Retention Deficit and Disorder:
The Riddle In Document Retention Policies

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After a few hundred years of the development of American law, one would think that there are concrete answers to legal questions and that good lawyers will provide that concrete, yes or no answer with just a phone call. When lawyers begin any response with, "Well, that depends on . . ," our clients groan, begin hitting themselves with the phone and decry the existence of all things legal. So I cannot help but grimace when faced with the single most common question thrown at lawyers giving seminars on almost any topic to almost any audience - How long should I keep my project files?

Well, that depends. [Groan] Where do you live? Do you have a written document retention policy? Do you have a claim coming down the road and now want to shred everything you ever did since the beginning of time? Are you in the middle of litigation? How old are the potential plaintiffs? At this point, the poor soul who asked the question blushes a little and wishes that he or she had chosen a different session for the morning.

But this is not a stupid question, particularly in the post-Enron world. Answering the question even for liability and risk management purposes requires some background, a written plan for document retention and consistency. This Topic of the Day will concentrate on retention of documents for liability and risk management purposes. For an excellent discussion of records management generally, see ***Records and Information Management: Meeting the Challenge***, ProNet's Practice Notes, *Vol. 7, No. 3. August, 1994, http://aepronet.org/pn/vol7-no3.html*.

Document retention is governed by a number of possible authorities, laws and regulations, as well as philosophies about defense of claims. There are tax rules, litigation rules, statutes of limitation, criminal laws and, ultimately, common sense weighed against the ever-rising cost of storing the work product of a practice that adds new projects and paper every year. Concentrating on liability and risk management, first, think about how long. Then what to save. And then in what format to save.

Riddle In Time

A statute of limitations has nothing to do with statuary or with the amount of clothing necessary for dancers to satisfy local decency ordinances (people have really used the term this way). State and federal laws provide for different time limits to file different types of civil and criminal lawsuits. As little as one year for certain civil claims, as long as 40 years for others, and some have no limit at all - murder charges, for example.

Many states have special time limits applicable to claims arising out of construction or improvements to real estate. When provided in a fixed number of years, it should be easy to calculate, right? But when does the fixed number of years start running?

A new warehouse, constructed in 2000, substantially complete on January 30, 2001 and a final certificate of payment was issued on April 30, 2001. On May 1, 2001, substantial rains pound the new warehouse, resulting in some ponding on the new roof. A roof drain becomes clogged with debris blown about by the storm, and, eventually, water finds its way in through the ceiling, damaging some ceiling tiles. The architect reviews the condition, the contractor comes back, cleans out the roof drain, replaces the tiles and recaulks several areas around the roof drain. Months go by without any water infiltration. The following February, in warm weather, some melting ice finds its way in. In the Spring, rains begin with slow, dripping leaks developing near another roof drain. Each time, the architect gets a phone call, goes to the site and watches the contractor come back to clean up and caulk. This continues through years 3 and 4, after which the contractor is out of patience, blaming a bad drainage design and the building is out of warranty. The following summer, in year 5, a Hundred Year Storm yields more water inside the structure, this time like a running stream rather than occasional drips. The owner files suit against the architect and the contractor, both of whom argue that the four year statute of limitations has expired.

In Illinois, an injured party has ten years to discover a claim (the "repose" period) and four years to sue, running from when they knew or should have known they had a claim (the "limitations" period), for up to fourteen years in total. A long time, but its predecessor was "forever." In comparison, fourteen years seems better.

Discovery Rules and Equitable Estoppel. Other states provide for fixed time limits to sue, but somewhat indefinite periods within which to discover a claim either by statute or by judicially created "discovery rule" periods. Either way, there is always, always, always a dispute over when the person knew or should have known of their claim.

In the above example, the contractor will argue that the roof leaked in 2001 and that the four year statute of limitations should begin running from the first leak in 2001. The owner will argue that the contractor continually fixed the problem, giving the owner no reason to sue. It wasn't until a deluge that the claim became obvious and that it was apparent to be caused by a construction or design defect. Assuming that the contracts say nothing about timing of post-construction claims, the inquiry is one of timing of "accrual" of a cause of action. (Although if the parties used unmodified AIA documents, they may have contractually agreed that the period began running against the contractor no later than a failure to act under the contractor's warranty or the "date of any correction of the Work or failure to correct the Work" during the one year call back warranty; and against the architect no later than Substantial Completion, Final Payment or when the architect's services are substantially completed) (Compare AIA Doc. A201 ¶ 13.7 and B141 ¶ 1.3.7.3).

