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# Drafting a Quality Control Manual: A Design Professional's Guide

By: Jacqueline Pons-Bunney, Esq. and Peter Stacy, Esq.<sup>i</sup>

## Introduction

Whether dictated as a specific requirement in your client contract or not, many firms attempt to assemble an internal set of quality control standards for use by employees in performing professional services. Some firms use quality control/quality assurance manuals, some issue policy and procedure bulletins, while others simply rely on verbal instructions. Regardless of the methodology, it is advisable to establish and reinforce the general standards by which a firm's employees are expected to perform.

The adoption of quality control standards brings a measured uniformity to your firm's practice. It can also be a demonstrative factor in establishing performance that meets the standard of care. Firms without any quality control standards or procedures are often left at a loss to explain why a particular employee or group within the firm missed something or failed to follow a seemingly understood procedure.

However, the adoption of too detailed a manual or list of procedures can have the opposite effect. The quality controls may, in fact, alter the applicable standard of care. Furthermore, once adopted, the failure to follow the standards and/or procedures outlined in the manual can create a presumption that a firm's, or its employees', performance was negligent. Therefore, it is imperative to take care in adopting and using quality control standards that will meet the ongoing needs and reality of your firm.

## Section 1

### QUALITY CONTROL PROGRAM

#### Requirements

Quality control standards should set forth the general requirements that will guide employees in performing professional services. This should not be mistaken for outlining the performance of services that meet the applicable standard of care. The standard of care not only reflects adherence to internal procedures, but also the exercise of professional knowledge and judgment. It should also reiterate external comparisons to that "degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances."

Bearing the preceding in mind, quality control standards typically include general requirements for all areas of the firm's practice affecting or affected by the quality system. These policies authorize project managers and/or department heads to implement specific procedures within the boundaries specified in the Quality Control Manual. Again, a Quality Control Manual should not attempt to address every minute detail of the design process or every procedure throughout every department. The manual should be a broad stroke document. It can also serve to provide a measure for procedures, processes, and results.

In terms of its contents, as a minimum, the Quality Control Manual must include the following:

- The company's policy that describes the company's commitment to quality.
- An explanation of the company's documentation structure.
- Policy statements demonstrating management's intention to comply with an industry standard and/or contractual requirement. These policies must include:
  - How management expects company operations to function.
  - Who is responsible to implement these expectations (by function or job title).
  - Where and when the policies are applicable within the organization.
  - What interdependencies exist between functions and processes.
- Reference to the actual "operating procedures" of the company.
- Assignment of one or more "management representatives" for quality in the organization.
- A description of the company's organization (usually in the form of an organization chart, top level of the company only).

Typically, the key program elements address the following:

- **Quality Control Budget** – factored into every division and every project.
- **Staffing** – both in terms of specific project needs and quality control monitoring.
- **Incorporation of Basic Checking and Review Procedures** – from proposal to contract, schematic design, construction documents, and completion of construction (if applicable).
- **Peer Review Procedures** – internal and/or external.
- **Client Quality Assurance Procedures** – contractual requirements and expectations.

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The development of the Quality Control Manual can follow several steps:

- List standards/policies to be written;
- List more detailed operating procedures, cross-referenced to standards/policies;
- Draft standards/policies;
- Circulate for input from all departments;
- Note quality system inadequacies identified;
- Determine format and structure of the manual;
- Create first draft of manual; and
- Formally review, make appropriate changes, approve and release. <sup>i</sup>

## Firm Management/Organizational Structure

Every firm should already have in place some type of organizational structure flow chart/chain of responsibilities from management on down. In the context of developing a quality control manual and program, it is a good idea to revisit the functionality of your firm's current organizational structure. From there, the firm must decide who will serve as the Quality Assurance Manager and if there should be more than one Quality Assurance Manager and/or whether subordinate Quality Assurance Coordinators are necessary.

