the benefit of its creditors; or
- (b) breaches any of its material responsibilities or obligations under this Agreement, which breach is not remedied within ten (10) days from receipt of written notice of such breach.

11.3 In the event of termination, Designer shall be compensated for the Services performed through the date of termination in the amount of (a) any advance payment, (b) a prorated portion of the fees due, or (c) hourly fees for work performed by Designer or Designer's agents as of the date of termination, whichever is greater; and Client shall pay all Expenses, fees, out of pockets together with any Additional Costs incurred through and up to, the date of cancellation.

11.4 In the event of termination by Client and upon full payment of compensation as provided herein, Designer grants to Client such right and title as provided for in Schedule A of this Agreement with respect to those Deliverables provided to, and accepted by Client as of the date of termination.

11.5 Upon expiration or termination of this Agreement: (a) each party shall return or, at the disclosing party's request, destroy the Confidential Information of the other party, and (b) other than as provided herein, all rights and obligations of each party under this Agreement, exclusive of the Services, shall survive.

12. GENERAL

12.1 *Modification/Waiver.* This Agreement may be modified by the parties. Any modification of this Agreement must be in writing, except that Designer's invoices may include, and Client shall pay, expenses or costs that Client authorizes by electronic mail in cases of extreme time sensitivity. Failure by either party to enforce any right or seek to remedy any breach under this Agreement shall not be construed as a waiver of such rights nor shall a waiver by either party of default in one or more instances be construed as constituting a continuing waiver or as a waiver of any other breach.

12.2 *Notices.* All notices to be given hereunder shall be transmitted in writing either by facsimile or electronic mail with return confirmation of receipt or by certified or registered mail, return receipt requested, and shall be sent to the to the addresses identified below, unless notification of change of address is given in writing. Notice shall be effective upon receipt or in the case of fax or e-mail, upon confirmation of receipt.

12.3 *No Assignment.* Neither party may assign, whether in writing or orally, or encumber its rights or obligations under this Agreement or permit the same to be transferred, assigned or encumbered by operation of law or otherwise, without the prior written consent of the other party.

12.4 *Force Majeure.* Designer shall not be deemed in breach of this Agreement if Designer is unable to complete the Services or any portion thereof by reason of fire, earthquake, labor dispute, act of God or public enemy, death, illness or incapacity of Designer or any local, state, federal, national or international law, governmental order or regulation or any other event beyond Designer's control (collectively, "Force Majeure Event"). Upon occurrence of any Force Majeure Event, Designer shall give notice to Client of its inability to perform or of delay in completing the Services and shall propose revisions to the schedule for completion of the Services.

12.5 *Governing Law and Dispute Resolution.* The formation, construction, performance and enforcement of this Agreement shall be in accordance with the laws of the United States and the state of _____ without regard to its conflict of law provisions or the conflict of law provisions of any other jurisdiction. In the event of a dispute arising out of this Agreement, the parties agree to attempt to resolve any dispute by negotiation between the parties. If they are unable to resolve the dispute, either party may commence mediation and/or binding arbitration through the American Arbitration Association, or other forum mutually agreed to by the parties. The prevailing party in any dispute resolved by binding arbitration or litigation shall be entitled to recover its attorneys' fees and costs. In all other circumstances, the parties specifically consent to the local, state and federal courts located in the state of _____ _____. The parties hereby waive any jurisdictional or venue defenses available to them and further consent to service of process by mail. Client acknowledges that Designer will have no adequate remedy at law in the event Client uses the deliverables in any way not permitted hereunder, and hereby agrees that Designer shall be entitled to equitable relief by way of temporary and permanent injunction, and such other and further relief at law or equity as any arbitrator or court of competent jurisdiction may deem just and proper, in addition to any and all other remedies provided for herein.

12.6 *Severability.* Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect and the invalid or unenforceable provision shall be replaced by a valid or enforceable provision.

12.7 *Headings.* The numbering and captions of the various sections are solely for convenience and reference only and shall not affect the scope, meaning, intent or interpretation of the provisions of this Agreement nor shall such headings otherwise be given any legal effect.

12.8 *Integration.* This Agreement comprises the entire understanding of the parties hereto on the subject matter herein contained, and supersedes and merges all prior and contemporaneous agreements, understandings and discussions between the parties relating to the subject matter of this Agreement. In the event of a conflict between the Proposal and any other Agreement documents, the terms of the Proposal shall control. This Agreement comprises this Basic Terms and Conditions document, the Proposal, Schedule A, and the following documents as indicated by the parties' initials:

___ Supplement 1: Print-Specific Terms & Conditions

___ Supplement 2: Interactive-Specific Terms & Conditions

___ Supplement 3: Environmental-Specific Terms & Conditions

By their execution below, the parties hereto have agreed to all of the terms and conditions of this Agreement effective as of the last date of signature below, and each signatory represents that it has the full authority to enter into this Agreement and to bind her/his respective party to all of the terms and conditions herein.

