

Document Retention

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Guidelines for Managing Project Files

Summary

No firm can – or should – retain every document created. But what documents need to be preserved and for how long? While there are no absolute answers to these questions, reasonable guidelines do exist.

This paper proposes a practical approach to document retention. It blends basic legal requirements with experience gained in construction litigation battles, tempered by business realities. The resulting guidelines are simple and easily managed.

The Basic Rules

DOCUMENT TYPES

A document retention policy should address three types of documents: temporary, final, and permanent.

Temporary Documents Are Discarded When the Project Is Closed

Temporary documents are intermediate documents used to develop final, deliverable documents, or are documents superseded by more polished versions. Temporary documents include:

- Research Notes specific to the project;
- Report Drafts;
- Handwritten logs and diaries, if more formal versions exist;
- Rough calculations; and
- Draft sketches.

Interim documents, which you provide to your client as milestone submittals, are *not* temporary documents. Because you provide them as required submittals, they are a deliverable in their own

right. The same logic applies to Guaranteed Maximum Price drawings or specifications. Since those documents establish project scope and price, they are “final documents” even though they will be later modified or supplemented.

A firm should discard temporary documents when it creates or receives the superseding document. But this rule is difficult to enforce. A simpler and almost equally effective rule is: *Discard temporary documents when closing the project.*

Contract drafts are an exception and should be maintained as “Final Documents” because they document contract negotiations. In many instances, these documents can help to clarify final contract terms by looking at what each party proposed, what was objected to, and what compromises occurred. Courts are more likely to uphold specific clauses, such as limitations on liability, if the firm can demonstrate that the parties actually negotiated, and possibly modified, other contract terms.

*Final Documents
are Discarded
After 10 Years*

Final Documents are documents that are not superseded or incorporated into later documents. For example, sent or received project correspondence falls within the “Final Document” category. Final Documents can be informal – handwritten telephone memoranda or field notes are “Final Documents,” if not superseded by typed versions. Other examples of “Final Documents” include:

- All project correspondence;
- Meeting memoranda;
- Internal memoranda;
- Field logs, daily journals and calendars, if not superseded by more formal versions; and
- Accounting data.

*Keep Permanent
Documents Forever*

Permanent Documents form a subset of Final Documents. They serve as source documents for later work, or to record your final opinions or designs. Examples of Permanent Documents include:

- Final drawings, calculations or specifications;
- Milestone drawings, specifications, or calculations if they are project deliverables;
- Final reports;
- Interim reports, if submitted to the client or governmental agencies;
- Submissions to governmental agencies, if used for securing any permit or approval; and
- Your contract or contracts, along with any contract amendments and accepted proposals.

**RETENTION
SCHEDULE**

Basic Document Retention Schedule

Document Type	Retention Period
Temporary	Until Project Closure
Final	10 Years ¹ After Project Closure
Permanent	Forever

¹ The choice of 10 years reflects a typical “statute of repose” period, common to many jurisdictions and discussed below. Adjust this number to the *maximum* period affecting the jurisdictions in which you practice.

It is possible to create document retention guidelines that discriminate much more finely between different document types, and which assigns different retention periods to each type. These fine-tuned systems almost always fail.

Few firms possess the administrative support necessary to implement and manage complex document retention systems. In actual practice, firms with such systems either rarely discard documents, or discard them in haphazard fashion. And a failed document retention system is as dangerous as having no system at all. If the whim of the project manager or engineer determines which documents to discard, she may discard documents that other team members or the client retain, putting the firm at a disadvantage in any later dispute. Worse, destroying documents outside of the document retention guidelines can create suspicion that the firm discarded them to destroy evidence. Thus, adherence to the document guidelines is important, and a simple, manageable system is the best means to achieve that goal.

The proposed document retention guidelines contained in Appendix “A” are an easy to manage system that uses only two dates: project closure, and ten years after project closure.