## Quality Control throughout Project Phases

From proposal to executed contract and from conceptual design through final completion, quality control must play a role in development of uniform standards. The development of quality assurance procedures is critical to the following key areas:

- Potential Clients: What is your experience with this client? Have you taken steps to confirm its financial solvency? Is the client involved in excessive litigation? Is the client fair in its approach to contract negotiations? Does that client have reasonable expectations of your scope of services and performance?
- Proposals: Who prepares and who reviews proposals prior to distribution? What standard terms and conditions are used? What information is known about the client (background, credit worthiness, standard contracts, procedures, manuals)? Consider budgetary issues, timing, scope, etc.
- Contracts: What are the firm's policies for reviewing and signing contracts? Is everyone following the same guidelines? Who is in charge of negotiation? Who has authority to execute?
- Project Initiation: Who is responsible for setting up a new project, obtaining a new job number, billing number, files, budget, staffing, etc.?
- QA/QC Project Performance: During the design and construction phases of a project, the project manager and/or designated Quality Control Manager or Coordinator must perform the quality control activities (checks and balances) as to the responsibilities of the project team and the firm, pursuant to the firm's contract with its client and industry standards.
- Closeout: At the conclusion of a project, the Quality Control Manager and/or Coordinator should prepare a summary of the quality control results.

## Disclaimers and Limitations

Whatever format your firm's Quality Control Manual takes, be certain to include a disclaimer and limitation language to prevent unjustified reliance by employees, clients, and third parties. A Quality Control Manual is intended as an internal guide for the firm's principals, associates, administrators, and managers to assist them in controlling those day-to-day project and contract issues that exist in almost every office.

The standards and procedures are meant as guidelines only – the provisions contained are not a substitution for, or modification of, specific contract requirements. Nothing in a Quality Control Manual is intended to create a warranty, either express or implied, to the professional services rendered by a particular firm. Lastly, it is not meant to replace or modify the applicable standard of care governing the performance of services on any given project.

## **Section 2**

### CHECKING & REVIEW PROCEDURES

#### Project Checklist

Ideally, a design firm should have a set protocol regarding project review at each stage of design and production. The review should include an evaluation of project completeness, technical accuracy, and conformance with project and code requirements. For more complex projects, or where certain issues may be problematic, third party reviews may be in order. Finally, the firm should insist on obtaining the client's comments and written approval at each stage of design prior to moving forward with the next phase.

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A firm should consider establishing a policy that project checklists be maintained on each project, and that every employee contributing to the work be required to review and sign off on that checklist. The checklist might include an overview of tasks to be done, and be tailored to conform to the complexities and scope of each individual project. General categories of items that should be considered include:

- Scope of services
- Schedule of performance
- Specific requirements
- Budget
- Contacts with authority to consent
- Specific exclusions
- Reporting requirements

The scope of the individual project review will vary depending upon the nature and complexity of the project. The following are basic objectives for all reviews:

- The work product accurately reflects the input data used;
- The work product is in compliance with the requirements of the project;
- The work product satisfies the requirements listed in the approved project checklist;
- The work product is clearly understood and technically accurate;
- Calculations are correct and assumptions noted; and
- Grammar and spelling are correct.

### **Documentation and Records**

Ask any cynical lawyer, and he or she will tell you that the only events that really transpired during a project are those that are documented in writing. A case based on "he said" versus "she said" is not likely a winnable one. A "writing" in the legal arena takes many forms: e-mails, videotape, diaries, schedules, sketches, etc. It becomes vital that a design firm keep impeccable records of their progress during a project: from contract negotiation, through conceptual design, through construction administration. All employees should understand the importance of keeping good records of telephone discussions, site visits and construction meetings. These records play a crucial role in litigation for many reasons, including:

- Providing evidence that the terms of the contract were met;
- Documenting client and governing agency changes;
- Confirming the custom and practice of the firm; and
- Evaluating performance of the design professional in issues involving project delay, changes, or general negligence.

A project file should include:

- Contracts, invoices, and confirmation of payment
- Correspondence (including e-mails, letters, and phone memos)
- Meeting minutes
- Design drawings, plans and calculations
- Directives, change orders, requests for information, etc.

All communications that have been copied to other individuals should be so noted. Transmittals listing the specific items sent, and confirmation of receipt of same, should also be maintained in the project file. (Note commentary on document retention, below.)

Finally, all communications with attorneys, insurance carriers, and/or insurance brokers should be kept separate from the project file.

