# PROFESSIONAL LIABILITY UPDATE

**A Loss Prevention Newsletter for the Design Profession**

MSP PL 09/2006: "Statute of Repose Key to Your Record Retention Policy" September, 2006

# Statute of Repose Key to Your Record Retention Policy

*Article courtesy of Professional Liability Agents Network (PLAN)*

The modern design firm often finds itself drowning in documents. There are the usual plans, reports and schedules. Add on the inevitable requests for information, technical calculations, memos and other correspondence. These various records mount across a variety of media, including hard drives, CDs, blueprints, e-mail attachments, photographs and reams of office paper. So much for the paperless office we all heard about!

Once a project is complete, there is the question of what to do with all of the documents, plans, correspondence and other records that have been generated. Should you keep them all? If so, how long should you keep them? What records must you keep at a minimum to meet your risk management needs?

## Protection from Stale Claims

The issue of how long to retain your records largely revolves around the potential need for documentation to defend your firm against charges of negligence and professional liability. Simply put, a consulting firm that provides professional services may find itself sued for negligence long after the design work is done and the project is completed. Professional liability claims can come years or sometimes a decade or more later.

Whatever the timeframe, your firm will likely remain the principal target of any lawsuit, even if the problem was the result of poor maintenance rather than design errors or omissions.

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Cavignac & Associates
INSURANCE BROKERS
License No. OA99520
450 B Street, Suite 1800
San Diego, CA 92101-8005

**Phone: 619-234-6848 ✧ Facsimile: 619-234-8601**
**Web Site: http://www.cavignac.com**

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Regardless of why a claim occurs, your firm's defense will largely rest on its ability to produce records of what actually happened during design and construction phases of the project. This is especially true if the claim occurs years after project completion as there are few other means (such as statements of witnesses) to confirm your side of the story.

State laws have traditionally offered design firms some protection against "stale" claims — those instituted long after the project was 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 has been discovered or a known injury is caused. This limited protection can be problematic. 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.

While statutes of limitation do offer some protection, it is 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, have lobbied state legislatures to adopt 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 either at the completion of services or, more likely, the substantial completion of construction. Once the time limit elapses, all causes of action are barred, no matter when the injury occurred or the defect was discovered.

Statutes of repose time frames vary from state to state. Some are as short as four years and others run as long as 15 years. 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 five 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

Because of their specific 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.

Keep in mind that approximately nine out of ten claims are brought within five years after project completion. What's more, nearly all claims are filed within 10 years of substantial completion. Therefore, there is little reason to keep records beyond the length of your state's statute of repose plus a short safety margin.

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 to keep.

Fortunately, your firm does not have to keep all of its records for 5, 10 or even 15 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. *All*, in this case, means every

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Repose *(continued from page 2)*

plan, every schedule, every memo, and every piece of correspondence, including e-mail. In short, every piece of information that a 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. For example, records can be scattered among several locations. They can include drafts of plans that were later discarded due to discovered errors or omissions. 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 company-wide 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 Tips for Record Retention

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

1. The plan should be in writing and communicated to all employees. Clients should also be informed of your policy.
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 documents are 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. Require that employees aggressively manage e-mail according to company policy. Generally, most e-mail correspondence can be purged after relatively short periods — six months or a year.
5. 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 or on a company hard drive.
6. Make sure your record retention policy covers items such as desk calendars and daily planners. These items, whether paper or electronic, are subject to discovery.
7. Archive electronic records on an appropriate storage medium and consider keeping a duplicate copy offsite. Remember, however, to destroy both copies in accordance with your record retention policy.
8. Provide for suspension of record destruction in the event of pending or ongoing litigation. Continuing to destroy relevant documents

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when you know a claim is likely can be interpreted as an attempt to eliminate damaging evidence.

9. When the time comes, destroy the 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. 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. 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, it is well advised to establish and then follow a formal record retention policy. Have it drafted or thoroughly reviewed by legal counsel and then distribute it to all appropriate employees and clients.

Implementing 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.

