



To Document or Not to Document: That is the Question

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Course Description

When organizing your file after a project is complete, what should you toss, and what should you keep?



- Did you ever have a project email you wish you could delete “by accident”?
- Did you ever have a project drawing that went out and was later corrected, so you wish you could make the initial drawing “disappear”?

This seminar will provide guidance on document retention policies, covering the laws and rules prohibiting the destruction of evidence including electronically-stored information.

Learning Objectives

Participants will learn:

- 1** Gain a perspective on what to document versus what not to document;
- 2** Consider the merits of internal versus external project communications;
- 3** Review the basics of a document retention policy; and
- 4** Understand how the law applies to electronic and non-electronic information.

Statistic

Roughly **20 out of every 100** A/E firms experience a professional liability claim each year.



What are some important things to document?

Useful Documentation

- 1** Contract documents
- 2** Documentation of key decisions
- 3** Construction related correspondence

Contract Documents



- Scope of services
- Fee(s)

- Signature(s) by required party(ies)

- Terms & Conditions
 - a) Dispute resolution
 - b) Limitation of Liability
 - c) Indemnity

CA Written Contract Requirement

Business and Professions Code (BPC) § 5536.22

- (a) An architect shall use a written contract when contracting to provide professional services to a client pursuant to this chapter...The written contract shall include, but not be limited to, all of the following items:
- (1) A description of service to be provided by the architect to the client.
 - (2) A description of any basis of compensation applicable to the contract and method of payment agreed upon by both parties.
 - (3) The name, address, and license number of the architect and the name and address of the client.
 - (4) A description of the procedure that the architect and client will use to accommodate additional services.
 - (5) A description of the procedure to be used by either party to terminate the contract.

CA Exceptions

Business and Professions Code (BPC)

§ 5536.22

(b) This section shall not apply to any of the following:

- (1) Professional services rendered by the architect for which the client will not pay compensation.
- (2) An arrangement as to the basis for compensation and manner of providing professional services implied by the fact that the architect's services are of the same general kind which the architect has previously rendered to an received payment from the same client.
- (3) If the client knowingly states in writing after full disclosure of this section that a writing which complies with the requirements of this section is not required.
- (4) Professional services rendered by an architect to a professional engineer registered to practice engineering under Chapter 7 ... or to a land surveyor licensed under Chapter 15...

Limitation of Liability

...[A]ny and all injuries, claims, losses, expenses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, Engineer's or its Consultants services or this Agreement...shall not exceed the total amount of \$ ___ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

EJCDC Document E500-2014, Exhibit I

Indemnification

To the fullest extent permitted by law, CONTRACTOR shall indemnify and hold harmless the Owner, [Design Professional (DP)], [DP's] consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work...

AIA A201-2017 § 3.18.1

Documentation of Key Decisions



- Project Team
- Project Delivery Method
- Documents by Phase of Service

- Cost Changes
- Coordination of Consultants

- Specifications
- Code Reviews
- Schedule Changes

Construction Related Documents

- RFIs
- Submittals
- Substitutions

- Change Orders
- Emails/Photos
- Site Visit Reports

- Applications for Payment
- Certificates of Completion and Occupancy



Photographs



Guidelines:

Review photos

Take good photographs

Provide context and perspective

Written Communication & Documents



Guidelines:

Think before you send

Remain professional

Social media considerations

Documentation

Things to Consider...

- ✓ **Create a contemporaneous record**

Create a contemporaneous record.

- ✓ **Document facts, not opinions**

Document facts, not opinions. Know what is privileged and what is not.

- ✓ **Follow required protocol**

If required by the contract, follow the required documentation protocol.

- ✓ **Preserve the record**

Create a document retention policy and enforce it consistently.

Document Retention Policy

Follow your document retention policy consistently – consistency is key!

Basic Elements:

Purpose

State the purpose of the policy.

Scope

Define the policy users and types of data covered.

Duration

Identify the retention period and any exceptions.

Proper protocol

Procedures for retaining and destroying data.

How long should I hold onto my records?