### **Sub-Consultant Procurement and Collaboration**

The theory of vicarious liability in the law controls the design professional's responsibilities with regard to its sub-consultants. Vicarious liability has its roots in the law of agency, and generally holds that a superior is responsible for the acts of its subordinates. When a design professional decides to retain a sub-consultant, or agrees to do so as a favor to his client, he accepts responsibility for the acts or omissions of that sub-consultant. It becomes very important then, that the sub-consultant: be of the highest caliber; have a clear understanding of client expectations, project schedule and scope of work; and accept contractual responsibility for his own errors and omissions.

Specifically, in choosing a sub-consultant, the prime should be familiar with that professional's experience, history of performance, financial solvency, insurance status, and involvement in litigation. A reference check, or simply casual conversations with other members of the community, may provide good information about the sub-consultant's past performance. Most courts have on-line case lists that will allow you to search a party to a lawsuit by name. Of course, being named in a lawsuit is not

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indicative of poor performance; however, if the number of lawsuits seems excessive in light of the firm's size and nature of services, you may want to consider your options.

A written contract between a prime consultant and a sub-consultant is as important as that between the prime and the owner. Both parties should clearly accept financial responsibility for claims and damages arising from their respective negligence or willful misconduct. If you are the prime consultant, you should require proof of professional liability insurance that appropriately protects all parties in case of substantial damages resulting from errors or omissions of the sub-consultant. Coverage under general commercial liability and workers' compensation policies are also important, and should closely mirror the requirements imposed on the prime. If you are the sub-consultant, you should review the prime consultant's agreement with its client and confirm whether that agreement attributes any responsibilities to you.

During the project, it is important that good communications be maintained between the prime and the sub-consultant. All tasks, timelines and procedures should be clearly delineated, and substantive communications and transmittals should be documented. All project-related records and information should be made available for review by the sub-consultant. Both parties should meet regularly to, as the scope of work requires, coordinate information and assure that contractual and technical requirements are met.

Litigation often creates strains between the prime and the sub-consultant. The best case scenario typically results from a strong collaboration of the design team that begins in the early stages of procurement and continues through the litigation process.

### Technical Reports/Calculations

When such an above-named report comes under scrutiny by attorneys or experts during a lawsuit, quality control becomes paramount in the professional's defense. A design firm providing technical reports should have already in practice written review procedures, and follow them. References to these procedures should be included in a well-written report, and the procedures can further be verified by the author. An internal checklist may serve useful in ascertaining that anyone involved in the preparation of a report or calculations follows the pre-established guidelines.

From a litigation standpoint, it becomes imperative that the purpose and requirements of technical reports and studies are defined both in the contract and in the ultimate report itself. The data and calculations supporting final conclusions and summaries should be included within the report. If further backup data or computations have been used in reaching certain conclusions and are not included in the report, those should be kept by the design professional in its project file. Quite often at the core of a dispute in a legal action is whether certain tests or calculations were performed, or performed correctly, and to have a record of all the steps taken to reach the final conclusions is an effective way to avoid unnecessary speculation and expert fees.

Procedures guiding the preparation of technical reports may include the following:

- Establish a clear purpose and scope of the report requested in both the contract for services, the concluding report, and any interim communications;
- Clearly articulate assumptions and parameters of the report;
- Attach supporting data and/or calculations to the final product for easy reference. If too cumbersome, retain the information in the project file for later reference;
- Write the report in clear and concise language so that it is easily understandable by those involved in the project;
- Emphasize, in unambiguous written language, problematic issues that may affect design and construction;
- Include a listing of all reference sources in the report;
- Establish an in-house review procedure to verify the accuracy and adequacy of the findings and conclusions; and
- Maintain written record of transmittals of reports and backup documentation throughout the course of the project.

### Drawings

Much like technical reports and calculations, drawings also require well-established procedures for preparation and review. The suggestions made in the preceding section generally apply here. Specifically, a design firm's procedures relevant to drawings may include the following:

- Create a listing of required sheet titles and contents to conform to contract and project requirements, and for reference by those who will be involved in the preparation of the drawings;
- Prepare drawings at a scale such that they are legible when reproduced;
- Include sufficient details to illustrate the intent of the design;
- Include basic information on each sheet, including the date of the last update and reference to specific items updated;
- Discard drafts or superseded drawings unless needed for project documentation;
- Establish an in-house review procedure to check drawings for completeness, accuracy and conformance to project and code requirements;
- Maintain communication with related consultants to coordinate information; and
- Retain comments and mark-ups from agency reviews until all issues are resolved and the revised drawings are submitted for bidding.

