



Construction Project Documentation: If it's not documented...

Questions from the Webinar + Answers

Note from the presenters: This Q & A (as well as the preceding live webinar) is designed to provide continuing education purposes only based upon the experience of the Panelists, and should not replace legal guidance or advice specific to any project, or laws of the jurisdiction governing any project. These may vary with each State. On all matters and issues, the recipients of the information related to the webinar and this Q & A acknowledge and agree that they will seek the advice of their own legal counsel.

In reference to the “Top 4 Non-Technical Risk Drivers” slide, Client Selection - of products or just working with that client?

The client selection category relates to selecting/working with a client. Selecting “good” clients is good risk management. The factors to consider determining when selecting or if you are dealing with a “good” client are the client’s experience in design and construction, if they have a history of claims or litigation, their financial condition, are they making payments of your fees, is the client receptive to mediation to resolve issues, or other factors you consider based upon your experience.

How is a Statute of Repose different from Statutes of Limitations?

Statutes of Repose for Improvements to Real Property

By Thomas A. Wolfe, JD, LLM, The Wolfe Firm

Normally, a statute of repose is an expression by the state legislature as to how far back one may look from the date the cause of action arises to have a valid cause of action. To put it into the real property context, the statute will dictate how far back in time an entity that is involved with construction or design of improvements to real property will be liable for a construction defect causing a property loss. In contrast, a statute of limitations is the period by which suit must be filed from the date the cause of action arises. Moreover, the statute of repose is backward looking, while the statute of limitations is forward looking.

Wolfe, Thomas A., JD, LLM, The Wolfe Firm. "Updated Statutes of Repose vs. Statutes of Limitation." *Updated Statutes of Repose vs. Statutes of Limitation*. Parker, Smith & Feek, 2011. Web. 17 Dec. 2015.
<<http://www.psfinc.com/press/updated-statutes-of-repose-vs-statutes-of-limitation>>.

Is that 2 years past the statute of repose limit?

Laws vary from state to state. Check with your legal counsel for the states that you practice in. In Ohio, the Revised Code 2305.131 for the ten-year statute of repose states as follows (partial text below/see entire statute for full text):

(A)(1) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, no cause of action to recover damages for bodily injury, an injury to real or personal



property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

(2) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, a claimant who discovers a defective and unsafe condition of an improvement to real property during the ten-year period specified in division (A)(1) of this section but less than two years prior to the expiration of that period may commence a civil action to recover damages as described in that division within two years from the date of the discovery of that defective and unsafe condition.

(3) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during the ten-year period specified in division (A)(1) of this section and the plaintiff cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, the plaintiff may commence a civil action to recover damages as described in that division within two years from the removal of that disability.

Can your contract supplant the statutes of repose if the contract sets the limit between Owner and Architect at 5 years?

Generally, if you have two parties of equal bargaining power, you can set a different time limit so long the length of time is reasonable, and if a dispute arises a court will have to determine what was reasonable. Since laws vary from state to state, check with your legal counsel on this.

What is the 10 foot / 100 foot photo rule?

As with general observations, documentation of your specific observations can be very helpful, perhaps with a photo from 10' away. However, numerous and random photos that you have and may never look at is not the best practice. These photos will contain info that you do not know that you have. So the better practice is to take photos of specific items you intend to make part of your observations at 10' away, and also take a few general photos from a farther distance like 100' feet away, in order to know the context where your specific photos were taken.

What is the concern with webcam?

The slide that contained a webcam reference was not illustrating a concern. Rather, it was outlining webcam as another form of documentation that exist today. We know of no concern with a webcam.

What about the possible use of a drone to photograph or film construction operations on a project site? Doesn't that end up increasing the risk tremendously if a firm is expected to examine all the information provided by the drone? What about if the drone is misdirected and misses something?



As discussed in question 5 above regarding the 10' vs. 100' rule, the drone may be taking photos of information that you do not know that you have, if you are not looking at the entire video. New practices, like the use of a drone, probably have not been tested in the courts as to their reliability or credibility.

Would you ever cite unsafe site condition that you noticed in your field observation report, or keep it as a separate item?

Generally, your first duty is to protect the public. However, there is no real answer to this question, and it would depend on each situation. However, putting it in a separate document could have the advantage, as opposed to it being buried in a site visit report, in order to stress its importance. Thus, someone with responsibility for safety would then be able to take specific notice. In doing this, generally advise the contractor that you noticed unsafe conditions, but be clear to not offer suggestions on corrective work that may be required.