Without a contractual provision to define it, accrual of a claim is usually defined to be the time when someone knows or should know that they have a claim. In the above example, when would that be? A drip in year one. A few more drips in year 3. A deluge in year 5. If the first drip gave the owner enough information to sue, he had to sue. But these inquiries are inherently handled case-by-case, leaving little hope of an early judicial determination of the issue before a trial.

In many states, efforts to repair the condition can lull the owner into a false sense of security, delaying the filing of a lawsuit because the problem was temporarily fixed. Whether called "equitable estoppel" or

"fraudulent concealment," the owner usually gets more time to sue when repeated repair efforts temporarily fix the problem. In the above example, the architect did not repair anything. Should the owner get more time against the architect too? That depends. [Groan]. What did the architect do or say?

The Injured Child. The problem becomes even more difficult when a child is injured or a person is left mentally incapacitated. Although not true in every state, many states grant children the opportunity to become 18 before having to sue. And even then, the child gets an additional period of time after their 18th birthday to sue. The incapacitated plaintiff gets some time after resolution of his incapacity - an indefinite extension for someone permanently incapacitated.

A snowy day on a public sled hill, four years after construction*. Recent snow storms have left mounds of snow piled by snow plows in an adjacent parking lot. Kids find that they sled down the side of the hill, toward the parking lot, and launch themselves over the plowed snow banks and into the parking lot, landing on their feet. Neat. A five year old does just that, down the side of the hill, airborne into the parking lot, landing on his right hip, shattering it and parts of his leg. Thirteen years and dozens of surgeries later, the child is 18, walking despite a two inch difference in the length of his legs, which may yet be repaired by further surgeries. He files suit against everyone who designed, owned, managed, plowed or even thought about the hill one week after his 18th birthday -- thirteen years after the accident, seventeen years after completion of construction and nearly twenty years after issuance of the design documents.*

How much do you remember from any particular day, week, year or project from twenty years ago? If you saved your letters, meeting minutes, drawings, change orders and surveys, your lawyer can piece together what happened, what was decided or agreed and why.

The above example is an oversimplified description of a real claim in which we were able to blow the dust off of old surveys and drawings long enough to demonstrate that the parking lot onto which the boy was launched did not exist at the time of completion of construction. The lot was expanded five years later, causing it to be much closer to the hill and setting the scene for the snow plows to leave mounds of snow 15 feet away instead of 50 feet away. It had been 20 years since the completion of design. None of the firm's principals realized that the lot had been modified until the documents were compared to a current survey. Without those documents, there may have been no obvious defense other than blaming the child for his injuries. Instead, we were able to move for summary judgment and resolve the case long before trial.

Time. Insurance companies will tell you that the vast majority of claims are filed within 5 or so years following completion of construction. But claims may be filed much later -- 14 or more years after the completion of construction in Illinois. So when clients or seminar attendees ask how long to keep their records, I usually recommend that important records be maintained for 14 years. Longer if children are likely intended users or if the projects are unusual in either danger, number of probable users or there is something unusual about the design or application. Public buildings, sled hills, skate parks, ski resorts, zoos all need special consideration. Much less so for residential work or interior office build-outs. Remember also that your contract may have committed you to keep all of your records for some period of time. It has become very common for public and private bodies to audit construction contracts in the context of both civil and criminal investigations. Particularly after Enron, even if the contract did not set a time to keep records, one never wants to tell the auditor, Inspector General of some agency or U.S. Attorney that they destroyed the records.

Riddle In Contents - The Phone Book And Pin Up Calendars

Everyone who has ever moved to a new home knows that when you first start packing boxes, you begin by carefully sorting what you will take with you from what you will throw away. As time and patience grow short, you begin throwing everything into the boxes even if you may throw it away when you get to the new house - the drawer full of pens from every hotel you've ever visited, broken scissors and pizza coupons, the broken tooth brush holder, the cook books damaged in the flood . . . Anything to be done with packing.

