

# INDUSTRY INSIDER



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Effective document retention policies are quickly becoming one of the most important aspects of defending design-defect claims and professional negligence claims for architects. The issue of what documents your firm should keep and for how long largely revolves around the potential need to defend your firm against design-defect or professional negligence claims. If your firm is in a project dispute, your defense will largely be based on what you contractually agreed to do and what actually occurred during the various phases of the project. Thus, it is imperative that architects are actively retaining project documents and have a system in place that systematically manages, retains and releases project documents. Having an effective document retention policy will not only allow for a more effective defense in litigation, but will also help avoid the potential for discovery sanctions relating to spoliation of evidence.

## WHAT TO KEEP

Design-defect and professional negligence claims often can be resolved based on the determination of what the architect's actual scope of work was for the project. Thus, the documents that will include what the scope of work was for the project should always be retained. These documents can include the professional services agreement, all amendments or changes to the professional services agreement, any requests for proposals ("RFPs"), and importantly, all exhibits to these documents.

Where a project dispute involves the architect's scope of work, project-specific documents will need to show what actually occurred during the course of the project. These documents can include all bid documents (including project manuals, specifications, and drawings) prepared for the project, drawings, specifications, calculations, reports, approvals, design criteria and standards, submittal logs, site visit reports, RFI logs, change orders, certified payment applications, certificates of substantial completion, certificates of occupancy, certificates of final payment, close-out documents, and key correspondence with contractors, owners, agencies, or other design-professionals relating to the project.

## HOW LONG

The question of how long to retain project documents is answered in four parts. First, some project documents should be retained for the life of the structures or improvements. These include the professional services agreement, all amendments or changes to the professional services agreement, any requests for proposals ("RFPs"), the bid documents (including project manual(s), specifications, and drawings), record drawings (if any), the certificates of substantial completion, and the final certificate for payment. Thus, your retention policy should reflect that these key project documents are retained for the life of the structure or improvement.

Second, other project-specific documents should be retained for the period of time for which a potential claim sounding in design-defect or professional negligence can be brought. This period is defined in the applicable statute of repose or statute of limitations. Under Utah law, the Builder's Statute of Repose provides a time limit and complete bar to bring a claim against an architect after a specified period of time. The Builder's Statute of Repose provides an outside repose period of nine years from the date of completion of the improvement or abandonment of construction. This means that any claim against an architect sounding in design-defect or professional negligence must be made within nine years



of the completion of the project or the abandonment of the project. However, if a cause of action is discovered or discoverable in the eighth or ninth year of the nine-year period, an injured party has an additional two years to bring an action. Thus, an injured party can have up to eleven years from the date of completion of the improvement or abandonment to bring a claim. Therefore, a conservative approach to retaining project documents would be to ensure that those documents are retained for at least twelve years following completion of the improvement.

Third, your professional services agreement or contract with an owner or contractor may require that project documents are maintained for a period longer than the twelve year period following completion of the improvement. If the relevant agreement requires a longer period, you must ensure that your firm's retention policy is amended for that project and for those project documents. You must be vigilant in regards to the agreements that are entered into as contractual duties may exist to a client or a third party.

Finally, if your firm does find itself in litigation, a litigation hold will supersede any document retention policy. The purpose of a litigation hold is to put your firm on notice of potential or actual litigation and put your firm on notice that you cannot destroy, release, or otherwise relinquish any documents your firm has relating to a project. Once you have notice of an actual or threatened litigation, you have a duty to retain documents relevant to the subject matter of the project dispute.

## FAILURE TO RETAIN PROJECT DOCUMENTS

Failing to adequately retain project documents will place you at a disadvantage when defending against design-defect or professional negligence claims. However, there are more severe consequences of failing to retain project documents. In Utah discovery sanctions are available to the court if a party destroys, conceals, alters, tampers with or

fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Discovery sanctions include an award of attorneys' fees and expenses caused by the failure to preserve documents, an adverse inference with respect a missing document, and default judgment. Utah courts are not lenient to the spoliation of evidence and have clarified that the sanction of a default judgment does not require a showing of willfulness, bad faith, or violation of court order. This means that even the mere failure to preserve project documents, regardless of any other factors, is potential-enough for a default judgment against a design professional. Having effective retention policies and adhering to litigation holds will not only aid you in a project dispute but will reduce the risk of harsh consequences stemming from court-ordered sanctions.

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