DOCUMENT RETENTION POLICIES AND PROCEDURES

The Importance of Having Document Retention Policies and Procedures
The idea of litigation will always be disquieting for engineers. However, engineers who implement good document retention policies and procedures are likely to breathe easier when facing the moment that they hope will never materialize—a claim or lawsuit. If an engineer finds himself or herself facing a lawsuit, the documents they provide their attorney will be central to their defense. The strongest defense is one that does not merely pit the engineer’s story against the claimant’s story. Rather, the best defense is built on the most complete story that the engineer can support with contemporaneous documentation, as this defense does not require leaps in reasoning or the weighing of credibility to overcome missing information.

The three most common questions asked by engineers when implementing a document retention policy are as follows:

• Who should retain the documents?
• Which documents should be retained?
• For how long should the documents be retained?

1. The engineer is the best person/entity to retain the documents concerning their work on projects.

The engineer is in the best position to retain the documents concerning their work on the project. In the volatile construction and related industries, the engineer should not count on other persons or entities to preserve crucial evidence on their behalf.

It is common for development and/or construction companies to become insolvent after a project is completed, or even during the course of a project. In fact, many development companies are structured so that they do not own any assets for the specific purpose of being able to quickly dissolve the development company upon completion of the project and thereby limit any exposure regarding the project. In situations where the other parties have become insolvent, bankrupt, inactive, etc., the engineer may be one of the only viable defendants and/or one of the only sources of information in later ensuing litigation.

Even if the other parties involved with a project remain solvent and active, it is best for the engineer to take control over retaining their own documents, as the engineer is not in a position to dictate or monitor the other parties’ document retention policies and procedures. Moreover, the other parties may place different import on certain categories of documents than the engineer does. In other words, the other parties, even if competent and responsible, are not as concerned with the welfare and future defense of the engineer.

A. Retaining documents will help to ensure that the engineer avoids spoliation sanctions.

In the event that an engineer must defend against a lawsuit alleging professional liability, the professional’s inability to produce important evidence may result in sanctions if the professional lost or destroyed evidence despite a duty to preserve the evidence. State law often determines whether spoliation of evidence may result in sanctions, and the nature of any sanctions imposed against a party who fails to preserve important evidence can vary greatly by state.

In Illinois, if a party breaches the duty to preserve evidence, the court can award monetary damages to the non-breaching party. The non-breaching party will be required to prove the likelihood of prevailing “but for” the missing evidence and the amount that could have been recovered if the missing evidence was available. Under California law, the duty to preserve evidence generally arises from a contract. If the contract does not contain an agreed liquidated damages amount, the non-breaching party must prove the amount of damages caused by the failure to preserve evidence.

New York courts have imposed a wide range of sanctions on parties who dispose of crucial evidence. Under New York law, the jury can be allowed to infer that the missing evidence would have been unfavorable to the party who lost or destroyed it. In more serious instances of lost or destroyed evidence, the court can strike the defendant’s answer, which has the effect of stating that the defendant does not contest the allegations in the complaint and can result in an automatic win for the plaintiff. New York courts can also impose monetary sanctions in the form of attorneys’ fees and costs incurred by the non-breaching party in connection with successfully arguing a spoliation of evidence claim.

In Ohio, disputes over lost or destroyed evidence can result in sanctions to a party by excluding expert testimony, which can be devastating to the breaching party’s position. Texas courts have the ability to enter a default judgment against a party as the most severe sanction for destruction of evidence.

To avoid sanctions for spoliation of evidence, prior to destroying any documents, engineers are strongly advised to consult a local attorney specializing in construction litigation for counsel on the nature of documents that should be preserved and the recommended duration of the document retention period.

B. Litigation holds often give rise to a duty on the part of engineers to preserve documents and other potential evidence prior to the initiation of a lawsuit.
Compliance with a “litigation hold” generally means preservation of certain documents that may be relevant to a lawsuit. When a litigation hold is in place, parties must suspend their routine destruction of documents and preserve all documents for examination by another party. Parties may request production of documents of a specific nature during the discovery phase, but a litigation hold can be put in place long before discovery begins and ensures preservation of documents that may become important as the legal dispute changes shape. In this way, a litigation hold may be broader than any future discovery request, as it involves preservation of anything and everything associated, or that may become associated, with the subject of the lawsuit.

A litigation hold can commence in a variety of ways. One party may serve another with a demand to preserve evidence, a lawsuit may be filed, or a party may be required by law to proactively institute a litigation hold when a dispute cannot be resolved. Federal law is particularly instructive and generally requires that the party put its litigation hold in writing so that all individuals are aware of the hold and understand its scope. “[T]he failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.” Furthermore, “once a party reasonably anticipates litigation, it is obligated to suspend its routine document retention/destruction policy and implement a “litigation hold” to ensure the preservation of relevant documents.” Notably, the beginning of a litigation hold depends on whether there is a reason to expect the filing of a lawsuit, which could be long before suit is actually filed.

