November 2014
Vol. IV No. 6

ProNetwork News

Risk Management Tools for the Design Professional

mwelbel@mgwelbel.com
www.mgwelbel.com

The Do's and Don'ts of Document Retention - More Paper or Paper-Less?

by William Thomas, Pitzer Snodgrass, PC

Which is better, more or less documentation in your project file after the job is complete? Despite recent advances in technology, document retention has become a difficult, expensive and complex proposition. Computers have changed design professionals' work flows and methods, greatly increasing efficiencies, but also exponentially multiplying the volume of data; e-mails, attachments, drawing revisions, text and voice messages, not to mention folks are still sending faxes and letters, actual paper ones. All of this adds up and can become an unmanageable mess, even for the best of us.

Making decisions now about which project documents to keep and which to discard is like trying to pick who will win the Super Bowl in the year 2024. You never know which ones will be the most important until you are right in the middle of a claim. Experience and common sense tell us that there are certain documents that, no matter what, are probably safe bets to come in handy down the road. You may also be required by law or contract to keep certain records for certain time frames.

This article will offer suggestions on those categories of critical project documents necessary to defend claims, and which ones are better off being discarded as a matter of course after project completion. The question ultimately is framed as "what to keep and for how long?" Of course, these are only suggestions, and you should discuss implementation of any document retention program with your chosen legal and accounting advisors in your specific jurisdiction. Further, this article only addresses retention of construction project documents and not corporate, HR or tax records.

mwelbel@mgwelbel.com
www.mgwelbel.com

ProNetwork News

Risk Management Tools for the Design Professional

"Age of Discovery"

Modern construction projects, with all this data, are subject to modern lawsuits. These lawsuits are conducted by increasingly younger, tech savvy and sophisticated lawyers who sometimes make the litigation more about the discovery effort than about the facts of the case. Parties are allowed to submit detailed and specific "requests for production of documents" once in the lawsuit, or issue subpoenas to non-parties. State and federal court discovery rules could require parties to turn over copies of all information they have in their possession related to the project.

These "spare no expense" tactics drive up the cost of litigation and unfortunately are one of the many harsh realities of the process. Discovery requests can get at your paper files, as well as all of your "Electronically Stored Information" (ESI), such as e-mail and document servers, databases and other electronic documents. Everything is fair game, with few boundaries, so your files need to be in order.

Design professionals are a detailed bunch. Often, personnel on a project keep personal journals, phone logs, or other files where they maintain their own copy of project information. These "personal files" are discoverable project records the firm would have an obligation to produce once the litigation begins, so they too should be subject to collection and enforcement per the firm's document retention program.

Document "Retention"

Nothing is more uncomfortable than hearing your client testify in a deposition about their firm's "document destruction policy." Document retention is the name of the game, even if it means at some point stuff is no longer retained. The point is that everyone should have a formal, written policy. Put it in the firm's manual and disseminate it to employees. Inform your clients in your initial retention letter about the firm's policy, and ask that they acknowledge and approve of it, so later there can be no question you did what you said you were going to do with those documents at the end of the job. The American Institute of Architects, (AIA) and National Society of Professional Engineers, (NSPE) both offer suggested policies on their websites as a starting point.

Once you have a written policy, the next step is to make sure it is enforced uniformly, across the board, every time the same way. No one can complain about your firm's policy if it is uniformly enforced. You get into trouble when, on some projects more material was either kept or discarded than the policy provides. Assign an employee to manage the program and perform occasional audits to make sure it is being properly enforced. Periodically review the policy to keep it up to date with changing technologies and trends.

William Thomas

William S. Thomas is a principal at Pitzer Snodgrass, P.C., in St. Louis, Missouri where he focuses his practice on handling matters involving the construction process, from up-front contract reviews, commercial litigation, professional liability defense and trial work. He has represented owners, contractors, subcontractors, architects, engineers, land surveyors and landscape architects in all phases of construction claims. He also handles product liability claims, other general commercial disputes and general liability claims. He is licensed to practice law in Missouri and Illinois, and several Federal Courts. He is involved in many professional organizations, and is a past president of the Lawyers Association of St. Louis, the local trial bar, and is active in the Missouri Organization of Defense Lawyers, the Defense Research Institute and its Construction Law Committee, Product Liability Committee, and Building Products - Substantive Litigation Group, and Professional Liability Committee, where he served on the Steering Committee, and Design Professional Subcommittee. Bill is an associate member of the ASCE and the AIA. He is a frequent lecturer and writer on a number of issues, from product liability to construction law.

mwelbel@mgwelbel.com
www.mgwelbel.com

ProNetwork News
Risk Management Tools for the Design Professional

It would help to maintain the archived version of the file in a uniform and organized fashion, as opposed to simply dumping all the paper in a box, as it will save a lot of time on the back end. You will also need a place where all these records will be stored. Make sure your solution for electronic documents is secure and backed up. When discarding material, make sure it is disposed of securely, using shredding or other irreversible methods. The last thing you need when trying to dispose of a client's file is a claimed "data breach" or violation of a confidentiality provision in your agreement.

