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Record Retention and Destruction in the Digital Age

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.

Having a well planned and executed record retention and destruction policy is vital to a well-run design business. Being able to locate important documents at a moment's notice saves time and money and leads to more effective planning and decision-making. Alternately, trying to find a piece of vital information within the jumble of disorganized files and years' worth of correspondence of all types and formats can be a fruitless exercise in frustration.

With automation came the promise of a "paperless office." But truth be told, automation has only exasperated the problem of disorganized, out-of-control recordkeeping. As automation tools and digital information continue to evolve and grow, storage capacity for electronic data has reached unimaginable dimensions. Today, the need to purge unnecessary or duplicate digital information, from a storage capacity standpoint, is virtually nonexistent for most companies. Huge amounts of information can be stored on hard drives, on flash drives, on network servers, on laptops, on phones, on discs and on tapes. Today, you can even store your documents in the seemingly limitless clouds.

The lack of a formally planned and executed record retention and destruction policy can dramatically lower a design firm's productivity and profitability. Beyond that, it creates a huge liability from a legal standpoint. If you've ever faced the threat of a professional liability claim and had to gather vital information regarding an alleged error or omission on one of your projects, you know the challenge this can present. And when a plaintiff demands evidence from your records, electronic documents are subject to the same "discovery" rules as paper documents.

Discovery *is a legal process that allows opposing attorneys to get access to all of a firm's records relating to the project being litigated. That includes every plan, every schedule, every memo, and every piece of printed or digital correspondence, including e-mails and text messages, that the plaintiff deems relevant. In short, every piece of information that your firm or its employees has kept, whether it knows that it still 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 and destruction. Those snarky email comments about a client, or an employee's informal, spur-of-the-moment admission to making design errors are discoverable. What's more, your company incurs the cost of producing the requested information. That's why it is imperative that all design firms make a formal program of record retention and destruction a high priority.

Developing a Record Retention Policy

Someone within your firm should be designated as the record retention manager and lead a team in developing a document retention and destruction policy. Because of the importance of digital recordkeeping, it is often best to appoint an IT manager or equivalent to lead the charge. Or, if necessary, bring in an outside consultant to work alongside members of your management team. You'll also want to make sure that your legal counsel is involved in the process and assists in developing appropriate protections against potential liabilities.

The primary task of your record retention team is to identify what information should be kept and for how long and then destroy no-longer necessary documents and files per a formal schedule. Many design firms find it efficient to organize and store its records by project. All documents and correspondence, including photos, drawings, emails and text messages, should be kept in an electronic or hard copy file for the duration of a project. Then, upon project completion, unnecessary and duplicate records should be destroyed and disposed of. It is important that whatever record retention and destruction policy you create, it must be consistently applied.

Examples of the types of information that should be organized, labeled, dated and stored past project completion include:

- The designer/client contract
- Designer/subconsultant contracts
- The contractor/client contract
- Any other contracts between project parties
- Project team directory
- Drawings
- Specifications
- Calculations
- Design criteria and standards
- General conditions
- Atypical jobsite conditions
- Scope of services
- Services refused or suspended by the client

- Quality reviews
- Advisory letters
- Product research
- Submittal and document logs
- Important meeting notes and reports
- Jobsite observation reports
- Project milestones
- Requests for information (RFIs)
- Change orders
- Billing and payment records
- Certificates of substantial completion
- Project cost summary
- Project closeout checklists.

Records of any complaints from or disputes with the client, contractor or other parties to the project should also be retained. These may include emails, text messages, phone records, bulletin board posts, blogs and other "informal" means of communication. Retain copies of responses to these disputes and complaints as well as any evidence that the problems were resolved to the other party's satisfaction. These may be retained in a separate "issues" sub-file.

No-longer-necessary or outdated working documents, early drafts of plans and specifications and informal notes are the types of documents that should likely be destroyed at project completion.

How Long Must I Store My Records?