DESIGNER:

CLIENT:

[Designer name]

[Client name]

[Address]

[Address]

Signed: _____

Signed: _____

By: [Client officer name]

Date: _____

Title: _____

Date: _____

Schedule A: Intellectual Property Provisions

IP 1. RIGHTS TO DELIVERABLES OTHER THAN FINAL ART

- IP 1.1 *Client Content.* Client Content, including all pre-existing Trademarks, shall remain the sole property of Client or its respective suppliers, and Client or its suppliers shall be the sole owner of all rights in connection therewith. Client hereby grants to Designer a nonexclusive, nontransferable license to use, reproduce, modify, display and publish the Client Content solely in connection with Designer's performance of the Services and limited promotional uses of the Deliverables as authorized in this Agreement.
- IP 1.2 *Third Party Materials.* All Third Party Materials are the exclusive property of their respective owners. Designer shall inform Client of all Third Party Materials that may be required to perform the Services or otherwise integrated into the Final Art. Under such circumstances Designer shall inform Client of any need to license, at Client's expense, and unless otherwise provided for by Client, Designer shall obtain the license(s) necessary to permit Client's use of the Third Party Materials consistent with the usage rights granted herein. In the event Client fails to properly secure or otherwise arrange for any necessary licenses or instructs the use of third party art, Client hereby indemnifies, saves and holds harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party arising out of Client's failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Art.

- IP 1.3 *Preliminary Works.* Designer retains all rights in and to all Preliminary Works. Client shall return all Preliminary Works to Designer within thirty (30) days of completion of the Services and all rights in and to any Preliminary Works shall remain the exclusive property of Designer.
- IP 1.4 *Original Artwork.* Designer retains all right and title in and to any original artwork comprising Final Art, including all rights to display or sell such artwork. Client shall return all original artwork to Designer within thirty (30) days of completion of the Services.
- IP 1.5 *Trademarks.* Upon completion of the Services and expressly conditioned upon full payment of all fees, costs and out-of-pocket expenses due, Designer assigns to Client all ownership rights, including any copyrights, in and to any artworks or designs comprising the works created by Designer for use by Client as a Trademark. Designer shall cooperate with Client and shall execute any additional documents reasonably requested by Client to evidence such assignment. Client shall have sole responsibility for ensuring that any proposed trademarks or Final Deliverables intended to be a Trademark are available for use in commerce and federal registration and do not otherwise infringe the rights of any third party. Client hereby indemnifies, saves and holds harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by any third party alleging any infringement arising out of Client's use and/or failure to obtain rights to use or use of the Trademark.
- IP 1.6 *Designer Tools.* All Designer Tools are and shall remain the exclusive property of Designer. Designer hereby grants to Client a nonexclusive, nontransferable (other than the right to sublicense such uses to Client's Web hosting or Internet service providers), perpetual, worldwide license to use the Designer Tools solely to the extent necessary with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, create derivative works or otherwise disassemble or modify any Designer Tools comprising any software or technology of Designer.

IP 2. RIGHTS TO FINAL ART

Final Art ownership options: choose A-License (either limited usage, exclusive license with no modification rights, or exclusive license with modification rights – all licenses include liquidation for unlicensed use) or B-Assignment. Check appropriate media for each provision:

IP 2.A (i) (a) License for limited usage, no modification rights:

IP 2.1 For ___ print, ___ online/interactive, ___ three-dimensional media:
Upon completion of the Services, and expressly subject to full payment of all fees, costs and out-of-pocket expenses due, Designer grants to Client the rights in the Final Art as set forth below. Any additional uses not identified herein require an additional license and may require an additional fee. All other rights are expressly reserved by Designer. The rights granted to Client are for the usage of the Final Art in its original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, create derivative works or extract portions or in any other manner, alter the Final Art.

Category of use: _____

Medium of use: _____

Duration of use: _____

Geographic territory: _____

Initial press run: _____

With respect to such usage, Client shall have (check one)

Exclusive / Nonexclusive rights

OR

IP 2.A (i)(b) Exclusive license, no modification rights:

IP 2.2 For ___ print, ___ online/interactive, ___ three-dimensional media:
Designer hereby grants to Client the exclusive, perpetual and worldwide right and license to use, reproduce and display the Final Art solely in connection with the Project as defined in the Proposal and in accordance with the various terms and conditions of this Agreement. The rights granted to Client are for usage of the Final Art in its original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, create derivative works or extract portions or in any other manner, alter the Final Art.

