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Statute of Repose Key to 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.

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 mediums, 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.

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 timeframes 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 3 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

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 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 10 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 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. 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 call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.

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	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
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
New York	None, 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, 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.