***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.*

# Documentation: If It Isn't in Writing, It Didn't Happen!

*By Jeffrey W. Cavignac, CPCU, RPLU, CRIS*

Hundreds – probably thousands – of decisions are made on a typical project. While many of these are documented in formal meeting minutes or job file notes, many are not.

Unfortunately, some of these decisions are critical and may become an issue. If these are not appropriately documented, there is no way to prove what was actually agreed upon. If you documented everything that was said on every project, that is all you would have time to do.

The key is to make certain you document issues you feel are important. This requires some judgment on your part.

Documentation *(continued on page 5)*

# Statutes of Repose by State

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. And remember, changes in statutes of repose occur frequently. Have your legal counsel verify the applicable rules in your territory.

| State | Statute of Repose |
|---|---|
| AL | 13 years |
| AK | 10 years |
| AZ | 8 years |
| AR | 5 years for property damage;<br>4 years for personal injury |
| CA | 4 years for patent defects;<br>10 years for latent defects |
| CO | 6 years |
| CT | 7 years |
| DE | 6 years |
| DC | 10 years |
| FL | 15 years |
| GA | 8 years |
| HI | 10 years |
| ID | 6 years |
| IL | 10 years |
| IN | 10 years |
| IA | 15 years |
| KS | 10 years |
| KY | 7 years |
| LA | 5 years |
| ME | 10 years |
| MD | 10 years |
| MA | 6 years |
| MI | 10 years |
| MN | 10 years |
| MS | 6 years |
| MO | 10 years |

| State | Statute of Repose |
|---|---|
| MT | 10 years |
| NE | 10 years |
| NV | 10 years for known defects,<br>8 years for latent defects, and<br>6 years for patent defects |
| NH | 8 years |
| NJ | 10 years |
| NM | 10 years |
| NY | None<br>3-year statute of limitation |
| NC | 6 years |
| ND | 10 years |
| 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 for contract claims,<br>12 years for tort actions |
| VT | None |
| VA | 5 years |
| WA | 6 years |
| WV | 10 years |
| WI | 10 years |
| WY | 10 years |



## Documentation *(continued from page 4)*

A formal documentation plan communicated to every one in your office is a good addition to your policies and procedures. You might make "Documentation" the subject of an office round table or brainstorm session.

The key is coming to agreement on what needs to be documented, and what form that documentation will take.

One way to make certain everyone is "on the same page" is follow up e-mail. We call these "As We Agreed" letters. Others call them "Confirmation" letters. Such e-mails should be either printed and placed in the project file, or attached electronically to the appropriate file.

The key is knowing how to access this information when you need it.

Some information may not seem important enough to confirm with others, but it may still need to be documented. This can be noted in a project log or daily diary.

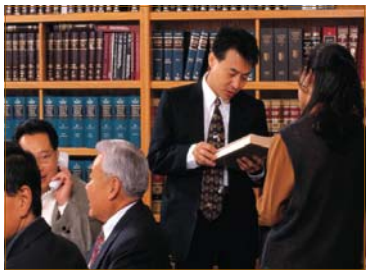
The key with any documentation is to make certain it is timely and factual. The documentation needs to occur very soon after the conversation took place, and it should not be editorialized.

In the event of problem situations, people tend to have convenient memories. A lot of times the difference between prevailing in a dispute or coming up short can be the quality of your documentation.

Remember: "if it isn't in writing, it didn't happen."

*Jeff Cavignac is President and a Principal of Cavignac & Associates.*

# The Trouble with Arbitration



Has arbitration improved as a dispute resolution process for design professionals? The consensus from the Claims Specialists of the Design Professional group of the XL Insurance companies is a resounding ***No!*** The biggest problems with arbitration are:

### It is difficult to get knowledgeable arbitrators appointed.

While the American Arbitration Association's "Construction Arbitrator Master Panel" is a step in the right direction, the majority of arbitrators have either no or limited construction experience.

### Awards, no matter how unjust, are almost impossible to appeal.

Absent a finding of fraud on the part of the arbitrator (or other very limited circumstances), an award can rarely be overturned.

### Arbitrators are not required to follow the principles of law or civil rules of discovery.

Tools such as Motion to Strike, Summary Judgment and Demurrers – which could eliminate or minimize claims – are typically unavailable.