Are there any specific suggestions you would have for a small design-build firm?

There are 3 different types of design-build delivery scenarios, as follows: 1.) architect lead d-b where architect engages the contractor; 2.) contractor lead d-b where the contractor engages the architect; and 3.) where the owner engages a d-b firm that has both in-house design and build capabilities.

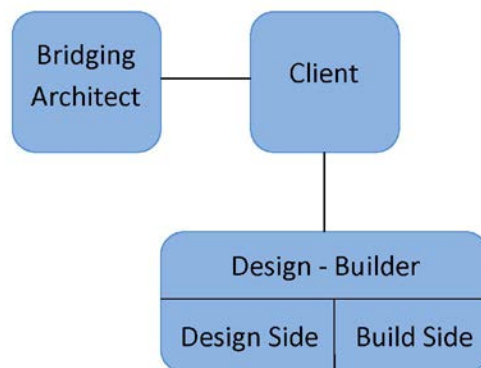
- 1.) Architect Lead D-B: Regarding insurance matters, the architecture firm would have to have separate professional liability insurance for design services, and general liability insurance for the build part of their practice. This scenario obviously gives the architect the best control of the project, and the documentation. While at the same time, the architect's responsibility to protect the interests of the project owner is also consistent with the ethical obligations of the profession. Some architects may find that they are out of their comfort zone with this scenario, and opt to not risk the pitfalls that may come with being responsible for construction, notwithstanding the rewards of higher profits.
- 2.) Contractor Lead D-B: Regarding insurance matters, the contractor would have their own general and other normal coverages, and would need to buy professional liability insurance for vicarious liability for any negligent acts, errors or omissions on the part of the architect. Regarding documentation, this method could have some issues because the contractor is in control, and may not follow through with all the responsibilities that the architect has towards the project owner. For example, the contractor may not keep the architect in the loop for review submittals. Rather, the contractor may build whatever they want, regardless of the design intent of the project. Thus, documentation would be lacking.
- 3.) Design-Build Firm: This scenario, regarding insurance, would similar to architect lead d-b. Both general and professional liability insurance would be in place. The d-b firm has the advantage of having to not form a new team on a project-by-project basis, and thus has the established internal procedures to deliver the project. Good documentation would follow, since there is a design professional (the architect) directly responsible to the project owner, unlike the contractor lead d-b scenario.



A hybrid form of d-b is where the owner hires a “bridging” (a.k.a. criteria) architect that prepares a set of schematic documents. The owner then uses these schematic documents to solicit proposals from design-build teams (regardless of which of the 3 types stated above). The advantage of this approach is that the design-build firms are bidding apples to apples, all using the same schematic documents. This allows the bidding to be based upon best cost, as opposed to design and cost. In other words, without the bridging architect and the schematic documents, the owner would have to sort out which design they want and what is the best cost, at the same time.

As an option, the bridging architect could stay on board with the owner during final design and construction, perhaps as an owner’s rep. See diagram below. Be thorough in documentation, regardless the type of the practice you have.

Bridged Design-Build (also called Criteria Architect)



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A.R.E. Study Session - PP&P

What about contractor minutes?

The architect’s minutes and the contractor’s minutes should be reviewed together for consistency. A contractor’s minutes would provide additional documentation, like the contractor’s responsibility to prepare a list of items to be corrected at end of a project (commonly called a “punch list”). See AIA B101 (2007):

§ 3.6.6.2 The Architect’s inspections shall be conducted with the Owner to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the list submitted by the Contractor of Work to be completed or corrected.

Can you elaborate a little further regarding what to do or not do if not hired for construction phase services?

First, you should discuss the importance of construction phase services with your client, because the architect is there in this phase to observe that the general intent of the design of the project. The architect’s involvement during construction is in everyone’s best interest – not only the client, but also



the contractor as well. Also, since most issues manifest during the construction phase, the architect should be there to help resolve issues before they become a much larger problem.

If after educating the client about the value of this service, but they still insist on not engaging the architect, the following is a contract clause that may help:

If the architect's scope of services does not include construction phase services, such the services will be provided by the client. The client assumes all responsibility for interpretation of the contract documents and construction observation, and client waives any claims against architect that may be in any way connected thereto. Client agrees, to the fullest extent permitted by law, to indemnify, defend and hold the architect, its officers, directors, employees and sub consultants against all damages, liabilities and costs, including reasonable attorneys' fees and defense costs, arising out of or may be in any way connected with the performance of such services by other persons or entities and from any claims from modifications, adjustments or changes made to the architect's documents to reflect changed field or other conditions, except for claims arising from the sole negligence of the architect.