How long must your important digital and hard copy documents be retained? That depends partly on two areas of state law: statutes of repose and statutes of limitation.

Statutes of repose set definite time limits during which a cause of action can be brought against a design firm. Under a statute of repose, the time limit starts running at the completion of design services or, more typically, the substantial completion of construction, and runs for a specified number of years. Once that timeframe elapses,

causes of action are barred, no matter when the injury occurred or the defect was discovered.

Statutes of limitation differ from statutes of repose in that they set time periods during which a party can file a lawsuit once a defect or injury has been discovered. While somewhat useful, statutes of limitation offer only limited protection for design firms. A defect can be discovered or an injury could happen long after a project has been completed. That means a firm's exposure to a claim can run for decades.

Statutes of repose and limitation timeframes vary from state to state. A few states do not offer a statute of repose, while others may impose different lengths of time for different types of claims. Note: These state statutes are subject to change – check with your attorney to verify the current statutes of repose and limitation for the states in which you operate. These should serve as the minimum length of time you should retain important project records.

There is one important exception to these rules for disposing of project records: when you have reason to believe that the project may be a source of litigation. If you are currently in litigation regarding a project, or if you have reason to believe that a claim may be made in the future, then you are obligated to retain all of your current records regarding that project. You have a duty to preserve these records, including all digital records such as emails, and any destruction may be seen as destroying relevant evidence even if you are following your normal record retention and destruction policy.

Design firms may wish to keep permanent copies of items such as contracts and the final sets of plans and specifications. Also make sure you follow any record retention requirements that might be included in your client contract, or that might be contained in any legal, regulatory or administrative requirement associated with the project.

Tips for The Digital World

Going forward, it is wise to set guidelines and instruct employees on how they may and may not use and store digital documents and communications when conducting company business or using the company computer network. Here are a few suggestions that can help keep the company organized and out of legal trouble.

Create a formal record retention policy. Draft a policy statement that summarizes your document retention and destruction objectives, establishes calendars for reviewing and destroying unnecessary project files, and outlines the roles and responsibilities of management and employees.

Educate employees on digital document retention. Train them on setting up their digital files so that recordkeeping is consistent throughout the company. Based on your document retention and destruction policy, teach employees how to organize and store project document and when and how to delete unnecessary and outdated documents, including preliminary drafts of documents and plans, and emails that no longer serve a purpose. Also, explain to employees that they should take the attitude that no digital document is ever completely deleted, that there is almost always a retrievable copy in some computer or some backup drive, tape or cloud. Thus, they should take extreme caution before creating any digital document or communication that could come back to bite them or the company.

Keep it in-house. As much as possible, have employees conduct company business on the company's computer equipment and network. That includes emails, phone calls, digital files and general correspondence. Sure, it's almost impossible to prohibit employees from making occasional business calls or sending messages to colleagues, vendors and clients on their personal phones, or communicating or transferring documents on personal email accounts. But these should be the exception, not the rule.

Back it up offsite. Keeping a back-up copy of your project and other important records off site serves as valuable protection in the event of a fire, earthquake or other disaster at your office. However, be sure to update and destroy these back-up records in accordance with your record retention policy.

Strive for 100% digital. Chances are you currently maintain a mix of digital and hard copy documents in your project files. Your goal should be to get 100% digital record retention. That may require digitizing some of your hard copy documents as part of your project closeout procedures.

Beyond Project Files

The focus of this article is on digital document retention and destruction as is applies to a design firm's project files. However, realize that digital document retention and destruction policies can and should apply to other aspects of the business as well. For example, financial recordkeeping, including tax filing , can benefit greatly from such as policy. So can human resource management. Any aspect of business that utilizes digital recordkeeping is a potential target for improvements in document creation, retention and destruction.

If you lack a well-staffed IT department, this project may call for the hiring of a consultant experienced in setting up a document retention policy. However, it will be up to management to ensure it is appropriately applied and enforced in order to gain the full benefits of increased efficiency and decreased liabilities.

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.