In or Out?

When it comes to project documents, then, which ones are essential to keep? The point is to keep those materials crucial to defending yourself against a claim, yet not to keep non-essential material that, when viewed in the context of hindsight, wind up doing more harm than good. Innocently, by keeping material in draft form, or superseded by later issued drawings, or with internal edits and notes, you may fuel an otherwise unfounded claim by allowing skillful lawyers opportunities to confuse the issues and make you look bad.

One way to combat this weakness, particularly if there is some indication during the course of a project that there may be a claim is to segregate any internal documentation related to the claim itself into a "circumstance," "potential claim," or "claim file." Arguably, this may be protected from discovery later. Further, all correspondence with counsel or your insurance carrier should be similarly segregated from the project file at large, so if material has to be produced later, it would be easy to remove privileged items.

The AIA and other professional organizations suggest categorizing and segregating project documents considered "temporary" and those considered "permanent." Temporary records are those that are works-in-progress, or earlier drafts of documents that become final, permanent records, like sealed reports or drawings. Permanent records should be kept, while temporary ones can be discarded at project completion.

The firm should develop a comprehensive list of the "essentials" that are kept on every project for critical reasons. The following are suggested guidelines when formulating a firm's document retention policy:

Things to Keep:

- Signed and sealed drawings and specifications are perhaps the most critical as they represent the "work product" of the design firm, and typically embody their opinions and recommendations for the job. Space permitting, they should be kept in perpetuity.

mwelbel@mgwelbel.com
www.mgwelbel.com

ProNetwork News
Risk Management Tools for the Design Professional

- Some additional suggestions are:
  - Contracts, including all proposals, drafts, revisions and edits;
  - Design criteria and development as approved by client;
  - Calculations;
  - Final reports;
  - Shop drawings and submittals and logs;
  - Product research and catalog cut sheets;
  - Site visit reports and project photographs;
  - Change Orders and logs;
  - RFAs, RFIs and responses and logs;
  - Close out documents and final certifications;
  - Review of pay applications;
  - Key correspondence with all parties;
  - Correspondence with approval agencies and approval documents;
  - Meeting minutes;
  - Phone notes;
  - Bid packages and information;
  - Schedules;
  - Certificates of Insurance from any parties;
  - Warranty information and project close out documentation;
- Other communications may still be a significant portion of the documents retained. Correspondence on critical issues or project direction or details should be retained, however, other less formal and non-critical communications that are otherwise reflected in other documents can be discarded.
- If new, novel or special systems or products are specified for your project, it would be a good idea to retain all documentation related to that issue. The claim and/or trial will focus on this issue if there is some failure, and you want to make sure that your exercise of professional judgment was based on a sufficient amount of due diligence.
- Litigation usually focuses on things like substitutions of products that are not quite as good, or change orders or decisions that altered the original path. Consider maintaining a separate file on these issues that have some project significance, and keep all the documents that explain the reason why you got from point A to B. This will make it easier later to explain the story of the project to the jury from your perspective.
- If the firm has a formal, published “quality control” program, then you should keep all documents that evidence the program was adhered to, including review documents and marked up drawings. This would be an exception to the idea that draft documents not be retained, if they were the ones that were marked up as part of adherence to the QC program.
- Contracts are another exception to the “don’t keep drafts” rule. Often times,

mgwelbel@mgwelbel.com
www.mgwelbel.com

ProNetwork News
Risk Management Tools for the Design Professional

your client may claim that a certain provision of your contract or terms and conditions were not "negotiated," like a limitation of liability clause. However, if you went back and forth on the language of the agreement, and that provision was never changed, that would be pretty strong evidence they accepted the clause, and it should be enforced. In addition, drafts may be used to explain ambiguous terms.

Things NOT to Keep:

- Working versions and superseded versions of documents should generally be discarded after final versions of the documents are issued. All "milestone deliverables" should be maintained, however.
- Informal communications and internal e-mails and memos may have been prepared which offer critiques, suggestions for improving plans or reports, or "self-critical analysis." These comments, while possibly helpful at the time to improve the finished product, are only going to be damaging later in a lawsuit, and should be discarded after the final version of the drawing or report is created.

"I have to keep this stuff how long?"