In the event that an architect's original scope of services includes the construction phase, but later is eliminated, XL Catlin Insurance has also prepared the following contract clause:

The Consultant's commitments as set forth in this Agreement are based on the expectation that all of the services described in this Agreement will be provided. In the event Client later elects to reduce design professional's scope of services, Client hereby agrees to release, hold harmless, defend and indemnify Consultant from any and all claims, damages, losses or costs associated with or arising out of such reduction in services.

Any comments for an architect working as a construction observer for an owner - not as architect of record - regarding documentation? (following clarification later added) Describing my work as "owner's rep" is more or less accurate - working for Owner's Project Manager, and, yes, it is a School. Somewhat as a "watchdog" to help make sure architect does their job, but also to be present during construction process - more frequent site visits than the architect of record

To date, the AIA has not prepared an owner's representative model agreement.

However, see AIA B132 (2009) Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser for a description of the scope of services for an architect. For an additional reference, see also AIA B209 (2007) Standard Form of Architect's Services: Construction Contract Administration, for use where the Owner has retained another Architect for Design Services.

If you are an owner's representative, hopefully are still able to respond to questions with the assistance of the design architect, otherwise you have to make numerous assumptions and that creates risks.

Do you recommend using a formal Certificate of Final Completion vs. just using the final pay app for that purpose?



I am not aware of an AIA document such as a certificate of final completion. AIA B101 (2007) and A201 (2007) both capitalize the "S" in substantial and the "C" in completion, but leave the words "final" and "completion" with small caps to signify the importance of Substantial Completion. The Certificate of Substantial Completion is AIA G704 (2000). A hybrid document could be created for final completion, but since final completion may be hard to determine, using the contractor's final application for payment along with your last invoice could be used.

AIA's "Frequently Asked Questions" states the following at
<http://www.aia.org/groups/aia/documents/pdf/aiab080100.pdf>



THE AMERICAN INSTITUTE
OF ARCHITECTS

AIA Contract Documents Generally

Frequently Asked Questions

Q1. Does the AIA offer a "Certificate of Final Completion" form or a "Notice of Completion" form?

The AIA does not offer a "Notice of Completion" form or "Certificate of Final Completion" form. If using AIA Document A201™–2007, General Conditions of the Contract for Construction, you will not need a separate Certificate of Final Completion. Section 9.10 of AIA Document A201, Final Completion and Final Payment, outlines the necessary steps in certifying the project's final completion. Initially, the Contractor requests a final inspection by the architect and owner and attaches the final application for payment. The architect issues the final application for payment and signs the certificate if all conditions for final completion and final payment are met. A separate certificate for final completion is not necessary, since the architect's signature and final payment indicates that the work is complete.

"AIA Contract Documents Generally: Frequently Asked Questions." (2004): n. pag. The American Institute of Architects, 10 June 2010. Web. 17 Dec. 2015. <<http://www.aia.org/groups/aia/documents/pdf/aiab080100.pdf>>.

Many contractors make up their own Application for Payment forms that look like an AIA G702/703, but are actually a copyright infringement. If the architect signs and 'certifies' such a pay app, are they complicit in the infringement?

Check with your legal counsel on this.

Since the contractor is responsible for all job site safety not the Architect, you said the architect has a responsibility for safety issues, what are those specific requirements of an architect?

As stated in the answer to Question # 8, generally, your first duty is to protect the public. However, an architect should notify the responsible party for site safety if they see or there may be a safety issue, but an architect is not responsible for any safety issues. That is why it is highly recommended to visit the site with the site superintendent. B101 (2007) states:



§ 3.6.1.2 The Architect shall advise and consult with the Owner during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.

Could you give examples of lack of procedures to identify errors, etc.?

