Communiqué

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XL Group
Insurance

Design Professional

Preservation of Evidence

David N. Garst, Esq., of Lewis Thomason in Nashville, serves as approved defense counsel for XL Group's Design Professional team. He practices principally in the areas of design professional liability, construction defect litigation, construction contract law and commercial litigation.

Mr. Garst has written the article below to help architects and engineers understand their legal responsibilities for preserving project-related materials in both print and electronic form.

This is the second article in an occasional series of articles on legal topics written by our defense counsel members. To learn more about Design Professional's approved defense counsel, see the sidebar, "Approved Defense Counsel—An Introduction."

In the United States, parties to lawsuits are granted broad rights to obtain information possessed by other parties and witnesses in relation to the dispute. The process for obtaining this information is called "discovery."

Courts permit many forms of discovery, including written questions, oral examination of witnesses, entry upon land (inspection of the project site) and examination of physical evidence, and the copying and examination of documents and electronically stored information. The litigants' discovery rights are enforced by the full power of the court systems, and failure to adhere to the rules of discovery can result in harsh sanctions.

What Can Be Discovered

Every type of document and electronically stored information may be subject to discovery. For a design professional, this might include contracts, correspondence, meeting minutes, emails, calculations, drawings, specifications, progress reports, submittals, permits, payment requests and approvals, completion certificates, photographs and video, and financial records. Even text and photo messages, as well as information posted on social

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media such as Facebook, Instagram and Twitter, may be discovered under some circumstances.

Today's design firms store much more information electronically than in printed form. Litigants typically request all project-related documents, so a staggering quantity of electronically stored information is produced on an average project's discovery.

Trial courts are given broad discretion in determining what information is discoverable. The Federal Rules of Civil Procedure permit parties to discover non-privileged information possessed by another party. Accordingly, in construction disputes most courts permit parties to discover essentially all project-related documents. Parties generally cannot withhold documents based on their alleged irrelevance. The courts err on the side of broad disclosure, and wait until trial to determine what's relevant.

How Long Is Long Enough?

One of the most common questions construction lawyers are asked is, "How long should I keep my documents?" The answer to this question varies from state to state and depends on the nature of the firm's projects and documents. It's clear, however, that design professionals have an immediate duty to preserve evidence when they become aware of pending or reasonably foreseeable litigation. Not every conceivable dispute creates a duty to preserve evidence, but the courts generally find a witness is under a duty to preserve evidence that likely will be requested in reasonably foreseeable litigation.

Often, witnesses are made aware of litigation by a formal notice called a "litigation hold letter." This is a letter from a party or the party's attorney specifically advising a witness or potential party of anticipated or pending litigation. Once a litigation hold letter is received, the witness typically has a duty to preserve evidence within his or her control and exempt project-related materials from automatic destruction even if such destruction is required by the firm's document retention policy.

Once a duty to preserve evidence arises, take immediate steps to segregate and protect the evidence.

Document retention policies can provide significant protection against allegations of document spoliation.

Preserve and Protect

Once a duty to preserve evidence arises, immediate steps should be taken to segregate and protect the evidence. Physical documents and drawings should be gathered and stored in a safe location. The firm also must take positive measures to safeguard electronically stored information. Systems that routinely delete or overwrite data should be modified to preserve the data. Alternatively, all electronically stored data can be collected and downloaded to a hard drive or other backup system.

All electronically stored information in the control or possession of a firm can be subject to discovery. Accordingly, the collection process should include employees' work computers, tablets, smartphones, personal cameras and any other devices containing potentially relevant information.

Properly conceived and managed document retention policies can provide significant protection against allegations of document spoliation. Courts define "spoliation" as the wrongful destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. In the U.S. Supreme Court's opinion, a company may instruct its employees to comply with a valid document retention policy under ordinary circumstances. Once the duty to preserve arises, however, evidence may not be destroyed even in compliance with a document retention policy.

The courts have inherent powers to craft proper sanctions for spoliated evidence. For example, in an extreme case of spoliation by a plaintiff, a court could limit the proof or even dismiss all or part of the claim. The courts also may infer, or permit a jury to infer, that the contents of a lost document were unfavorable to the party that destroyed it. This inference is permitted due to the likelihood that a party that destroys a document when facing litigation does so because the document's contents hurt the party's position. The inference is meant to discourage litigants and witnesses from destroying relevant evidence prior to trial and to penalize parties whose misconduct could lead to an erroneous judgment.