OR

IP 2.A (1) (c) Exclusive license, with modification rights:

IP 2.3 For ___ print, ___ online/interactive, ___ three-dimensional media: Designer hereby grants to Client the exclusive, perpetual and worldwide right and license to use, reproduce, adapt, modify and display the Final Art solely in connection with the Project as defined in the Proposal and in accordance with the terms and conditions of this Agreement.

AND

IP 2.A (2) Liquidation for unlicensed use:

IP 2.4 Client's use of the Final Art shall be limited to the usage rights granted herein for the Project only. Use of the Final Art, Deliverables or any derivative works thereof by Client at any other time or location, or for another project or outside the scope of the rights granted herein require an additional fee and Designer shall be entitled to further compensation equal to _____ percent (___%) of the original Project fee unless otherwise agreed in writing by both parties. In the event of non-payment, Designer shall be entitled to pursue all remedies under law and equity.

OR

IP 2.B Assignment:

IP 2.5 Upon completion of the Services, and expressly subject to full payment of all fees, costs and out-of-pocket expenses due, Designer hereby assigns to Client all right and title in and to the Final Art. Designer agrees to reasonably cooperate with Client and shall execute any additional documents reasonably required to evidence such assignment.

Supplement 1: Print-Specific Terms and Conditions

- P 1. *Samples.* Client shall provide Designer with ____ (number) of samples of each printed or published form of the Final Deliverables, for use in Designer's portfolio and other self-promotional uses. Such samples shall be representative of the highest quality of the work produced.
- P 2. *Finished Work.* The printed work, and the arrangement or brokering of the print services by Designer, shall be deemed in compliance with this Agreement if the final printed product is within the acceptable variations as to kind, quantity, and price in accordance with current or standard trade practices identified by the supplier of the print and print-related services. Whenever commercially reasonable and if available, Designer shall provide copies of the current or standard trade practices to Client. Notwithstanding, Designer shall have no responsibility or obligation to negotiate changes or amendments to the current or standard trade practices.

Supplement 2: Interactive-Specific Terms and Conditions

I 1. SUPPORT SERVICES

- I 1.1 *Warranty Period.* "Support Services" means commercially reasonable technical support and assistance to maintain and update the Deliverables, including correcting any errors or Deficiencies, but shall not include the development of enhancements to the Project or other services outside the scope of the Proposal. During the first _____ (insert number) months following expiration of this Agreement ("Warranty Period"), if any, Designer shall provide up to _____ (insert number) hours of Support Services at no additional cost to Client. Additional time shall be billed at Designer's regular hourly rate, then in effect upon the date of the request for additional support.
- I 1.2 *Maintenance Period.* Upon expiration of the Warranty Period and at Client's option, Designer will provide Support Services for the following _____ (insert number) months (the "Maintenance Period") for a monthly fee of \$_____ [or Designer's hourly fees of \$_____ per hour]. The parties may extend the Maintenance Period beyond one year upon mutual written agreement.

I 2. ENHANCEMENTS

During the Maintenance Period, Client may request that Designer develop enhancements to the Deliverables, and Designer shall exercise commercially reasonable efforts to prioritize Designer's resources to create such enhancements. The parties understand that preexisting obligations to third parties existing on the date of the request for enhancements may delay the immediate execution of any such requested enhancements. Such enhancements shall be provided on a time and materials basis at Designer's then in effect price for such services.

I 3. ADDITIONAL WARRANTIES AND REPRESENTATIONS

- I 3.1 *Deficiencies.* Subject to the representations and warranties of Client in connection with Client Content, Designer represents and warrants that the Final Deliverables will be free from Deficiencies. For the purposes of this Agreement, "Deficiency" shall mean a failure to comply with the specifications set forth in the Proposal in any material respect, but shall not include any problems caused by Client Content, modifications, alterations or changes made to Final Deliverables by Client or any third party after delivery by Designer, or the interaction of Final Deliverables with third party applications such as Web browsers other than those specified in the Proposal. The parties acknowledge that Client's sole remedy and Designer's sole liability for a breach of this Section is the obligation of Designer to correct any Deficiency identified within the Warranty Period. In the event that a Deficiency is caused by Third Party Materials provided or specified by Designer, Designers sole obligation shall be to substitute alternative Third Party Materials.
- I 3.2 *Designer Tools.* Subject to the representations and warranties of the Client in connection with the materials supplied by Client, Designer represents and warrants that, to the best of Designer's knowledge, the Designer Tools do not knowingly infringe the rights of any third party, and use of same in connection with the Project will not knowingly violate the rights of any third parties except to the extent that such violations are caused by Client Content, or the modification of, or use of the Deliverables in combination with materials or equipment outside the scope of the applicable specifications, by Client or third parties.