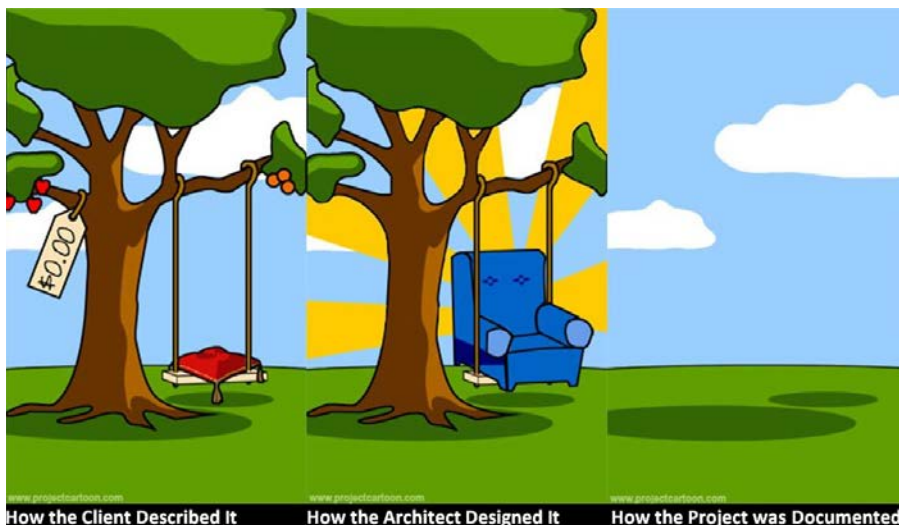
An example of procedures to identify errors or omissions is a quality control program at an architect's office. Such a program could include an internal peer review of a project before it is released for bids, checklists, etc. Also, risk management articles on the standard care of an architect should be read and explained to all staff, especially those that are inexperienced in the profession.

Do you recommend collecting filing all emails by all parties on a project both during design and during construction? For how long?

It is recommended to retain all emails from all parties related to each project, both during design and construction. The length of time would be best when weighed against your state's statutes of repose and limitations, and with your legal counsel's advice.

Is there a downside to NOT writing formal Field Reports when your Owner/client is local and you meet with them in-person regularly, anyway?

The in-person meeting is presumably verbal in lieu of written documentation. Written documentation is the better practice. The title of the webinar illustrates the needed for documentation, because if it's not documented, it is as if the information does not exist.





Can substantial completion be for construction document preparation completion or is it only for construction completion?

The concept of "Substantial Completion" is used only for construction. There is no certificate of completion for the end of the construction documents phase of a project. But see the portions of B101 (2007) regarding moving from one phase to the next.

3.2.7 Architect shall submit Schematic Design Documents to Owner, and **request the Owner's approval**

3.3.3 Architect shall submit Design Development documents to Owner, advise of any adjustments to the estimate, and **request the Owner's approval**

3.4.5 Architect shall submit Construction Documents to Owner, advise Owner of any adjustments to the estimate, and **request the Owner's approval**

Especially if the superintendent is not accessible at that particular moment?

Reschedule the site visit for when the superintendent is present.

I understand that the architect should never "stop" work. However, there may be a situation where a worker performing a function and is in imminent danger. In this case, would be correct for the architect to stop this particular person's operation?

As stated in the answer to Question # 8, generally, your first duty is to protect the public. That is why it is highly recommended to visit the site with the site superintendent. However, professional judgment on this is required such as a situation stated here, so there is no specific answer can be given, since no two sets of circumstances are the same. Involve the superintendent.

In a job meeting, if the contractor keeps the minutes, what should the architect do? Should the architect keep separate minutes for their own use?

Yes, it would be helpful to take your own notes to able to recall what was stated in the meeting, and then review the contractor's minutes to ensure it is consistent with your recollection and notes. Then correct the contractor's minutes as you see fit.

Do you have any acceptable Forms and Procedures that small firms could utilize - recommend?

Reference the Architect's Handbook of Professional Practice and your professional liability insurance agent. Also see materials that are available through the AIA, such as the Small Firm Roundtable and the Knowledge Community regarding "Small Project Practitioners."

The Small Project Practitioners (SPP) Knowledge Community generates, collects and disseminates knowledge and wisdom on how to profitably run a small firm and how to carry out small projects that do not fit into the model of departmental production that characterizes many larger firms.

Small Project Practitioners (SPP): <http://network.aia.org/smallprojectpractitioners/home>
Small Firm Roundtable (SFRT): <http://network.aia.org/smallfirmroundtable/home>



Can emphasis on Substantial Completion at the expense of "final" completion be contrived to relieve the contractor from completing their contract work?

AIA A201 (2007) makes it clear that the contractor has to complete the project for unfinished work even after the date of Substantial Completion. See:

***§ 9.8.4** When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.*