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What You Can Do

What steps can you take to minimize the risk of spoliation of evidence and its potential to weaken your defense against a claim? Your firm should develop a strong culture of internal reporting of claims and circumstances that could lead to claims. A specific principal or risk manager should be appointed and all employees instructed to report potential claims to that individual.

Employees also should report any known litigation between other parties related to the firm's projects and any legal process (e.g., subpoenas, notices of deposition, document requests) and informal contacts from attorneys.

In the event the firm becomes aware of pending litigation or reasonably anticipates a lawsuit, firm management and information technology staff should take positive steps to safeguard all information that related to the project. Finally, be sure to report these circumstances to your professional liability insurance agent.

For more information and a sample record retention policy, see the "Document Retention" chapter in XL Group's Contract eGuide for Design Professionals *on the Learning Management System (LMS). If you need LMS assistance, please call 831-657-2524.*

Approved Defense Counsel—An Introduction

Our insureds often require the services of an attorney to assist in legal proceedings and to help defend against allegations of professional negligence. In some cases, we may also ask an attorney to assist an insured before a claim arises. XL Group maintains relationships with attorneys across the country whom we've determined to be well-qualified to represent the interests of our insureds. These attorneys collectively are called "approved defense counsel."

When we assign counsel to represent an insured, an attorney/client relationship is formed between the attorney and the insured. The defense counsel assigned to your matter represents your firm, not XL Group. Nevertheless, it's in the best interest of XL Group and our design professional insureds to appoint lawyers who are knowledgeable and experienced with the unique and complex issues that arise in claims against design professionals.

Some approved defense counsel are former architects, engineers or contractors. All are well-respected construction litigators and active in the design professional community. Many have established relationships with PLAN (Professional Liability Agents Network) agents and participate actively in our professional liability education program. Approved defense counsel also are skilled in providing other services for design professionals such as contract review, assistance with corporate and business legal needs, professional discipline and risk management consultation.

Our defense counsel have the knowledge and expertise to provide the detailed reporting, evaluation and budgeting we rely on when determining a resolution strategy.

They also provide information to insureds regarding their potential exposure and the progress of any litigation or dispute resolution proceeding. Accordingly, they keep the carrier and design professional informed, and assist both in formulating strategies for avoiding and resolving claims.

We're happy to share our recommendations regarding approved defense counsel with insureds seeking a qualified attorney in a particular jurisdiction. Please feel free to contact your XL Group claims manager for information.

New Lessons to Learn: The 2014 *Contract eGuide*

The 2014 release of *XL Group's Contract eGuide for Design Professionals* is exclusive to our policyholders on our online Learning Management System (LMS). (See the sidebar, "The Learning Management System.") The *eGuide* is available 24/7 and is mobile friendly, so you can access it on your phone or tablet—whenever or wherever you need it.

The *eGuide* contains a wealth of practical information and tools to help you better manage your risks. Even if contract review is not your responsibility, we hope you refer to it often. Many architects, engineers and attorneys consider it to be the risk management gold standard for the industry. That's just part of the reason we work hard to keep it updated and relevant.

The 2014 release introduces two new topics and several important updates to existing chapters. Here's a brief overview of the new and revised sections:

New: Contractor Payment Applications

Did you know that contractor payment applications could expose you to a variety of potential claims? It's your signature on the payment application, and if something goes wrong, owners may use your signed certification in an attempt to hold you responsible. The best solution is to address the issue in your contract—long before you set foot on the project site or review the first pay application. This brand new chapter provides suggested language, compares the two approaches found in the AIA and EJCDC documents and offers practice management tips to help address the risks.

New: Restarting Stalled Projects

When you work on a restarted project, you'll likely assume one of several roles: 1) the original designer who is called back to restart the project; 2) a replacement designer who is hired when the project is resurrected; or 3) the original designer who is replaced by another consultant when the project comes back to life. This new chapter, much of which is based on a presentation by David Ericksen, Esq., Construction Practice Leader of Severson & Werson in San Francisco, offers contract and practice management suggestions for providing services on a restarted project. (Mr. Ericksen, who also serves as approved defense counsel for Design Professional, recently wrote a two-part article about restarting stalled projects for *Communiqué*, which you can access here.)