The choice of a ten year period for this sample guide fits the statutes of limitation or repose of many jurisdictions.² Some types of claims survive beyond this period, such as fraud, misrepresentation, intentional misconduct or statutory violations, and not all jurisdictions have statutes of limitation or repose that conclusively end liability at the expiration of such a period. But the vast majority of actions against design consultants involve claims of professional negligence or breach of contract claims – the types of claims typically covered by statutes of repose. Thus, after the repose period has past, the likelihood that you will need your documents to defend your work greatly diminishes.

The basic ten year recommendation is subject to review and adjustment to suit the requirements of the jurisdiction(s) in which the firm practices. If the firm practices in multiple states with different statutory periods, select the longest period for administrative simplicity.

Exceptions to the Basic Schedule

The basic document retention guidelines cover most situations, but there are exceptions.

CLIENT OWNED DOCUMENTS

Certain clients, especially institutional and public clients, often require ownership of all “documents” created by the consulting firm, and define “documents” in the broadest of terms. This requirement creates thorny issues relating to payment, reuse of documents, and use of incomplete documents. It also creates problems related to document retention. For example, if documents are “owned” by your client, do you have the right to dispose of them? Can you dispose of interim documents? How long must you keep the documents? Who pays for the cost of storage? How do you destroy, or can you destroy, “confidential” documents? If your client is a public agency, does granting “ownership” turn your project files into “public records” that must be maintained in accordance with public agency document requirements? Are they susceptible to public record “Freedom of Information” type requests?

To lessen these problems, we recommend that you not grant ownership of documents to any other person or organization. But if you must grant ownership, we recommend that:

- You define *which* documents must be transferred;

² See Appendix C for a summary of “Statute of Repose” provisions in different jurisdictions.

- Your client only receives ownership of specific project deliverables;
- Ownership transfers on completion of your work;
- Your client only receives ownership if it has fully paid your fees;
- Your client releases and indemnifies you from any claims regarding modification, reuse, or misuse of the documents;
- Your client releases and indemnifies you from any errors or omissions in *incomplete* documents used by the client to complete the project;
- You only be required to maintain documents for a specific time period;
- Your client compensates you for lengthy document retention requirements; and
- You can destroy documents after giving notice to your client and allowing the client to take possession of the documents.

Appendix “B” contains an example document ownership clause.

CONTRACT REQUIREMENTS

Some consulting agreements contain specific document retention requirements. Environmental projects, in particular, commonly require maintaining documents in confidence and preserving documents for the client’s later use. We discourage these provisions because they are difficult and costly to administer. But, if your client insists on such a provision, the client should designate which documents it considers “confidential” and which need to be preserved. Broad clauses that require you to treat “all documents received or created” as confidential can create serious administrative burdens. Similarly, contract clauses that require you to maintain documents for use in operations or maintenance can create administrative and storage problems.

In general, we recommend against agreeing to client-specific document requirements. But if you do agree to such requirements, you should have a mechanism to ensure that project managers and administrative personnel know the requirements *before* they discard or store documents.

FORENSIC DOCUMENTS

Forensic documents have their own document retention requirements. It may, or may not, be important to prove “chain of custody,” authenticity, or other legal requirements. If you undertake a forensic assignment, have the attorney specify what documents should be retained and the record handling procedures to be followed. All members of the forensic engineering team should be briefed on these provisions, and if confidentiality is a requirement, should execute a written acknowledgement of the provisions.

Never Destroy Records If You Are a Party to a Dispute

As the recent Enron collapse has illustrated, once you are aware you may be involved in a legal proceeding, you *must* maintain *all* records. Otherwise, you open yourself to criticism, or even a lawsuit, for destroying evidence. At the very least, you may undermine your case if the judge or jury believes that you destroyed important documents to enhance your case.

ELECTRONIC DOCUMENTS

Electronic documents are rapidly becoming the preferred method for communication and information exchange, creating new issues for document retention.