Likewise, a party’s duty to preserve potentially relevant evidence arises “as soon as a potential claim is identified” and “once a party reasonably anticipates litigation.” This duty can arise prior to the initiation of a lawsuit. Moreover, federal district courts in California have held that “[a] party’s discovery obligations do not end with the implementation of a litigation hold—to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.” By requiring legal counsel to manage the litigation hold, it is clear that each party must ensure preservation of its own documents, rather than relying solely on what another party has requested.

However, by way of contrast, federal district courts in Texas have held proper compliance with a litigation hold is judged by each party’s conduct and is not measured by blanket rules. Where parties demonstrate bad faith in failing to preserve documents, courts will find non-compliance with the litigation hold.

Federal district courts in Illinois look to whether a party’s conduct under a litigation hold was reasonable. “While [a party] need not have an official written policy regarding the preservation of documents related to litigation to avoid sanctions,” its “apparent failure to warn its employees to preserve documents potentially relevant to this litigation evidences fault by acting with negligence or flagrant disregard of the duty to preserve potentially relevant evidence.”

Given the varying standards applied by the federal courts, engineers should have a policy in place for preserving information, documentation, and other potential evidence prior to the filing of any lawsuit, particularly where a reasonable person might recognize the potential for litigation in the future.

2. The engineer should retain all material documents and err on the side of over-inclusion in determining what documents are material.

An engineer should retain all materials documents. Material documents would include all contract documents; specifically contracts, plans, drawings, specifications, and calculations. Material documents would likewise include shop drawings, inspection/observation reports, photographs, invoices, receipts, timesheets, requests for information, change orders, any and all communications, including correspondence, emails, text messages, and the like. Therefore, it is a good idea for the engineer to keep in mind when engaging in email and text message communications that these communications may be produced later in the context of a claim or litigation and thus avoid using language that he or she would not want repeated in public. It is also important to retain all drafts, revisions, and final copies.

An engineer should err on the side of over-inclusion in retaining documents, as it is difficult for any party to predict what might be relevant to a future dispute or litigation. The wisest strategy is to simply retain all information, documentation, and potential evidence indefinitely, or at least as long as possible, considering the jurisdiction’s applicable statute of repose, regardless of state or federal document retention requirements. Retaining all, or at least nearly all, documentation will ensure that the engineer has the documents and/or evidence necessary to defend itself and can aid an engineer in obtaining a swift exit from litigation. For example, individuals’ timesheets may not seem very material during an ongoing project, but they often come in handy in litigation by indicating that certain individuals either were or were not on the construction site at a certain date and time. They can often establish that the engineer had no opportunity to witness an accident or condition on the site.
In this digital age, it should not be difficult for an engineer to store large amounts of information in an electronic format. That being said, the engineer should make sure that the information being stored electronically is backed up, whether to another hard drive or server or to the “cloud,” as courts are not likely to look upon computer crashes or data corruption kindly given the ease with which redundancy in storage is now available.

3. The engineer should retain documents for the length of time that a legal action could be brought against them, which is usually determined by the statute of repose.

The final and most difficult question that engineers ask when establishing document retention policies and procedures is how long the documents must be retained. While the short answer is that the engineer should retain the documents for the length of time that a legal action could be brought against them with respect to the subject project, it is not always easy to determine the length of time that a legal action could be brought against the engineer, as such will often depend on the state law governing the project. As noted below, it is best for an engineer to base the length of retention on the applicable statute of repose (if possible). Statutes of repose vary from state-to-state, and it can be difficult to determine how the statute of repose operates from simply reading it. Therefore, it is best if the engineer consults their local attorney for information on the statute of repose applicable in their jurisdiction and/or the jurisdiction of the subject project.

Other concepts to keep in mind when establishing the length of a document retention policy include permanent retention of the documents necessary to show that the statute of repose has expired, such as certificates of substantial completion or occupancy, as-built drawings, and compliance with any statutes or administrative codes established with respect to the engineer’s professional license.

A. Statute of limitations vs. statute of repose: The engineer’s document retention policy should be based on the applicable statute of repose.

The most common question that comes up when an engineer evaluates their document retention policy seems to be: “What is the statute of limitations?” However, the engineer should really be asking: “What is the statute of repose?” While engineers often use the terms “statute of limitations” and “statute of repose” interchangeably, the distinction between the two terms is of pivotal importance when creating a document retention policy.