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Guides for Record Retention

Consider the following and act consistently...

Applicable Statutes of Repose and/or Statutes of Limitations

Contractual obligations

Advice from Attorney

Practice-related considerations

Advice from Accountant

E-Discovery considerations

Contractual Requirement

Design Professional shall **keep such records and other documentation relating to the Services** for a period of three years after their completion, or for such longer period as may be required by the Law.

Sample Contract Language

Statute of Limitations & Repose

The protections afforded by the applicable statute of limitations and repose vary by state.



Statute of Limitations

Sets the period of time within which a claim must be brought once a cause of action has accrued.

Statute of Repose

Sets the period of time after which a claim cannot be brought regardless of whether a cause of action has accrued.

Case Law

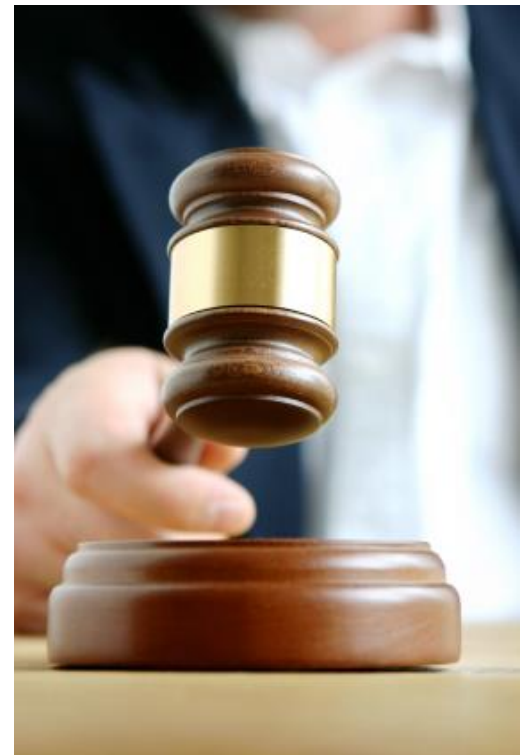
Scenario:

Client files a claim for moisture issues alleging breach of contract to perform in accordance with professional standards.

Court finds the claims are time-barred by the applicable statute of repose.

Relevant dates:

- **December 19, 2002** – School first occupies the building.
- **March 3, 2004** – State issues Certificate of Completion, transferring State's interest in the Project to the school.
- **April 30, 2015** – School files a complaint.



OH Statute of Repose

Ohio Revised Statute § 2305.131

(A)

(1) ...no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such an improvement.

OH Statute of Repose

Ohio Revised Statute

§ 2305.131

(G) As used in this section, “substantial completion” means the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

Failure to Retain Project Documents

Spoliation of evidence

Intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding.

- Physical objects
- Photographs
- Documents
- Electronically stored information (“ESI”)

FRCPP Rule 37(e)

Federal Rules of Civil Procedure Rule 37

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the information lost was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

Spoliation Analysis

Factors for consideration

Factors a court may consider when determining whether sanctions are appropriate include:

- 1** Was there a duty?
Actual notice of a claim is not required. Sometimes the standard is “reasonably foreseeable that a claim may be filed.”
- 2** Was there resulting prejudice or harm?
Considerations such as relevancy of data, harmful effect of its absence, and availability of other evidence.
- 3** Intentional or negligent spoliation?
Potential defenses to spoliation include destruction in the ordinary course of business, or by events beyond the spoliator’s control.

Key Take Aways

Remember:

Create good documentation

Document facts, not opinions.

Have a document retention policy

Draft a document retention policy and follow it consistently

Duty to preserve records

Upon notice of a claim or document retention letter, preserve all data!

It may be prudent to notify relevant parties (such as an sub consultants) so that they may do the same.

Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
Continuing Education Systems Program**

Ellen Wechsler, Operations Representative
Ellen.Wechsler@rlicorp.com

Vince Costello, AVP Professional Services Group
Vince.Costello@rlicorp.com

Greg Mello, Design Professional Underwriting Manager
Greg.Mello@rlicorp.com

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