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A few words of caution: If you are asked to prepare a "builder's set" of plans, be certain that your contract with the client clearly denotes the scope of your drawings and the level of detail expected. Further, if your drawings are submitted for bid prior to permitting, document your file appropriately. Be clear that you will not be held responsible for inaccurate bids based on incomplete drawings.

### Technical Specifications

There is a school of thought that specifications are written for lawyers. While perhaps a bit cynical, this is not altogether a false statement. Specifications are that portion of the contract documents depicting in words the requirements for materials, equipment, systems, standards, and workmanship for the project. They are reviewed, analyzed, dissected, and grossly emphasized during litigation. They are, perhaps, a more effective tool for lawyers and judges because they are in language understood by the average layperson. It is vital, then, that specifications be well-written, consistent in terminology, and properly coordinated with the project drawings.

Again, emphasis must be placed on procedure. A checklist can be beneficial to make sure that the specifications are consistently complete, accurate, and coordinated with the project drawings. Specification writing should begin at the early stages of design, and should be developed as the design matures. A specification library can be a good way to maintain consistency in terms. Establishment of a review process by persons qualified in each discipline to substantiate conformance with project and code requirements is strongly recommended.

Special attention should be given to the selection of materials and products. Design professionals are often requested or required to select specific products for implementation in the project. The professional assumes a substantial risk when making such decisions, particularly if the product is unfamiliar, new, or not adequately tested.

Take precautions to select manufactured products that have a proven track record for the application you intend for your project. Contact the manufacturer, in writing, to inquire whether such application is appropriate and request a written warranty of the product. Request information on the product's testing history and specifications. Consider asking that a representative of the manufacturer be present at the site when the product is installed. Finally, involve your client in every decision involving a new or unproven product. The more you do to verify the product's quality and appropriateness for its intended application, the less your exposure should the product underperform.

### Construction Cost Control and Estimates

Design professionals are generally not contractors and not in the business of providing detailed cost estimates of projects. However, they are looked upon by their clients, judges, and juries as *professionals*, and by implication, all-knowing. A client who asks for your professional opinion as to potential costs of a project is relying on your experience and knowledge to provide an accurate estimate. Unfortunately, an "estimate" becomes set in stone in the minds of many owners, and the minute the professional gives a number, he or she establishes the basis for a lawsuit.

The most effective way to manage this risk is at the contract stage. A contract that calls for the provision of construction estimates should unambiguously and repeatedly emphasize the limitations of the estimates provided, at each stage of design. For example, the professional has no control over market conditions, availability of labor, contractor's method of pricing or construction, etc. Further, the professional should strongly suggest, in writing, that the client retain a professional cost estimator for a detailed breakdown of costs.

When the design professional takes on the task of providing construction estimates, some general guidelines should be considered:

- Review the construction budget with the client, and discuss the adequacy of the budget;
- Advise the client if the budget appears insufficient and confirm these findings in writing;
- Evaluate impact of design decisions from the early stages of design development;
- Involve the client in cost-saving changes and impact on design;
- Document all value-engineering and cost-saving changes, noting the client's written approval; and
- Establish a quality control process wherein two qualified individuals provide independent cost estimates of the same design, or meetings are held wherein the estimator reviews his numbers with a qualified group of individuals familiar with the project.

### Section 3

#### **CONSTRUCTION-RELATED SERVICES**

##### **Overview**

There is good and bad in having the design professional involved in the construction phase of the project. The good part is that the professional will have more control over the finished product. The bad part is that the professional will have more control over the finished product. By including bidding, scheduling and construction observation services in your scope of work, you are potentially increasing your exposure in the event litigation ensues. Conversely, it may serve to decrease the risk of litigation in the first place. Should the professional choose to provide construction-related services, certain precautions should be taken.

##### **Bid Evaluation and Selection of Contractor**

Assisting the owner in the selection of a contractor can be a harrowing task. Much responsibility is tied into this endeavor, and with that responsibility comes possible liability. There are certain basic considerations to be taken when advising your client regarding project bidding and selection of a contractor:

- Contractor's experience and qualifications;
- Contractor's prior performance on similar projects;
- Contractor's staffing and concurrent projects;
- Contractor's understanding of the contract documents; and
- Contractor's warranties, terms and conditions, and schedules.

