

# CONSTRUCTION RECORDKEEPING

## BUILD A RECORD YOU'LL BE PROUD OF

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The management of construction projects involves the management of information. Frequently, decisions need to be made on-the-fly, before the written information necessary to document the decision is available. Under time pressure and with no reliable systems in place, project documentation (building a record) is regularly neglected. Unfortunately, a poorly built record can have serious negative legal and financial consequences.

### *Why Build a Record?*

One good measure of the success of a construction project is whether the completed building meets the needs and vision of the owner. Even small projects require a written proposal containing references to plans and specifications. Without good documentation, there is a greatly increased risk that the customer's vision may not be converted to reality, leading to a dispute. A key attribute of project documentation is the extent to which it enables any given stakeholder (general contractor, subcontractor, designer, supplier, owner, lender, insurer) to protect its own legal and financial interests during the course of, and after the project.

If a dispute arises for any reason (payment, workmanship, change orders, etc.) the first thing that lawyers need to see is the record – for the simple reason that arbitrators, judges, juries, and opposing counsel are more easily persuaded by a good record than someone's good word. Increasing the odds of success in a construction dispute is a valid business reason to create and maintain good records. Neglecting to build a good record greatly increases the risk of an expensive dispute or a bad result. That is, a bad record can ruin an otherwise good case.

### *What is a Record?*

The term "record" is used in many different contexts. The Random House Unabridged Dictionary provides 26 definitions. It describes one usage as: "the commitment to writing, as authentic evidence, of something having legal importance . . ." Another useful definition is: "an account in writing or the like preserving the memory or knowledge of facts or events." Records can also be defined by functional categories such as: payroll records, RFIs, applications for payment, tax records, RRP records, etc. In general

terms, a record is information in written or electronic form that is needed for business, organizational, legal, historical or other reasons.

The recordkeeping needs of businesses vary greatly by size, industry, and scope of business. In the construction context, the recordkeeping requirements of a Cost Plus contract are more transparent than those of a Lump Sum contract. OSHA and state equivalents address workplace safety documentation. Hazardous materials regulations including MSDS information are also well known. Remodelers need to be aware that EPA enforcement of the Lead Renovation, Repair and Painting Rule (RRP Rule) is predominantly in the form of records audits.

### *Records vs. Documents*

Beyond external legal requirements for creating records, organizations have wide latitude to decide what documents and information serve organizational purposes. Additional recordkeeping systems cost money and it is up to managers to evaluate the most cost-effective way to manage information on each project. According to the U.S. Supreme Court, absent legal or contractual requirements, in the normal course of business every document created by a business does not need to be kept as a record, or kept forever.

However, once there is notice (or reasonable anticipation) of a dispute or investigation, the legal system immediately broadens the duty to preserve documents. Notwithstanding a formal or informal records retention policy, both records and nonrecords (e.g., documents, email & other electronically stored information) may become relevant to a dispute or investigation. At the time when there is sufficient anticipation of a dispute, subpoena or investigation, all relevant formal records as well as non-records must be preserved. The scope of a so-called "legal hold" is usually much broader than just records. In the event of any of these notices or "triggers," consult an attorney immediately. Once a legal hold is triggered, the deletion of any relevant records or documents could be interpreted as the destruction of evidence – sometimes a crime, sometimes a case killer, always a wildcard risk. *(continued)*



**About the Author Steven J. O'Neill** is an experienced construction litigator with extensive knowledge of computer data systems architecture, electronic records issues and eDiscovery law. He has presented numerous seminars on these topics throughout the U.S. His practice areas include construction law, business law and technology law focusing on eDiscovery, Document Retention Compliance and Information Security Compliance. He is admitted to practice in state and federal court in MA and CT and available to serve clients nationally.

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## *Records vs. Email*

Email presents a special problem. Is every email a record? Is every email a document? What about metadata? Email is convenient. Email is also characterized by informality. Email is often unvarnished. In disputes, lawyers know that there is often good evidence (truth) in email and want to see it all. When performing word searches on email, lawyers often include the “cuss words” and other colloquialisms associated with emotional stress or coverups to ferret out smoking gun statements.

Email is not necessarily a record. Email is not necessarily a document. Email contains information and metadata (e.g., time stamp, who was copied and bcc'd). In the context of recordkeeping, perhaps the best way to think of email is as a container for records, documents and other electronically stored information. Metaphorically it is the equivalent of a stamped envelope – the envelope may be empty, contain records or contain other relevant documents. The focus must be on content.

## *Making a Record*

As early as possible in the conception of a project (and definitely when the contract terms are negotiated) the parties and stakeholders to a construction project should try to address the information and recordkeeping needs of the project.

Making a record involves identifying at least four subsets of records: what records are required by the law, what records are required by the contract, what records are required for good management, and what records are required to prosecute or defend a claim. The “good management” subset can include anything that is deemed to help the project or the individual organization succeed. Depending on the type of project, the type of contract used, the relationship of the parties and other risk factors, the recordkeeping requirements for claims may vary.

## *Guidelines for Making a Record You'll Be Proud Of*

There are some overall attributes that make a good record. All records should be kept so that they are accurate and can be shown to be authentic. Records should be accessible to authorized personnel (internal and external). Records systems should be designed to facilitate the objectives of the organization. Many records systems will need to provide some sort of audit trail as to changes made to prove they were not altered. Records containing confidential information must be marked and secured.

Good management practices during a project involve the creation of records of events. Daily reports, meeting minutes, field memos, project photographs and other systematized recording of project information should be factual and contemporaneous. Other recordkeeping is triggered by project events such as the following:

- Field meeting
- Accident or injury

- Disruption
- Nonpayment
- Scheduling impact
- Telephone conversation
- Interference or coordination problem
- Design error
- Constructability issues
- Theft

When an event occurs that may have some impact on a party's rights or interests, it is important that a record be developed to protect and benefit that party. Whether the event is captured in a formal project record (e.g., daily report), letter, memo or email, the record should:

- Be factual
- Be specific
- Be accurate
- Be as contemporaneous as possible (e.g., dictate to voice mail)
- Explain who, what, when, where, & how
- Not overstate facts or positions
- Not be emotional
- Include date-stamped photographs where helpful

Especially before sending an email or text, give consideration to how the record might appear to a stranger in a dispute resolution, months or years after the fact. Consider how it might be attacked by an opponent. Gather and add backup documentation to the record so that it is all in a package. Assign each record to a “retention schedule” so that the record will later be destroyed when it is no longer required or needed, and after any legal hold is lifted.

Making a record you'll be proud of involves some time and money but can help avoid disastrous legal and financial consequences. Building a record requires training field and office personnel regarding how these guidelines apply to each project as well as an explanation of the financial and legal reasons for them. These and other “good management practices” should become part of a general risk management program. They can be built into the way business is conducted without the need for specialized computer software or equipment. Finally, to get rid of old records, develop and implement a document retention policy and legal retention schedule, which together allow old records to be destroyed in a legally defensible manner.

*Originally published by the National Association of the Remodeling Industry (NARI) in its “Legal Corner” Blog.*