Although very convenient, many electronic media are not suitable for archiving documents. Floppy disks and hard disks are susceptible to damage from static electricity, magnetism, heat and dangerous chemicals, such as spilled coffee. They also degrade relatively quickly. Floppy disks, for example, are only reliable for five years. Obsolescence is another problem with electronic media. How many firms have the “Magcards” or 8-inch floppy drives that were once common? How long will we be able to easily read current storage technologies?³

*Paper Is Still
Preferred*

These considerations lead us to recommend that permanent documents be conventional paper documents. These have a relatively long useful life – often over a century – and do not rely on document storage peripherals that may not be available or may be incompatible with new computer systems.

Electronic contracts are an exception. The advent of digital signatures and the passage of the *Electronic Records and Signatures in Global and National Commerce Act* made electronic documents and signatures legally binding. Where you have used electronic signatures, the electronic document is the legally binding instrument. You should store these on recordable CD-ROMs, with paper copies for convenience.

Electronic document control systems can usually maintain successive versions of a document. Which, if any, must you maintain? As a general matter, if the contract requires an interim version, such as a 50% design deliverable, then print and retain the required set as the submission set. Whether to then destroy the electronic version will depend upon your firm's anticipated need for the version. In some systems, it may be possible to "detach" an interim version into a new document for archiving. In these systems, archive the deliverable versions by writing them to a fixed media and preparing an archival print copy. The firm should discard any interim versions that are not deliverables.

CONCLUSION

Document retention systems should be logical and easy to administer. The approach used in this paper will work for a wide variety of firms. But, since state requirements vary, you should review your document retention program with your firm's attorneys.

APPENDIX “A”
SAMPLE DOCUMENT RETENTION POLICY

Note: This sample document retention policy is only an example of a general document retention policy and should not be used without modification to meet the specific administrative and legal needs of your company.

I. Purpose

This Document Retention Policy provides for the orderly management of documents maintained by the Company. It balances three goals: retention of important documents for reference and future use, organization of documents for retrieval and reduction in document volume to reduce storage and document administration costs.

II. Types of Documents

**“TEMPORARY”
DOCUMENTS**

Temporary documents are those used to develop final documents. Thus, drafts of reports, hand-written memos that are later typed, rough logs, draft calculations, reminders, “to-do” lists, internal coordination memoranda and similar documents are temporary documents. Interim documents that are “milestone” deliverables are not “temporary documents”; they are “final documents” although not complete. Any documents filed with governmental agencies are “final documents.”

**“FINAL”
DOCUMENTS**

Final documents are those that are complete or are not superseded by later versions of the same documents. Handwritten documents can be final documents if they will not be typed or “formalized.” Interim or periodic reports are final documents, even if their substance is incorporated into a final report. Any document that is provided to a third party or government agency is a final document. In general, correspondence, meeting minutes, field reports, plans, specifications, cost estimates, milestone documents, guaranteed maximum price plans, final or interim reports are examples of final documents. Accounting records are final documents.

**“PERMANENT”
DOCUMENTS**

Permanent documents are those that establish your scope of work, express your professional opinions, or are reference materials for your later work. Examples are any work proposals, contracts, amendments, or reports, or any documents, such as geologic maps, that should be maintained as reference for later work.

III. Retention Periods

Temporary

When a project closes, gather all documents related to the project from branch offices, project participants, or any other person or place where project documents may be located. Review the combined files and discard all temporary documents and all clean, duplicate’s of final documents. Where appropriate, catalogue the retained documents by folder name or other designator.

Final

Discard all final documents, except permanent documents, *ten years* after project close.

Permanent

Maintain permanent documents *indefinitely*.

IV. Document Management

[Insert firm specific language regarding who is responsible for document management, where documents will be stored, and how they will be cataloged and indexed.]

V. Electronic Documents

Electronic documents should be organized, maintained and discarded within the time periods set forth in Section III. However, many electronic media—especially magnetic media—are not appropriate for archival storage. The quality of magnetic media degrades quickly, and changing technology may render specific electronic media obsolete. At present, electronic documents that need to be archived should be kept on the most stable media available, and should be maintained in a printed, paper copy.