### Arbitration is often costly and time-consuming.

The fees for arbitrators can be $3,000 a day or more – and because there are no time constraints, arbitrators have no incentive for a speedy resolution.

### What should you do?

Arbitration can be appropriate for small dollar disputes. For matters of say $250,000 or even $500,000 it simply may not make sense to litigate an issue. If however the potential damages are significant, we recommend that arbitration be mutually agreed upon by the parties to the dispute.

# Accident Investigations

*By Stuart Nakutin, CSM, ASP, AIC, WCCP, CPDM*

Accidents are unplanned and unintentional events that result in harm or loss to personnel, property, production, or nearly anything that has some inherent value. Accidents are rarely simple and almost never result from a single cause. Most accidents involve multiple, interrelated causal factors.


Accidents can occur whenever significant deficiencies, oversights, errors, omissions, or unanticipated changes are present. Any one of these conditions can be a precursor for an accident; the only uncertainties are when the accident will occur and how severe its consequences will be.

To conduct a complete accident/incident investigation, the factors contributing to an accident, as well as the means to prevent accidents, must be clearly understood. Management prevents or mitigates accidents by identifying and implementing the appropriate controls and barriers.

Accidents occur when one or more barriers in a work system, including procedures, standards, and requirements intended to control the actions of workers, fail to perform as intended. The barriers may not exist, may not be adhered to, or simply may not be comprehensive enough to be effective. Personal performance and environmental factors may also reduce protection.

Understanding how to prevent or control accidents requires an understanding of the sequence of events leading to an accident in order to identify and implement countermeasures that contain risks.

*Stuart Nakutin is Director of Safety Control Services at Cavignac & Associates.*

# BULLETIN!

# AB573 Signed into Law

On September 25, 2006 Governor Schwarzenegger signed CELSOC's Fair Indemnity with Local Agencies legislation, AB573 (Wolk) into law.

This bill provides that *"for all contracts, and amendments thereto, entered into on or after January 1, 2007 with a public agency for design professional services, that all provisions clauses, covenants and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend the public agency, by a design professional against liability for claims against the public agency are unenforceable except for claims that arise out of or relate to the negligence, recklessness, or willful misconduct of the design professional."*

In other words, it is now illegal for a public agency to require a design professional to be responsible for more than the consequences of the design professionals own negligence. This is a huge victory. The actual wording of the bill follows.

## California Bill AB 573

An act to add Section 2782.8 to the Civil Code, relating to indemnity.

### LEGISLATIVE COUNSEL'S DIGEST

AB 573, Wolk. Design professionals: indemnity.

Existing law provides that agreements contained in or affecting any construction contract that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage, or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable, except as specified. Existing law also provides that provisions, clauses, covenants, or agreements relating to construction contracts with a public agency that purport to impose on the contractor, or relieve the public agency from liability for the active negligence of the public agency, are void and unenforceable.

This bill would provide, for all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, that all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of or relate to the negligence, recklessness, or willful misconduct of the design professional.

*The people of the State of California do enact as follows:*

**SECTION 1.** Section 2782.8 is added to the Civil Code, to read:

2782.8.(a) For all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend, the public

AB573 *(continued on page 8)*

AB573 *(continued from page 7)*

agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

(b) For purposes of this section, the following definitions apply:

(1) "Public agency" includes any county, city, city and county, district, school district, public authority, municipal corporation, or other political subdivision, joint powers authority, or public corporation in the state. Public agency does not include the State of California.

(2) "Design professional" includes all of the following:

(A) An individual licensed as an architect pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, and a business entity offering architectural services in accordance with that chapter.

(B) An individual licensed as a landscape architect pursuant to Chapter 3.5 (commencing with Section 5615) of Division 3 of the Business and Professions Code, and a business entity offering landscape architectural services in accordance with that chapter.

(C) An individual registered as a professional engineer pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, and a business entity offering professional engineering services in accordance with that chapter.

(D) An individual licensed as a professional land surveyor pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code, and a business entity offering professional land surveying services in accordance with that chapter.

(c) This section shall only apply to a professional service contract, or any amendment thereto, entered into on or after January 1, 2007.