IN THIS SECTION:

SETTING YOUR RECORD RETENTION POLICY

Frequent communication and systematic documentation are vital keys to running a successful, claims-free practice. Projects with well documented agreements, plans, reports, schedules, requests for information, technical calculations, memos and other correspondence tend to avoid many of the upsets that plague projects lacking such systematic written communications.

It is no surprise, then, that when a project closes out, there are mountains of information recorded on a variety of media, including computer networks, mobile devices, CDs, blueprints, e-mails and attachments, photographs and reams of paper. The question then becomes what to do with all of the reports, studies, plans, drawings, specifications, calculations, reviews, approvals, correspondence and other documents generated. Is it prudent to keep it all? If so, for how long? If not, which records should be kept to meet your risk management needs?

The issue of what to keep and how long to retain it largely revolves around the potential need for documentation to defend your firm against charges of negligence and professional liability. Unfortunately, a design firm that provides professional services may find itself sued for negligence long after the project is completed. Indeed, a large portion of claims occur after substantial completion of a project. Whatever the timeframe, your firm will likely remain a primary target of any project claim, even if the problem was the result of poor construction or maintenance rather than design errors or omissions.

Should you find yourself named in a project claim, your defense will largely depend on your ability to produce written documentation of what you agreed to do contractually and what actually happened during the project's design and construction phases. This is especially true if the claim occurs years after project completion as there may be few other means (such as statements of witnesses) to confirm your side of the story.

State Statutes are the Key

State laws offer design firms some protection against claims that are made long after a project is completed. These protections are usually embodied in two areas of law: statutes of limitation and statutes of repose.

Statutes of limitation set time periods in which a party can file a lawsuit once a defect or injury has been discovered. While somewhat useful, statutes of limitation offer only limited protection. The discovery of a defect or an injury could happen at any time — often long after the project has been completed and occupied. That means that a firm's exposure to a claim could theoretically run forever.

Recognizing this, several professional organizations, including the National Society of Professional Engineers, the American Institute of Architects and the Associated General Contractors of America, have lobbied state legislatures to enact additional protection via statutes of repose.

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

Statutes of repose timeframes vary from state to state. A few states do not offer a statute of repose, while others may impose different lengths of repose for different types of claims. See the table on page 4 for a state-by-state summary of statutes of repose. Note: State statutes change frequently – check with your attorney to verify the current statute of repose and statute of limitation within your state.

Record Retention Policies and Discovery

Because of their specific time limits, the statutes of repose in the states in which you operate help dictate the minimum lengths of time you should retain your records. Generally speaking, you should keep records for the length of the prevailing statutes of repose. Some advisors recommend adding a couple of years for a safety margin.

Keep in mind that approximately nine out of ten claims are brought within five years after project completion and nearly all claims are filed within 10 years of substantial completion. Therefore, there is little reason to keep records well beyond the length of your state's statute of repose unless your client requires it in your contract.

While the statute of repose in your state gives you a good guideline for how long to keep project documents, that's only half the battle. The other half is determining what records to keep.

Fortunately, your firm does not have to keep all of its records for 5 or even 10 years. In fact, it is often best that your firm 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 being litigated. All, in this case, means every plan, every schedule, every memo, and every piece of correspondence, including e-mails. In short, every piece of information that your firm or its employees has kept, whether it knows that it has the information on file or not, is discoverable.

Discovery can turn up some ugly surprises if a firm has not taken a consistent and systematic approach to record retention and disposal. True dynamite in a plaintiff's attorney's hands are copies of informal communication among team members. Informal correspondence such as e-mails or memorandums can include provocative remarks about a client or project, or raise questions about the quality of work performed.

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

10 Rules for Record Retention

While there is no single record retention program that fits all companies, there are some rules of thumb you can follow. Talk with your attorney about the following 10 suggestions:

1. Put your record retention plan in writing and communicate it to all employees. Clients should also be informed of your policy.
2. Identify the types of documents that should be retained. These may include contracts, drawings, specifications, calculations, reports, quality reviews, approvals, design criteria and standards, advisory letters, product research, submittal logs, site visit reports, change orders, close-out documentation and key correspondence with contractors, owners or agencies. The policy may dictate different retention policies for different types of documents. For example, some firms retain final hard copy drawings and specifications indefinitely while destroying most insignificant correspondence soon after project completion.
3. Generally speaking, working documents, early drafts and informal notes should be scheduled for destruction soon after the final documents are created. These early versions may contain incomplete or inaccurate information that could be discovered and used to mislead a judge or jury.
4. Require that employees aggressively manage e-mail and text messages according to company policy. Generally, most e-mail and text correspondence can be purged after relatively short periods.
5. Do not allow employees to archive company records offsite. A forgotten box of correspondence in an employee's garage is as subject to discovery as records found in a company filing cabinet or on the firm's computer network.
6. Make sure your retained documents are stored in an organized manner with clear labeling and dates. They should be kept in a clean, secure and easily accessible location.
7. Archive electronic records on an appropriate storage medium and keep a backup copy offsite. Remember, however, to destroy all backup copies in accordance with your record retention policy.
8. Suspend the destruction of records for a project in the event of possible, pending or ongoing litigation. Continuing to destroy project documents when you know a claim is imminent can be interpreted as an attempt to eliminate damaging evidence.
9. Destroy outdated records as completely as possible. Discarded papers may be retrievable, so be sure that they are destroyed through shredding, burning or other irreversible methods. Consult with information system specialists to determine the most permanent method of deleting electronic data from your computer network.
10. Make sure your record retention plan is consistently applied from project to project. Courts have shown a willingness to accept a company's explanation that records were destroyed in accordance with the company's record retention policy when the firm can show that its policy was consistently implemented. If there is a valid reason to deviate from the policy for a particular project, make sure the reason is well documented. It is critical that all employees know, understand, and are held accountable for implementing your firm's record retention policy.

Using the applicable statute of repose in your jurisdiction or jurisdictions as your guide, it is highly recommended that you establish and then enforce a formal record retention policy that conforms to your needs and unique liability concerns. Have it drafted or thoroughly reviewed by legal counsel and then distribute it to all appropriate parties. Such a system can go a long way toward eliminating the clutter of unnecessary paperwork while 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 contact us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.

ALFRED ZARLENGO | 303.831.5289 | 800.873.8500
ALFRED.ZARLENGO@USI.BIZ

6501 S. FIDDLERS GREEN CIRCLE, SUITE 100
GREENWOOD VILLAGE, CO 80111

Statues of Repose

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

Note: These are only general guidelines that are subject to change. Starting dates may vary; i.e., completion of design services, substantial completion of the project, etc. Different types of claims may fall under different statutes. Have your legal counsel verify the applicable rules in your territory.