VI. Exceptions

The following are exceptions to this Document Retention Policy.

CONTRACTUAL REQUIREMENTS

Consulting agreements may have specific, owner requested, provisions regarding confidentiality and maintenance of documents. In general, project managers should resist these provisions since they can require significant administrative effort. However, prior to organizing and discarding documents, the consulting agreement should be reviewed to determine if there are any restrictions on discarding documents, or any special instruction for document handling and storage. In some instances, the client owns the documents and they can be returned to the client, with appropriate copies retained for documentation purposes. Also, have corporate counsel review the 10-year period applicable to permanent documents in light of any “choice of law” provision, or if the project could subject the firm to the laws of a different jurisdiction, which may have different limitations and repose periods.

PUBLIC AGENCY REQUIREMENTS

Public agencies often demand that they own all documents created by a consultant for a project. In this instance, it may not be possible to discard documents that are owned by the public. For this reason, project managers should attempt to restrict granting ownership of documents to public agencies. If ownership must be granted, it should be limited to final deliverable documents, rather than all documents.

Prior to discarding documents on public projects, you should review the consulting agreement to determine if the public agency has been granted ownership rights. If it has, you should contact the public agency to determine how the documents should be handled.

LITIGATION

If it appears likely that the firm will be drawn into litigation, all documents must be preserved. This rule clearly applies once the firm has been served with a summons and complaint or a demand for arbitration. Discarding documents, even if innocently done under a document retention policy, may appear to be improper destruction of evidence.

*APPENDIX “B”
OWNERSHIP OF DOCUMENTS*

The following are examples of document ownership provisions in a standard consulting agreement. They should be reviewed, and modified as appropriate, to conform the provisions to the requirements of specific engagements, your firm’s specific needs, and any legal requirements specific to your jurisdiction.

**IF CONSULTANT
OWNS THE
DOCUMENTS...**

Documents prepared by Consultants are instruments of service and the property of Consultant. Provided the Client has met all of its obligations under this Agreement, including payment of all fees and costs due, Consultant grants Client a non-exclusive license to use final documents prepared by Consultant for the construction, maintenance and operation of the Project. Client shall not, unless Consultant expressly agrees in writing, provide the documents, or copies of the documents, to any person or entity other than consultant, contractors and public agencies whose involvement is necessary for Client’s completion of the project. Client shall defend, indemnify, and hold harmless Consultant from and against any and all claims, demands, damages, loss or liability that arise from use of Consultant’s instruments of service by any person or entity, other than as permitted by this paragraph.

**IF CLIENT
OWNS THE
DOCUMENTS...**

Provided that Client has met all of its obligations under this Agreement, including payment of all fees and costs due, Consultant will grant Client ownership of final documents prepared by Consultant for this project. Consultant reserves a non-exclusive license to use the documents for future work by Consultant or business promotion.

The documents are prepared solely for client’s use on this project, and no other. No person or entity, other than client may use or rely upon the documents, and Client agrees to defend, indemnify and hold harmless Consultant from claims, demands, damages, loss or liability that arise from any use of the documents by any person or entity, other than as permitted by this paragraph.

