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RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

# Setting Your Record Retention Policy

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

**Paperwork.** The modern design firm is drowning in it. Plans, reports, schedules, requests for information, technical calculations, memos and other correspondence are scattered across a variety of mediums: computer disks, blueprints, photographs, and the old staple: paper — reams of it.

Once a project is completed, the question of what to do with all these records arises. Should a firm keep them? If so, how long should the firm keep them? And what records should it keep?

The answer is: it depends.

### **A Matter of Liability**

The issue of how long to retain records usually revolves around the need to defend your firm against charges of negligence and professional liability. Simply put, a consulting firm that provides a professional service may find itself sued for negligence long after its work is done and the project completed. These claims can come years, sometimes decades later and involve problems that have more to do with poor maintenance and upkeep than initial design errors. Whatever the time-lapse, your firm can still be the principal target.

Regardless of why a claim occurs, a firm's defense will largely rest on its ability to produce records of what actually happened. That is especially true if the claim occurs years after project completion as there are fewer other means (e.g., witnesses) to confirm your side of the story.

The law traditionally has offered design firms some protections against "stale" claims — those started so long after the work was completed that the firm couldn't be held reasonably responsible. These protections are usually embodied in two areas of law: statutes of limitations and statutes of repose.

**Statutes of limitations** set time periods in which a party can file a lawsuit once a defect has been discovered or an injury caused. This can be problematic as the discovery of a defect or an injury could happen at anytime — often long after the work has been completed. That

means that a firm's exposure to a claim could theoretically run forever.

So, while statutes of limitations do offer some protection, it is a thin protection at best. Recognizing this, several professional organizations, including the National Society of Professional Engineers, the American Institute of Architects and the Associated General Contractors of America, lobbied state legislatures to adopt statutes of repose.

**Statutes of repose** differ from statutes of limitations in that they set definite time limits under which a cause of action can be brought against the design firm. Under a statute of repose, the time limit starts running at a specific point in the project's life, generally either at the completion of services or the substantial completion of construction. Once the time elapses, all causes of action are barred, no matter when the injury occurs or the defect is discovered.

Statute of repose timeframes vary from state to state with some as short as four years and others as long as 15. Some states, like Kentucky, do not offer a statute while other states may impose different lengths of repose for different types of claims. (See the table on page 3 for a state-by-state summary of statutes of repose.)

## Record Retention Policies

Because of their concrete time limits, statutes of repose offer design firms a stronger level of protection against stale claims. They also help dictate the minimum lengths of time firms should retain their records. Generally speaking, firms should keep records for the length of repose plus two or three years for a safety margin.

Firms may also want to keep in mind that professional liability insurers report that nine out of ten claims are brought within five years after project completion and nearly all claims are filed within nine years of substantial completion.

Knowing how long to keep project documents, however, is only half the battle. The other half is determining what to keep.

First, a firm does not have to keep everything. In fact, it is often best that a firm does not keep everything. The reason is "discovery."

**Discovery** is a legal process that allows opposing attorneys to get access to all of a firm's records relating to the project. *All*, in this case, means every plan, every schedule, every memo, every piece of correspondence, including e-mail — in short, everything that a firm or its employees has kept, whether it knows that it has the information on file or not.

Discovery can turn up some ugly surprises if a firm has not taken a consistent and systematic approach to record retention. For example, records can be scattered among several locations. They can include drafts of plans that were later discarded or — true dynamite in an attorney's hands — copies of informal communication among team members containing inflammatory remarks about the quality of work being performed.

The solution is to develop and enforce a company-wide record retention policy that clearly states what kinds of records are to be retained, sets out schedules for record destruction and outlines how and where records are to be stored.