Be sure to caution a private owner that cheaper is usually not better. Selection of a qualified contractor, while perhaps not the least expensive up front, will serve all parties much better than a low bidder that lacks fundamental qualifications and will create binders full of documents supporting a cost-overrun claim.

##### **Scheduling and Controls**

Contractor claims typically call for damages based on delays. To combat these claims before they rear their ugly heads, the professional involved in the construction phase of the project should pay careful attention to construction schedules and keep the owner well advised of the contractor's progress or lack thereof.

A careful evaluation of the contractor's critical path method (CPM) schedule is vital to the overall success of the project. The critical path is the sequence of construction activities that, when added, determine the shortest time in which the project may be completed. A delay in a critical path activity will affect the overall completion schedule of the project. Prudence requires that the professional, if not sufficiently experienced in reviewing project schedules, require the owner to engage a contractor to provide evaluation of the CPM and determine whether the schedule is adequate and includes enough float (slack time).

The professional should also be involved in weekly construction meetings wherein the schedule is discussed and updated. A defense attorney attempting to recreate the significant events during construction in response to a delay claim will certainly tell you that professionals' project files are generally woefully deficient in documenting delay-related events. As the contractor's delay claim will certainly include claims of errors and/or omissions by the design professional that lead to the delay, it is imperative that the professional keep copious records of the circumstances behind every modification in the schedule. By the same token, the professional should keep the owner apprised of all issues affecting the project schedule, in writing, so that the owner can make appropriate decisions affecting the project.

##### **Review of Submittals and Requests for Information**

Submittals provide the design professional the opportunity to fine-tune the information provided in the drawings and specifications, and to monitor the contractor's progress and understanding of the design. Their purpose is not to modify design, but rather to fine-tune design and verify details furnished by a manufacturer or contractor. Therefore, deviations or conflicts between submittals and the contract documents often become key issues in litigation.

Similarly, a Request for Information (RFI) is a demand for an interpretation or clarification of a note, specification, detail, or other drawing in the construction documents. Generally, an RFI does not call for a change in the contractor's scope; however, RFIs are frequently the bases for contractor claims purportedly stemming from errors and omissions on the construction documents. It behooves the professional to take measures to guard against an abuse of the RFI process.

As expected, the first line of defense is contract language clarifying the design professional's role in processing submittals and RFIs. The contract (as well as the General Conditions, where applicable) should clearly state that a professional will review the submittals for purposes of conformance with design intent. The review is not intended for verification of dimensions or quantities, nor will the professional's acceptance of a submittal establish the professional's approval of construction means, methods, techniques, sequences, or procedures of construction. As to RFIs, the professional should respond to RFIs within a reasonable time. However, the contractor should be aware that the professional's time in responding to unnecessary RFIs (i.e., the information is

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found in the field or contained in the construction documents) will be charged to the owner as additional services, and passed on to the contractor.

It may be prudent for the design professional to make efforts to control the potential inundation of submittals and RFIs from the beginning. The contractor should review the contract documents prior to breaking ground and advise the professional of any questions or problems. Ask for a schedule of submittals and RFIs that you will review and require that the contractor abide by the schedule. Any submittals and RFIs received and not part of the agreed-upon schedule should be returned to the contractor. Be certain to go through the proper construction protocol; i.e., do not accept submittals or RFIs directly from a subcontractor or manufacturer. Rather, make certain that the documents go through the general contractor as required by the contract documents. Create a log of all submittals and RFIs with accurate information regarding issue, date, and status of review. Again, written documentation and organized recordkeeping will prove invaluable in legal proceedings.

It is further imperative that the design professional establish clear guidelines for processing submittals and RFIs. These should be reviewed, noting the following:

- All necessary components are included and can perform as intended;
- Latest design changes and prior comments from reviews have been incorporated;
- Drawings conform to code;
- Material selection is appropriate;
- Dimensions are accurate or within appropriate tolerances;
- Revisions are numbered, dated and identified.

Written documentation of the reviewer's procedure and comments should be maintained, perhaps in the form of a checklist, to provide consistency. An independent review of submittals and RFIs is also a good method of quality assurance. Finally, similar to the contract language suggested above, the professional's stamp of "approval" should note the limited role of the professional's review.