I 4. COMPLIANCE WITH LAWS

Designer shall use commercially reasonable efforts to ensure that all Final Deliverables shall be designed to comply with the known relevant rules and regulations. Client, upon acceptance of the Deliverables, shall be responsible for conformance with all laws relating to the transfer of software and technology.

Supplement 3: Environmental-Specific Terms and Conditions

3D 1. PHOTOGRAPHS OF THE PROJECT

Designer shall have the right to document, photograph or otherwise record all completed designs or installations of the Project, and to reproduce, publish and display such documentation, photographs or records for Designer's promotional purposes in accordance with Section 6 of the Basic Terms and Conditions of this Agreement.

3D 2. ADDITIONAL CLIENT RESPONSIBILITIES

Client acknowledges that Client shall be responsible for performing the following in a reasonable and timely manner:

- (a) Communication of administrative or operational decisions if they affect the design or production of Deliverables, and coordination of required public approvals and meetings;
- (b) Provision of accurate and complete information and materials requested by Designer such as, by way of example, not limitation, site plans, building plans and elevations, utility locations, color/material samples and all applicable codes, rules, and regulation information;
- (c) Provision of approved naming, nomenclature; securing approvals and correct copy from third parties such as, by way of example, not limitation, end users or donors as may be necessary;
- (d) Final proofreading and written approval of all project documents including, by way of example, not limitation, artwork, message schedules, sign location plans and design drawings before their release for fabrication or installation. In the event that Client has approved work containing errors or omissions, such as, by way of example, not limitation, typographic errors or misspellings, Client shall incur the cost of correcting such errors;

(e) Arranging for the documentation, permissions, licensing and implementation of all electrical, structural or mechanical elements needed to support, house or power signage; coordination of sign manufacture and installation with other trades; and
(f) Bid solicitation and contract negotiation; sourcing, establishment of final pricing and contract terms directly with fabricators or vendors.

3D 3. ENGINEERING

The Services shall include the selection and specifications for materials and construction details as described in the Proposal. However, Client acknowledges and agrees that Designer is not (if correct) a licensed engineer or architect, and that responsibility for the interpretation of design drawings and the design and engineering of all work performed under this Agreement (“Engineering”) is the sole responsibility of Client and/or its architect, engineer or fabricator.

3D 4. IMPLEMENTATION

Client expressly acknowledges and agrees that the estimates provided in the Proposal, at any time during the project for implementation charges such as, including, but not limited to, fabrication or installation are for planning purposes only. Such estimates represent the best judgment of Designer or its consultants at the time of the Proposal, but shall not be considered a representation or guarantee that project bids or costs will not vary. Client shall contract and pay those parties directly responsible for implementation services such as fabrication or installation (“Implementation”). Designer shall not be responsible for the quality or timeliness of the third-party Implementation services, irrespective of whether Designer assists or advises Client in evaluating, selecting or monitoring the provider of such services.

3D 5. COMPLIANCE WITH LAWS

Designer shall use commercially reasonable efforts to ensure that all Final Deliverables shall be designed to comply with the applicable rules and regulations such as the Americans with Disabilities Act (“ADA”). However, Designer is not an expert and makes no representations or warranties in connection with compliance with such rules, codes or regulations. The

compliance of the Final Deliverables with any such rule, codes or regulations shall be the responsibility of Client. Designer shall use commercially reasonable efforts to ensure the suitability and conformance of the Final Deliverables.

3D 6. CLIENT INSURANCE

Client shall maintain, during the term of this Agreement, at its sole expense, construction and maintenance liability, product liability, general business liability, and advertising injury insurance from a recognized insurance carrier in the amount of at least _____ million dollars (\$_,000,000.00) per occurrence. Such insurance shall name Designer individually as an additional named insured. Client shall provide a copy of said insurance policy to Designer at Designer's request.

About AIGA

AIGA, the professional association for design, is the oldest and largest membership association for design professionals engaged in the discipline, practice and culture of designing. Its mission is to advance designing as a professional craft, strategic tool and vital cultural force.

The organization was founded as the American Institute of Graphic Arts in 1914. Since then, it has become the preeminent professional association for communication designers, broadly defined. In the past decade, designers have increasingly been involved in creating value for clients (whether public or business) through applying design thinking to complex problems, even when the outcomes may be more strategic, multidimensional and conceptual than what most would consider traditional communication design. AIGA now represents more than 19,000 designers of all disciplines through national activities and local programs developed by more than 55 chapters and 200 student groups.

AIGA supports the interests of professionals, educators and students who are engaged in the process of designing. The association is committed to stimulating thinking about design, demonstrating the value of design, and empowering success for designers throughout the arc of their careers.

Through conferences, competitions, exhibitions, publications and websites, AIGA inspires, educates and informs designers, helping them to realize their talents and to advocate the value of design among the media, the business community, governments and the public.