Revised and Updated Chapters

We consider a "Suspension of Services" clause to be a Deal Breaker. We've expanded the chapter to include stronger indemnification options that contemplate an unanticipated reduction or elimination of your agreed-upon scope of services—for example, if a suspended project comes back to life but the owner is using another consultant, or if the owner cuts back or eliminates your construction phase services. We've also added steps you can take to protect yourself if your services on a project are suspended.

The revised "Replacing Another Consultant" chapter explains that projects on which a consultant is replaced can be messy and involve higher risk than usual—for both the consultant who is being replaced and the replacement consultant. Your contract should anticipate both scenarios. This chapter can help you do just that and offers an expanded discussion on important loss prevention measures.

The revised *eGuide* is available 24/7 and is mobile friendly.

As we point out in the revised "Arbitration" chapter, we're not big fans of arbitration generally. Still, there are some limited situations in which it may be appropriate. The chapter explains that the 2007 AIA standard form agreements are more permissive than the 1997 version in allowing for the consolidation of separate arbitrations and adding (joining) another party to an existing arbitration in certain circumstances. (The current EJCDC documents do likewise.) The chapter discusses the pros and cons of consolidation and joinder, as well as of arbitration in general, and provides contract language and risk management guidance.

The revised *eGuide* keeps the "Sustainability and Green Design" chapter relevant and current. In this update, we point out that most green projects take more time to research, design, get approved and coordinate. Unless your contract and scope of services anticipate the additional time

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and effort involved, you may be subject to an unrealistic schedule or be inadequately compensated.

We've taken a fresh look at the important "International Projects" chapter and asked some experts to weigh in. To successfully practice in other countries, design firms must become aware of the many issues and approach each one systematically and intelligently. We've updated and augmented the chapter with guidance and key suggestions to maneuver through the tricky international waters.

The rate of mold-related claims against design professionals has remained fairly flat, but architects and engineers are not off the hook. While the law and science surrounding mold issues still need to be clarified and permissible exposure levels to indoor molds established, it's important to protect yourself. We've updated the "Mold" chapter to help.

We've also updated the "Statutes of Repose and Limitation" chapter to discuss the discovery rule, address new court decisions and take a closer look at the AIA and EJCDC approaches. And we've added a new exhibit that outlines Canada's Periods of Limitation, province by province.

While the law sets a standard of reasonable care for engineering and architecture, that standard can be modified by contract. Your goal is a clause that affirmatively defines the standard of care to which you will perform. Our revised "Standard of Care" chapter offers an optional clause to help provide tougher protection should an owner later claim that your standard of care was higher than required by law.

Finally, we've updated the chapters in the "Electronic Information" section ("Building Information Modeling," "Electronic Files" and "Project Websites") to add mention of the new AIA 2013 Digital Practice documents. We've also made some small changes to the "Accessibility" chapter to reflect recent court decisions—another issue that continues to evolve—and minor adjustments to the "Subconsultants" chapter.

Any suggestions? We want to hear from you as we work on the next *Contract eGuide* update. We welcome your comments, as well as your thoughts about updates and new chapters. Contact us at xldp.communique@xlgroup.com.

To login to the LMS for eGuide *access, click here. You'll need to accept new Terms of Agreement the first time you sign in.*

A new exhibit outlines Canada's Periods of Limitation, province by province.

The Learning Management System

XL Group's Learning Management System (LMS) now has 40,000 individual users. They have exclusive 24/7 access to eLearning programs and resources designed to help them lower their risk, improve business practices and keep up with emerging trends.

In addition to our flagship publication, *XL Group's Contract eGuide for Design Professionals*, LMS now houses *Focus on Quality*, a series of five papers that can help you upgrade your firm's quality plans and processes.

You'll also find our eLearning courses: *Contract Basics for Design Professionals*, *Lessons in Professional Liability*, *Risk Drivers* and *Managing Construction Phase Risks*. These courses allow participants to earn a premium credit of up to 10% and continuing education units. You can also access back issues of *Communiqué*, see your education program participation and certificates of completion, and view other loss prevention publications.

To access the LMS, click here. If you need help logging on, call 831-657-2524 or email xldp.educ@xlgroup.com.

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