### **Field Observations and Changes**

A design professional's undertaking of site observation is a double-edged sword. While it allows the professional to have some control over the physical manifestation of the design, it also implicates the professional for discrepancies in construction. The contractor has the obligation to carefully study the drawings and other contract documents, verify field dimensions, and evaluate site conditions that may affect construction. With that, the professional that visits the site is often assumed to have a vast understanding, not only of the contract documents, but the means and methods of construction, down to the nominal detail.

Clearly, then, the professional's limited role during site visits must be defined in the contract documents. Moreover, the professional should establish protocol to document field changes, discrepancies and conflicts with the contract documents. The professional should walk the site with the general contractor and any pertinent subcontractor. Written documentation of the items reviewed should be maintained and transmitted to the owner and any other relevant party. Finally, where a change will result in a decrease or increase in project costs, a change order should be implemented.

### **Change Orders**

Construction-related claims are often riddled with disputes concerning change orders. A change order is a document prepared by the architect and signed by the owner, contractor, and architect, memorializing: the scope of change in the project; the adjustment, if any, in the contract sum; and the extent of adjustment, if any, in the project schedule.

Because change orders are fodder for litigants, it is important that the change order accurately reflect the intended scope of the modification. The change order should be carefully evaluated and negotiated among the parties involved. The effects on the project schedule and costs should be included and acknowledged. Your firm should establish basic procedures in the processing of change orders, that may look something like this:

- Advise the owner of the proposed change and the reason necessitating the change;
- Contact the contractor, in writing, describing the change and requesting price;
- Prepare cost estimate and schedule impact, then compare with contractor's estimate;
- If the estimates differ considerably, negotiate with contractor, keeping the owner well informed and involved in the process;
- Upon agreement of the effect in scope, price and schedule, submit change order to the owner for approval; and
- Once approved by owner, notify contractor to proceed with work.

There is no such thing as a perfect set of plans. The standard of care in the design fields make an allowance for human error. Therefore, it is inappropriate for the design professional to take on costs associated with simple errors and/or omissions that do not amount to negligence. The professional should be cautious in filling out standardized change order forms not to ignore such pre-printed language that states, for example, "change due to architect's error/omission." The implications of not challenging such statements in a change order potentially amount to an admission that is virtually impossible to defeat in the litigation arena.

### **Applications for Payment**

The professional's acceptance of the contractor's application for payment brings with it a representation by the professional that the contractor has performed work in accordance with the contract documents. The professional then, has certain responsibilities to his client to confirm that the work has indeed, been satisfactorily completed. In undergoing such an endeavor the professional should, to the best of his information and belief, confirm that the quantity of work completed conforms with the payment request, and compare the requested amount to the bid estimates. Before the professional recommends payment, considerations should be taken to include: conformance with the contract documents; acceptable results of testing and inspections; and correction and appropriate documentation of any deviation from the contract documents.

In a litigation scenario, much is read into the professional's acceptance of payment. The professional's acceptance should not be interpreted to mean that the professional has made exhaustive or continuous inspections of the contractor's work to confirm quality and quantity; evaluated construction means, methods, techniques, sequences or procedures; reviewed requests from subcontractors or suppliers to substantiate the contractor's payment request; or ascertained how the contractor has allocated sums previously paid. The more these limitations are repeated in writing, beginning with the professional's contract and extending to the payment requests themselves, the stronger the panoply of defenses at the time of a claim.

### **Section 4**

### **RECORDS MANAGEMENT**

#### **General Procedures**

A cornerstone of the quality control management program is the control of documents. Document control is an essential preventive measure ensuring that only approved, current documents, specifications, and standards are used throughout the organization; proper documentation of project events, conversations, decisions and conditions are maintained; and disposal of non-essential, out-dated documents is systematic and orderly. In general, less is often better than more. You should develop a document retention hierarchy and structure. Oftentimes, your client contract may dictate a records management, audit, and retention policy. You may be required to maintain certain project and/or accounting records for a specific period of time. It is important to know the contractual terms and/or regulatory requirements so that appropriate documentation methods are followed. Again, someone should be assigned responsibility for monitoring compliance.

