



## Design Professional

### What you need to know

**What should you do with that mountain of files, documents, correspondence, e-mail and other records in your office? There's no one-size-fits-all answer, but it's important to come up with a policy and stick to it.**

There are several reasons why your firm should retain records: First, you might want to refer to project documents later on, perhaps when designing additions or alterations. Federal, state and provincial agencies and regulations (such as OSHA, EPA and HIPAA) impose record retention obligations. And some clients may require you by contract to maintain records for defined periods.

You must be prepared to comply with potential litigation demands (and make sure your subconsultants are, too<sup>1</sup>). Additionally, courts sometimes impose “litigation hold” duties on firms involved in (or that reasonably expect) litigation, requiring them to take measures to prevent destruction of records that might be relevant.

### **Establish a policy**

Set up a document retention policy that details how information should be created, obtained and used—and how it should be saved and stored. The idea is to ensure that records are retained in an orderly way and in an accessible format so they can be retrieved easily, quickly and with a minimum of expense. The policy should also provide for regular identification and destruction or disposal of information that no longer serves a useful business purpose.<sup>2</sup>

Just as important, you must have policies in place to prevent the destruction of any information—electronic or paper—that may be relevant to a dispute.

No single record retention policy will be appropriate for every firm, and the requirements for each project may differ, too, depending on:

- **Applicable laws.** Laws vary depending on the state and the project. If a project is out of state or province, the laws that will govern disputes may be designated in the contract. If you work for federal entities or in other countries, you may be subject to laws that differ from those at the state, provincial or even federal level.

- **Your contract(s).** Each agreement will differ; requirements in the American Institute of Architects (AIA) or the Engineers Joint Contracts Documents Committee (EJCDC) standard form agreements may be vastly different from those in a public agency contract.

## How long should you keep records?

Many defense attorneys will answer “forever.” Since that’s unrealistic, you’re going to have to make decisions that reflect the factors above, as well as any archival and other business needs, and craft your policy around them.

## What should you keep?

Unfortunately, there is no easy answer. Some attorneys will say “everything” because the non-final, marked-up versions of documents often contain critical notes that help explain the choices made in the final version of the document. Another camp feels that only the final document should be retained so that, for example, a scribbled note on a draft document doesn’t take on inappropriate importance and confuse a jury.

But between “keep everything” and “toss all non-final documents,” there is a middle ground: Try to create and retain “good” documents. This means training your staff not to create “bad” documents in the first place (such as documents that read, “Oops, I messed up that design!”). Review the file at the close of the project and get rid of the misleading, inappropriate or extraneous documents.

Whichever path you choose, work with your attorney to develop a policy that reflects your projects, your jurisdiction and your risks.

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Just having a policy isn’t enough, however. Everyone at your firm must understand and follow it. Management will need to make sure this is happening by spot checking records and documenting such oversight. This preserves the documents that establish that your work met the standard of care and shows that your firm made reasonable efforts to preserve important documents.

Any destruction of records must be routine and in good faith. Courts have shown they are willing to accept a company’s explanation that records were destroyed in accordance with company policy but only if the firm can show that its policy was consistently implemented.<sup>3</sup> If you choose to keep all your documents, then follow that policy. If you choose another arrangement, then follow that policy.

Finally, if there’s trouble, immediately move to ensure that all files and records—including electronically stored information—related to the case are secured and maintained, and make sure your subconsultants do the same.

- <sup>1</sup> Because prime consultants can be held responsible for the negligent acts, errors and omissions of their subconsultants, in the event of a lawsuit, both parties are going to have to produce documentation. For that reason, consider including a record retention requirement in your sub consulting agreements.
- <sup>2</sup> The United States Supreme Court, in a case involving the demise of the Arthur Andersen accounting firm, recognized the validity of disposal of information pursuant to an appropriate document retention policy.
- <sup>3</sup> Per the landmark decision, *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla.1984), in which Piper Aircraft had a records management program but was unable to demonstrate that the program was consistently followed on a routine basis.

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