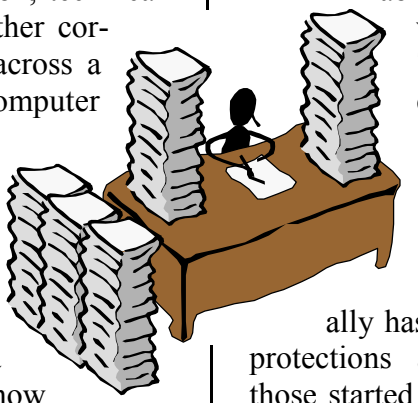
PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 03/02: "Setting Your Record Retention Policy" March, 2002

Setting Your Record Retention Policy

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 protec-

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tions are usually embodied in two areas of law: statutes of limitations and statutes of repose.

Statutes of Limitation

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 any time — 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

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 time frames 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 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.

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Statutes of Repose

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

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

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.
8. Archive electronic records on an appropriate storage medium and consider keeping a duplicate copy off-site, 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.

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Record Retention *(Continued from page 3)*

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.

Conclusion

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 a long way toward eliminating the clutter of unnecessary paperwork and ensuring appropriate records are maintained in the event of a future dispute or claim.✳

Disclaimer: *This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.*

Do You Ever Use Subcontractors?

Note that the term is "subcontractors" and **not** "subconsultants." Certainly most design professionals (especially architects and prime engineers) will, at times, use consultants to complete a portion of the work for which they have contracted.

On occasion, however, certain professionals (geotechnical and environmental engineers are good examples) will use subcontractors. The subcontractors may drill for a soil sample, test borings, or other things.

While most design professionals have a standard form "sub-consultant" agreement that they use, many do not have a standard form "subcontract" agreement (they are different). Of even more concern is when design professionals sign their subcontractors' purchase order forms.

Purchase order forms are a subcontractor-drafted agreement, and almost without exception are written to protect the subcontractor. Design professionals should develop their own subcontract agreements and avoid signing a subcontractor's agreement at all costs.

The problem is that a lot of times these are small jobs. By the time a contract is signed, the job has come and gone. You can reduce your risk substantially by using a blanket subcontract.

The basis for a blanket subcontract can be your basic subconsultant standard agreement with insurance requirements designed for a subcontractor and a broader indemnification provision running in your favor.

The contractual coverage in a contractor's general liability policy is broader than the contractual coverage in a professional liability policy, and therefore a contractor can sign an intermediate form indemnity and still be insured.

The blanket subcontract should basically state that the agreement covers all work done for you by the subcontractor during a given period of time unless a separate subcontract has been issued for work done on a specific job.

The blanket subcontract agreement can be issued to **all** subcontractors that you use on a repetitive basis. You should also obtain a blanket insurance certificate at the time the blanket subcontract agreement is issued that provides evidence of the insurance required in the subcontract, and specifically names you as an additional insured (the Additional Insured Endorsement you should request is a CG 20 10 11 85). You should also get a copy of the Additional Insured Endorsement.

You might consider establishing a guideline for your project managers on the use of the blanket subcontracts. For example:

- A job-specific subcontract is required for any subcontract, either exceeding $50,000 or lasting more than three months.
- If more than one billing is anticipated for a job, and this blanket subcontract is used, a one page notice to proceed can be issued, providing a subcontract number to allow your accounting system to track total billing for the subcontractor on a job.

While no system is perfect, a blanket subcontract agreement will enable you to have appropriate risk management protections in place for those contractors that you use on a repetitive basis for smaller jobs. ✳

Ten Commandments of Loss Prevention

The Third Commandment:

Foresee the Foreseeable – Identify Those Areas of the Contract that Traditionally have been a Source of Liability for A/E's and Address them in the Negotiations and/or the Language of the Contract

Excepted from "Ten Commandments of Loss Prevention"
by Gunther O. Carrle, Esq. Copyright RA&MCO Insurance Services, 1998

Shop Drawing Review

- The purpose of your review should be clearly stated. Generally, it is limited to a review for general conformance with design concept and with the information contained in the contract documents. You are not reviewing for: means and methods of construction, safety, dimensions, methods of installation, etc. Your shop drawing stamp should clearly set forth the purpose of, and limitations on, your review as contained in your Agreement. The shop drawing stamp cannot modify your contractual obligations.
- You should specify which shop drawings are to be submitted and immediately return shop drawings that do not require your review immediately.
- Require the contractor to review and approve shop drawings first and do not review shop drawings which have not been reviewed by him first.
- Maintain a log of when shop drawings were received, what action was taken, and when they were returned.
- Document all of your shop drawing comments.
- Require that the contractor notify you of changes.
- Your contract should state that you will not review a manufacturer's shop drawings prepared in response to a performance specification for a determination that the system will perform properly.

Ownership of Documents

- You should retain ownership.
- Do not permit your documents to be used for completion of the project, for additions thereto or for other projects without permission of the A/E and with additional compensation.
- The alternative is to require that your seal and title block be removed and the documents redrawn and reviewed by a design professional.

Construction Cost

- Detailed cost estimates vs. preliminary estimate of construction cost.
- Preliminary cost estimates should allow for contingencies and escalating labor and material costs.
- If detailed cost estimates are required, the owner should retain the cost estimator.

"As-Built" or Record Drawings

- You should be entitled to rely on data supplied by contractors without independent verification subject only to your obligation to note obvious discrepancies of which you have actual knowledge and, possibly, your obligation to detect errors which a reasonably prudent (architect or engineer) exercising usual and customary professional skill and care would have detected.

Structural Details

- If the structural details (in particular connections) raise questions of means and methods,

The Third Commandment *(continued on page 6)*

The Third Commandment *(continued from page 5)*

the contract should limit your responsibility for means and methods to that aspect.

Geotechnical Consultants

- Should be retained by the owner.
- You should be entitled to rely on their conclusions without independent verification.
- They should be required to make specific design recommendations, not merely present raw data.

Owner and Vendor Supplied Data

- You should be entitled to rely on such data without independent verification subject to the same limitations as in "as-built" drawings.

Design/Build Consultants

- You should not be responsible for code compliance of design/build work.
- You should not be responsible for the adequacy of the design/build systems.
- Your obligation to coordinate should be limited to providing the design/build contractor with the design criteria to be used by you that impacts on his aspect of the project, i.e. the architect can provide a space layout and wall section to the HVAC contractor; in turn, you should receive HVAC criteria that impacts on your aspect of the project, i.e. architect receives size and location of ducts from HVAC contractor.
- You should not be responsible for delays caused by the design/build contractor.

Indemnification Agreements

- Determine that your insurance provides coverage for indemnification agreements.
- Only agree to indemnify against losses **to the extent that they arise directly as the result of your professional negligence in the performance of services under this Agreement.**
- Specifically determine who is to be indemnified – limit it to the Owner, employees and agents.
- Get a mutual indemnification where possible.
- Under certain circumstances, anti-indemnification statutes preclude them.

Limitation of Liability Clauses

- Limit liability to your fee, to available insurance, to a fixed amount or exclude damages resulting from loss of profits and loss of use.
- The limitation must be rationally related to the services rendered.
- There should be a preamble that sets forth a basis for the clause such as:
- "Insurance is not available for the risk"
- "The fee is small in relation to the risk. ✷