#### **Document Retention and Disposition**

With the purpose of developing uniform document retention practices, and in order to preserve space and control document storage costs, a firm should consider adopting document retention policies and procedures. In adopting these policies and procedures, a firm must consider the possible administrative, legal, and business requirements that may arise with respect to documents in its custody. The policies and procedures are meant to strike a reasonable balance between those requirements and the practical considerations involved in protracted document retention (including space constraints and storage costs).

In order to implement a firm's document retention policies and practices, an officer, director, or employee should be designated as "document retention administrator." This may be the same person as the Quality Control Manager or a Quality Control Coordinator. The document retention administrator shall: endeavor to ensure the uniform application of these policies and procedures; resolve all specific issues not addressed by these policies; and make recommendations to the firm's management regarding the firm's document retention policies and practices.

A key element of the document retention policy will address the destruction/disposition of documents. Subject to the specific exceptions noted below, a policy statement should be addressed to the destruction of most project files so many years (i.e., 5 years) after the substantial completion of professional services on a given project. Because of certain specific regulatory, legal or administrative requirements, certain classes of documents will be retained for longer or shorter periods. The statute of limitations and statute of repose in a given jurisdiction will also serve to guide you in the length of time documents should generally be retained. Regardless of these time periods, generally you should permanently keep a copy of your executed contract and a copy of the permitted set of plans and specifications.

- **Specific Contract Requirements** - As mentioned above, you must also confirm the contract requirements for each project/client as some developers/owner indicate in the contracts that files have to be kept for a certain period of time. In the event of a conflict between the time periods in a firm's general policies and procedures and the specific contractual requirements of a particular project/client, the specific contractual requirements should be followed.
- **Legal Proceedings** - Do not destroy any documents at the end of the retention period(s) if the documents are known to be under subpoena, or are otherwise the subject of an actual, pending or anticipated dispute.
- **Pre-Destruction File Review** - At least once each calendar year, the document administrator should present to the President or other designated officer, a list of project files to be destroyed. Before the documents are destroyed, the document retention administrator will endeavor to determine whether the documents are under subpoena or are otherwise the subject of an actual, pending, or anticipated dispute.

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- **Destruction** - The destruction of documents and project files consistent with the above policies should take place at least once each calendar year, at a time to be specified by the document retention administrator. For purposes of administrative convenience, the document retention administrator may direct that document destruction will occur more frequently than once in any given calendar year. The document retention administrator shall keep a permanent record of all project files destroyed. The record shall also reflect the date of the file's destruction and the person(s) who performed the destruction.
- **Disclaimer** - As with the general quality control manual and standards, some type of disclaimer or limitation should be added that covers the following: To the extent that documents have not been retained in the past, that would have been subject to retention under a document retention policy, such documents of necessity are excepted from the requirements hereof. The purpose of the policies and procedures is to control document retention costs and preserve space. Nowhere shall it be construed to establish or create a duty, or to provide any obligations beyond those imposed by law, to any third party. While good faith efforts must be made to abide by these procedures, it is recognized that because of the volume of documents involved, the complexities of professional practice, and the ever presence of Murphy's Law, there may be instances where documents will be retained for a longer or shorter period than that prescribed herein. A failure to comply with these procedures should be presumed to be inadvertent.

### **Electronic Documents**

As we now function in the "electronic age" and/or "virtual paperless" environments, the retention of electronic information has become an increasingly hot topic. While we cannot hope to address all facets of this issue, we must be alert to the fact that e-mails in particular have become an extremely important element in litigation discovery practice. Given recent court decisions as to the discovery of electronic files/e-mails, there are numerous articles on electronic discovery ("e-Discovery") at the moment, so we will not go into that aspect further here. The purpose of this section is to briefly address the record retention policies regarding electronic information prior to litigation arising.

With the passage of document tampering and destruction provisions of the federal Sarbanes-Oxley Act and recent amendments to the Federal Rules of Civil Procedure, the storage and retrieval of electronic information has taken center stage. Every company or firm is required to have someone with knowledge of the storage and retrievability of electronic records.

First and foremost, you are well-served by consulting with your Information Technologies ("IT") person or outside firm as to your company's current system capacities and procedures. You need to have some understanding as to volume, usage, existing archiving (locally and system-wide) and time expended in existing and potential procedures. Your IT consultant may also know something about industry requirements and/or practices that will further assist you in adopting a formal policy. As with your "hard" document retention policy, the electronic information retention policy must balance legal requirements with realistic business practices. Regardless of the pre-litigation policy ultimately adopted, remember that the policy with respect to destruction of documents must be suspended once there has been a notification of litigation or when litigation is reasonably anticipated.