*APPENDIX “C”
SUMMARY OF STATUTES OF REPOSE*

State	Period	Contractual Limits	Exceptions
Alabama	13	Not permitted	Actual knowledge and failure to disclose defect; fraud
Alaska	10	May waive by contract	Intentional or reckless disregard of plans or codes; personal injury; intentional concealment; facts not discoverable by guardian (applies to minors only)
Arizona	8	Statute will not shorten written warranty	Personal injury
Arkansas	4/5 ^a	Contract may not extend	Fraudulent concealment
California	10	None specified	Personal injury claims; claim against an owner occupying single family residence
Colorado	6	None specified	None specified
Connecticut	7	Performance and payment bonds may limit to 3 yrs.	None specified
Delaware	6	May limit to 2 yrs. by contract	Residential structures
District of Columbia	10	Not applicable	Express or implied contract actions
Florida	15	May not shorten	None specified
Georgia	8	None specified	None specified
Hawaii	10	None specified	Negligent repair claim against property owner; boundary surveys
Idaho	6 ^b	Contract may not reduce	None specified
Illinois	10	May extend by express warranty or promise	Express warranty; fraudulent concealment or misrepresentation
Indiana	12	None specified	None specified
Iowa	15	Not applicable	None specified
Kansas	10	Not applicable	Latent diseases
Kentucky	7	None specified	None specified
Louisiana	7	None specified	Fraud
Maine	10	May alter by contract	None specified
Maryland	10/20 ^c	AIA accrual provision	None specified
Massachusetts	6	None specified	Applies to tort actions only; does not apply to asbestos or survey claims
Michigan	6/10 ^d	None specified	None specified
Minnesota	10	Does not apply to warranties	Fraud; negligent maintenance; breach of statutory or express warranty
Mississippi	6	Not permitted	Wrongful death actions
Missouri	10	Not permitted	Applies to tort actions only; intentional concealment of defect
Montana	10	Contract may not limit	Applies to tort actions only; excludes actions based on written contract
Nebraska	10	None specified	None specified

APPENDIX C: SUMMARY OF STATUTES OF REPOSE

State	Period	Contractual Limits	Exceptions
Nevada	8/10 ^e	None specified	Indemnity & contribution, defects in products; fraud, willful misconduct
New Hampshire	8	Contract may limit; written warranty may extend	Fraudulent misrepresentation or concealment; nuclear or hazardous material; negligent repair
New Jersey	10	None specified	Certain claims by governmental entities
New Mexico	10	Express contract, guarantee or warranty	Inconsistent terms of contract, warranty or guarantee
New York	— ^f		
North Carolina	6	Limited in insurance contracts	Fraud; willful or wanton negligence; wrongful concealment
North Dakota	10	Not permitted	None specified
Ohio	15	None specified	Fraud, express warranty or guarantee
Oklahoma	10	Not permitted	None specified
Oregon	10	Permitted in insurance and U.C.C. contracts	None specified
Pennsylvania	12	May shorten by contract	Negligent repair
Rhode Island	10 ^g	Not applicable	Applies to tort actions only
South Carolina	13	May extend by contract	None specified
South Dakota	10	May extend, limitations prohibited	Fraud, willful or wanton conduct
Tennessee	4	None specified	Fraud, wrongful concealment
Texas	10	Contract may not limit	Willful misconduct or fraudulent concealment; written warranty; asbestos
Utah	12	May change by contract	Fraudulent concealment, willful or intentional act, error, omission, or breach of duty
Vermont	— ^f		
Virginia	5	None specified	Applies to tort actions only
Washington	6	Limits permitted under U.C.C.	Fraudulent concealment
West Virginia	10	None specified	None specified
Wisconsin	10	None specified	Fraud; concealment or misrepresentation of defect
Wyoming	10	May agree otherwise by contract	No limit on public agency claims

Table Source: Steven G.M. Stein, CONSTRUCTION LAW (Mathew Bender & Company, Inc., January 2002), "State-by-State Summary: Statutes of Limitation & Repose" (Appendix to Chapter 3).

See following page for notes.

*NOTES TO APPENDIX “C”
(SUMMARY OF STATUTES OF REPOSE)*

- a. Arkansas statute period is 4 years for personal injury or wrongful death actions based on tort or contract; 5 years for property damage claims.
- b. Idaho statute is for “tort limitations accrual” rather than repose.
- c. Maryland statute provides a 10-year period for actions against architects, engineers and contractors, 20 years for other persons.
- d. Michigan statute has a 10-year maximum, with a 6-year period applying to involving gross negligence claims and claims involving surveys.
- e. Nevada statute applies 10-year absolute limit to known deficiencies, with an 8 year limit to latent deficiencies.
- f. New York and Vermont statutes are statutes of limitations only, no repose period.
- g. Rhode Island statute provides that a 10-year accrual period applies on discovery in the case of actions based on written contract or warranty.