So what's in your files? When projects are boxed up and shipped to storage they sometimes contain the same miscellany, all of which add to your volume and storage cost and some of which may be embarrassing. I was once involved in litigation in which documents from a construction trailer were numbered, copied and produced to all of the lawyers in the case. Every piece of paper was numbered and copied, including the phone book, the nudie calendar on the wall and reams of blank copy paper.

There are many schools of thought on what should be kept forever, what should be kept for awhile and what can be tossed at the end of the project. You do not need to keep blank paper, the phone book, the desk calendar (unless it reflects meetings or appointments). Some A/E's write nothing down during construction, keep no meeting minutes and try to avoid creating any paper that can be used to hang them later. Some A/E's keep their contracts, final drawings and specifications and throw everything else away at the end of the project. Others keep every scrap of paper forever. None of these extreme are really advisable, but they have more to do with the particular firm's claim experience and depends a little on their practice and project types.

At a minimum, keep your contracts, your final drawings and specifications, meeting minutes, notes and written correspondence with the owner and contractor. These will give your lawyer something to work with in the event of a claim. Without these, your lawyer will not have much to work with in analyzing or defending a claim. If there is something on paper that hurts you, chance are that it exists in the owner or contractor files anyway, or that someone would be able to testify to whatever it was. Avoiding paper just makes the truth harder to analyze or defend.

Whatever you decide to keep, do it consistently, using a written policy and checklist. If you throw out shop drawings for one project but not for others, a claim that you blew it in the review of a particular shop drawing will gain teeth if it comes on the one project where you tossed them.

One more area that is giving litigators heart attacks - email and voicemail files. The rules have changed, but court rules now require that electronic documents be preserved and produced like any other record. If you have a pending claim and keep backups of email and voicemail for your servers, but overwrite them every few weeks as you swap tapes, you may be unintentionally violating the Court's discovery rules.

Particularly for email and particularly if you know a claim is coming or has already arrived, print out every email and every attachment concerning the project and provide them to your lawyers. In the pre-claim and claim context, think early about whether your voicemail server has backups that may constitute evidence and need to be preserved. Destroying or deleting them, even unintentionally, will reflect poorly on your defense and can even result in monetary sanctions or presumptions at trial that the email you destroyed was damaging. Those email files may contain proof that you alerted your client or the contractor to precisely the issue that could have prevented the dispute -- like the fact that value engineering the mechanical system from a four pipe system to a two pipe system was a really bad idea.

Have a written procedure for printing and filing email, and save electronic copies by project if possible. Training your employees to diligently keep email like any other file document can help keep judges and juries from believing that you destroyed damaging evidence.

Riddle In Media - The 8-Track ROM Drive

My kids roll their eyes when I tell them this, but I used to back up my vinyl records on blank 8-Track tapes. Many businesses began the computer age by backing everything up on floppy disks, then later, hard drives or tape backups. Design firms eventually began imaging everything and backing up all CAD materials on CD-ROM's. Then DVD-ROM's held more data and became more cost effective.

Why save paper when you could be paperless, saving space and cost? Because technology continues to advance and push old media formats into the Smithsonian. Try to find somewhere to play 8-Tracks, or to read a 5-1/4 inch floppy disk that is only ten years old. In the next few years, it will become more difficult to find places to read a 3 inch floppy disk. As DVD-ROM's continue to take over the storage media market, CD's will be left far behind, probably in just the next five years. If you decide to back up documents electronically, print them out anyway. The DVD may help you if an issue comes up in the first few years. But with a claim twenty years later, your defense lawyer will not know what to do with a DVD.

The Riddle In Retention

How long should you keep which documents? It depends. [Groan]. But find a lawyer in your home state that knows how your state's statute of repose and limitations are interpreted and who understands the design professional's business risks. Work on written procedures and policies to apply consistently in all of your project files. If you have a written policy and apply it consistently, you should be able to avoid Retention Deficit & Disorder.

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