## Rules of Thumb

While there is no one record retention program that fits all companies — and a firm should develop one with the assistance of its legal counsel — there are some simple rules of thumb you can follow:

- 1 The plan should be written and distributed to all employees. Clients should also be informed and a firm may want to consider recording acknowledgement of the policy through additional contract language.
- 2 Documents retained should include contracts, approvals, drawings, specifications, calculations, reports, design criteria and standards, records of phone calls, advisory letters, product research, submittal logs, site visit reports, correspondence with contractors, owners or agencies, change orders and close-out documentation.

- 3 “Working” documents, drafts and notes should be scheduled for destruction soon after the final document is created. Keep only the final document, not all the iterations that lead up to it. Those early versions may contain incomplete or inaccurate information that could mislead a judge or jury.
- 4 Do not use sticky notes (paper or electronic). They can cause confusion if they are misplaced or raise questions of whether or not there were other notes that were removed.
- 5 Require that employees aggressively manage e-mail with most e-mail correspondence being purged after relatively short periods — six months or a year.
- 6 Do not allow employees to archive records offsite. A forgotten box of records in an employee’s garage is as subject to discovery as those records found in an office file cabinet.
- 7 Make sure your policy covers desk calendars and daily planners.

### Statutes of Repose

**State            Statute of Repose**

AL ..... 13 years	MT ..... 10 years
AK ..... 10 years	NE ..... 10 years
AZ ..... 8 years	NV ..... 10 years for known defects; 8 years for latent defects; 6 years for patent defects
AR ..... 5 years for property damage; 4 years for personal injury	NH ..... 8 years
CA ..... 4 years for patent defects; 10 years for latent defects	NJ ..... 10 years
CO ..... 6 years	NM ..... 10 years
CT ..... 7 years	NY ..... None, 3-year statute of limitations
DE ..... 6 years	NC ..... 6 years
DC ..... 10 years	ND ..... 10 years
FL ..... 15 years	OH ..... None
GA ..... 8 years	OK ..... 10 years
HI ..... 10 years	OR ..... 10 years
ID ..... 6 years tort; 5 years contract	PA ..... 12 years
IL ..... 10 years	PR ..... 10 years
IN ..... 10 years	RI ..... 10 years
IA ..... 15 years	SC ..... 13 years
KS ..... 10 years	SD ..... 10 years
KY ..... None	TN ..... 4 years
LA ..... 10 years	TX ..... 10 years
ME ..... 10 years	UT ..... 6 years for contract claims; 10 years for tort actions
MD ..... 10 years	VT ..... 8 years
MA ..... 6 years	VA ..... 5 years
MI ..... 6 years	WA ..... 6 years
MN ..... 10 years	WV ..... 10 years
MS ..... 6 years	WI ..... 10 years
MO ..... 10 years	WY ..... 10 years

Note: These are only general guidelines subject to change. Have your legal counsel verify the applicable rules in your territory.

- 8 Archive electronic records on an appropriate storage medium and consider keeping a duplicate copy offsite, but make sure both copies are destroyed at the same time.
- 9 Provide for suspension of record destruction in the event of pending or ongoing litigation. Continuing to destroy relevant documents when you know a claim is likely can be interpreted as an attempt to eliminate damaging evidence.
- 10 When the time comes, destroy the records. Discarded records may be retrievable at a future date so be sure that the records are destroyed through shredding, burning or other irreversible methods.
- 11 Make sure this plan is consistent from project to project. You don't want to be caught doing a little too much "house cleaning" on that one job that went south. (Courts have shown that they are willing to accept a company's explanation that records were destroyed in accordance with company policy only if the firm can show that its policy was consistently implemented.) For that reason, it is critical that all employees know, understand, and be held accountable for implementing a firm's record retention policy.

Using the applicable statute of repose in your jurisdiction or jurisdictions, it is well advised to establish and then follow a formal record retention policy. Have it drafted or at least reviewed by legal counsel and then distribute it to all appropriate employees. Such a system can go along way toward eliminating the clutter of unnecessary paperwork and ensuring appropriate records are maintained in the event of a future dispute or claim.

### **Can We Be of Assistance?**

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.