Statutes of limitations bar a lawsuit that is not brought within a certain time period, but the time period allowed may be subject to change based on the date in which the claimant discovers its injury and that the injury was wrongfully caused. In other words, in certain scenarios, the statute of limitations will not be deemed to begin running until the claimant discovers or should have discovered that its injury was wrongfully caused, which can occur years after the engineer completes their services. Due to this rule, which is commonly referred to as the discovery rule, statutes of limitations often do not set an outer limit on when a claim may be asserted or litigation may be filed.

On the other hand, statutes of repose typically set a time limit for filing suit that runs from a set point in time. While statutes of repose vary from state-to-state, they typically start running from the time of substantial completion of construction or improvement to real property, occupancy, or possession of the improvement, or the date of act, error, or omission. Thus, the applicable statute of repose starts running from an identifiable event and sets the outer limit for bringing a lawsuit. As such, engineers should use the statute of repose, not the statute of limitations, to set the time period for their record retention policy.

Because it can be difficult to determine the outer limit for bringing a lawsuit in the engineer’s jurisdiction from a simple reading of the applicable statute of repose, the engineer should always consult their local legal counsel to ensure that the engineer’s document retention period provides the engineer with adequate protection. For example, the statute of repose in Illinois is 10 years from the act or omission giving rise to the claim, which would make an engineer logically conclude that they can discard records 10 years after their services are complete. However, the statute of repose then goes on to say that a person who discovers the act or omission prior to the expiration of the aforementioned 10 years shall get 4 years to bring an action. In other words, if the claimant discovers the engineer’s act or omission within the 9th year, he will have 4 years from the discovery of the act or omission to bring the cause of action, potentially extending the outer limit for bringing a lawsuit up to 14 years after the engineer’s services are completed.

B. A wise document retention policy may require the permanent retention of certain documents.

If an engineer is unlucky enough to work in a jurisdiction with no applicable statute of repose and/or in a subject area where there is no applicable statute of repose, the wisest document retention policy may require the engineer’s permanent retention of all information, documentation, and potential evidence indefinitely, or at least as long as possible. Moreover, it is often wise for engineers, in jurisdictions with an applicable statute of repose, to
permanently retain the documents that show when his or her work was completed, when the improvement was substantially complete, and/or when the improvement was occupied, such as certificates of substantial completion or occupancy, and as-built drawings. Permanent retention of these types of documents will ensure that the engineer can actually prove that the claimant’s lawsuit is time-barred when such is the case.

Implementing good document retention policies and procedures can be one of the most effective risk management strategies employed by the engineer.

It is time well-spent to draft document retention policies and procedures with the advice of local counsel to determine which documents to retain and for how long. However, such policies and procedures are only useful if they are actually employed by the engineer. Assuming that the engineer has employed good document retention policies and procedures, the engineer should be able to provide records to their attorney without delay and be in the best position to defend their work from the outset of any litigation when the engineer’s defense is likely to take shape.

1 Fuller Family Holdings, LLC v. Northern Trust Co., 371 Ill. App. 3d 605, 624 (2d Dist. 2007).
2 Coprich v. Superior Court of Los Angeles County, 95 Cal. Rptr. 2d 884, 891 (Cal. Ct. App. 2000).
6 See Hetzer-Young v Elano Corp., No. 2013-CA-32, 2014 Ohio App. LEXIS 1017, at *29 [Cl. App. March 21, 2014] (Although the trial court barred Plaintiffs’ expert testimony, the appellate court found it error to do so.).
7 Trevino v. Ortega, 969 S.W.2d 950, 959 (Texas 1998).
11 Id.
15 While most states have a statute of repose that applies to claims against design professional in the construction context, a few do not. Moreover, claims that do not involve construction or improvements to real property may not be subject to a statute of repose.
17 Id.
18 Cal. Civ. Code Proc. § 337.15 [Deering 2018] ("No action may be brought to recover damages from any person [...] who [...] performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement [...]."); Colo. Rev. Stat. § 13-80-104 (2018) ("all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction or observation of any improvement to real property shall be brought within the time provided in section 13-80-102 after the claim for relief arises, and not thereafter, but in no case shall an action be brought more than six years after the substantial completion of the improvement to real property except as provided in subsection (2) of this section."); Fla. Stat. § 95.11 (2018) ("the action must be commenced within 10 years after the date of actual possession by the owner, the date of issuance of certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever is latest."); N.J. Stat. § 2A:14-1.1 (2018) ("No action [...] to recover damages for any deficiency in the design, planning, surveying, supervision, or construction of an improvement to real property [...] shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services or construction.").
19 735 Ill. Comp. Stat. 5/13-214 (2018) ("No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.").
20 Id. ("However, any person who discovers such an act or omission prior to the expiration of the 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section.").
21 Please note that this pamphlet assumes that the engineer’s services are going to involve construction or an improvement to real property. Where such is not the case, this information may not be accurate.