After initially meeting with your IT consultant, you should review both legal/regulatory and contractual requirements concerning the retention of electronic documents and/or records in general. Emails are records that need to be retained in some format/location for generally the same lengths of time as "hard-copy" documents. Next, what is the procedure for purging/deleting e-mails, from local hard drives, the company's system and/or separate server? How are you planning to implement and enforce this policy (i.e., automated **e-mail archiving** system or manual procedures by your IT person or by every employee)? Much like the hard-copy policy, the electronic information policy must address retention, destruction, system requirements, and storage capabilities, monitoring and enforcement.

Just when you thought you were done – be aware that e-mails are certainly not the only electronic files. You have to apply at least the broad elements of the policy to Internet downloads, instant messaging, text messages, Websites, e-faxes and on-line bulletin board postings.

Lastly, a good e-mail retention policy should have the following topics:

- Effective date
- Last change date and changes made
- Person or department responsible for the policy
- Scope/coverage
- Purpose of the policy
- Policy statement: This can include a company philosophy statement about the business/legal/regulatory reasons for records retention
- Definitions
  - Responsibilities
    - Procedures
  - Other retention policy guidelines
    - Duplicate copies/convenience copies

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## Drafting a Quality Control Manual: A Design Professional's Guide

By: Jacqueline Pons-Bunney, Esq. and Peter Stacy, Esq.<sup>i</sup>

- Consequences if the policy is not followed
- Litigation hold/stop destruction policy including a backup procedure<sup>ii</sup>

The use of electronic documents has had a significant effect on document retention requirements. Cases are being published left and right about production requirements in the context of litigation and various companies' failure to appropriately account for electronic information. Courts have imposed damage awards and penalties on companies that have stalled in discovery, failed to maintain and/or purged such information in anticipation of litigation. Furthermore, there are regulatory and contractual requirements that make adoption of an electronic information policy a must. That is why it is important to consult with an IT consultant and legal counsel to determine if your firm's existing record retention policy adequately addresses the use of electronic information, and specifically, the retention, storage, retrieval, and destruction of the same. The risks and costs of failing to address the retention of electronic information are too great to be ignored.

### **Conclusion**

There is nothing a lawyer can do to prevent a client from being sued. It is a fact that lawsuits involving design professionals are rampant in today's world. Consider the foregoing as a simple wish list from counsel with experience in negotiating and defending claims on behalf of design professionals. Establishing a sound Quality Control policy will assist your firm in consistently maintaining a high quality of performance. If used effectively, it will also serve as a shield to attacks of negligence and breach of contract. While we have offered a vast listing of suggestions and examples, we invite you to draft a manual that works for your firm, tailored to your employees, clients, and fields of practice. This investment early on may, in fact, save you time, money, and heartache for years to come.

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<sup>i</sup> Weil & Drage, APC, focuses its law practice on the representation of design professionals. The firm has offices in California, Nevada, and Arizona. Its experience covers all aspects of complex construction and business-related matters, including contract negotiation, pre-litigation, litigation, trial, and post-trial appellate matters.

Jacqueline Pons-Bunney, Esq., is a partner at Weil & Drage. She is admitted to the State Bars in California and Arizona, and to the U.S. District Courts, Southern and Central Districts of California. She earned her Bachelor of Architecture Degree from California Polytechnic University, Pomona, and participated in the International Studies Program in Florence, Italy. Ms. Pons-Bunney obtained her Juris Doctor, *cum laude*, from the University of La Verne College of Law. Her practice focuses on the representation of design professionals in litigation of design and construction-related claims, as well as contract review and negotiation.

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Both Ms. Pons-Bunney and Mr. Stacy have authored articles and presented seminars on risk management to a variety of professional organizations and private firms.

<sup>i</sup> The above two lists as to both content and development of a quality control manual follow the guidelines of the International Organization for Standardization (IOS) 9001, a voluntary Quality Management System standard.

<sup>ii</sup> From Bill Tolson's article "Email Retention Policy: A Step-by-Step Approach" as posted on SearchStorage.com. Mr. Tolson is Principal Analyst and Practice Manager at Contoural Inc.

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