Defending yourself against ever growing numbers of questionable claims requires some level of documentary evidence. Perhaps something as simple as your contract's scope of work could clarify the level of your firm's involvement, or those boring logs which show that, in fact, no rock was encountered at the various boring locations in question. Some document will undoubtedly be marked as "Exhibit A" in the inevitable lawsuit that usually comes at least once in a firm's existence. (It is always a good practice to state explicitly what your scope of work does not include.)

Claims cannot be brought against designers in perpetuity, without time limit, however, in nearly every state. What this means is, pursuant to most states' "Statutes of Repose," claims against design professionals for their involvement in the design and construction of a project are extinguished after the running of a certain number of years. Typically, the statute begins to run after the project's date of substantial completion, or some other similar date. These "Statutes of Repose," laws passed by the various states' legislatures, fix a "drop dead date" when claims for projects can no longer be brought1.

Why a cutoff date? Designers should not face endless liability for a project they turned over to an owner many, many years before. At some point, the owner has an obligation to properly maintain the building, which relieves the designers for any problems that could have been their responsibility. Further, over time, people's memories fade, records may be lost, and it just becomes unfair to make designers forever liable for something they relinquished control over so long before, (if they

mwelbel@mgwelbel.com
www.mgwelbel.com

ProNetwork News
Risk Management Tools for the Design Professional

ever really had it).

But, mere extinguishment of claims is, as you may have expected, not so easy. Many states have what are called “savings clauses,” which extend the cutoff date for claims if the injury is discovered within the original repose period. Further, most states have exceptions to the statutes for things such as fraud, intentional concealment or reckless disregard, among other exceptions. In other words, as you might imagine, people will often claim that the design professional committed fraud on the project as a litigation tactic just to get around the fact that they waited too long to sue.

So, as you can imagine, the conventional wisdom is that you should absolutely keep key project materials at least until the expiration of the repose period plus savings clause in the state where the project is located. Thereafter, recognizing that a claim could still be brought, it would be a good idea to continue to retain key documents identified above, unless space simply is not available, in which case, the design professional should make every effort to keep a group of core documents that should be retained by the firm in perpetuity. And that’s a mighty long time.

Litigation Hold

Unfortunately, if you know or suspect that there will be a claim arising out of a specific project, you should suspend destruction of any project related documents. Some claimants will go so far as to send a “litigation hold” letter early on in the claim process, even before suit is filed, placing you on notice not to destroy any records in your possession, including ESI. If any records are destroyed thereafter, it will allow your adversary the opportunity to argue it was done for an improper purpose, in an effort to cover up or destroy unfavorable evidence, even if there was none there. In some states, they may have an independent claim against you for what is called “spoliation of evidence,” in addition to an instruction being given to the jury that you destroyed evidence because it would have been unfavorable.

The clear message here is to refrain from discarding anything once a claim has materialized, and immediately discuss the issue with counsel in your jurisdiction if you have questions. You should also be careful what you put in writing once there is indication of a claim, and discuss the situation immediately with your carrier and lawyer, as they can assist you through the process.

Finally, if any documents are being maintained electronically, and are produced in their “native format,” great care should be taken by your IT department to remove all Metadata before documents are produced.

mwelbel@mgwelbel.com
www.mgwelbel.com

ProNetwork News

Risk Management Tools for the Design Professional

Broker's Notes:

Visit the a/e ProNet website today for more excellent resources:

ProNet Practice Notes

Building Information Modeling

Building Information Modeling (BIM) is the process of developing a virtual, three-dimensional, information-rich model to design, construct, and maintain a building project. BIM is much more than software used to produce a pretty 3D graphic. Because a variety of information can be embedded into the model, BIM can also be used to manage the project's construction schedule (4D); to track project costs (5D); and, once constructed, facility management (6D).

Guest Essays

Stirring the Pot: Workplace Drug Policy Implementation in the Era of Legalized Medicinal and Recreational Marijuana

In a wave of change that children of the 1960s only dreamed, debated and theorized about, almost half of the states in the United States have now passed laws legalizing the controlled distribution of medicinal marijuana, and two states have even legalized the sale of recreational marijuana… These new laws raise a variety of questions for employers who have drug screening programs or any type of drug-free workplace policy.

The ProNet Blog

The Travelers Contract Solutions Matrix

When it comes to insuring architects, engineers, and design consultants, one thing the top-tier Professional Liability insurance providers have in common is a wealth of risk management resources for their clients. Continue reading…

Permissions:

Reprinted with permission from William Thomas of Pitzer Snodgrass, P.C. and Travelers. Original article appeared online as part of the *Travelers Stamped, Sealed, Delivered* series.

Note: This article is not intended to convey legal advice. Readers in all cases should engage competent legal counsel with respect to particular issues, contracts, and disputes.