



DOCUMENT RETENTION:

Best Practices

Carol J. Stair, Esq.

Regional Claims Manager

Design Professional Insurance

XL Group

101 California Street, Ste. 1150

San Francisco, CA 94111

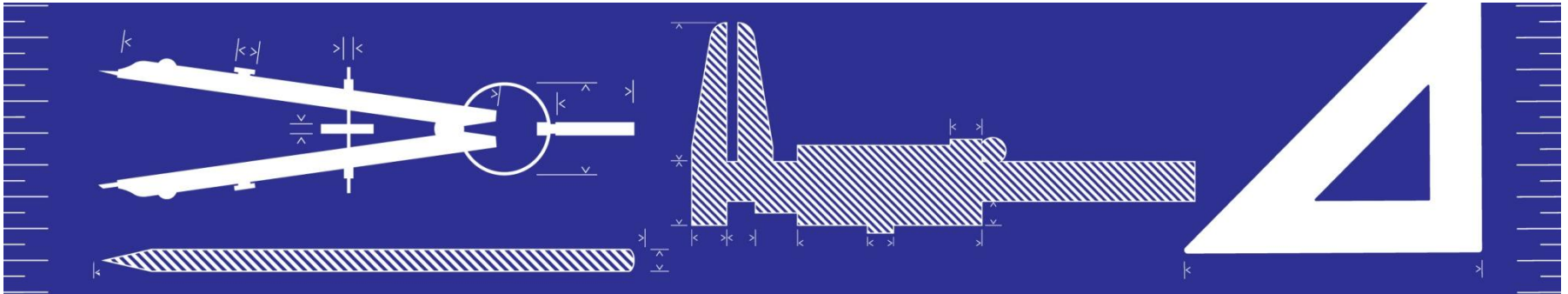
Phone: (415) 837-2425

Fax: (415) 421-8121

E-Mail: carol.stair@xlgroup.com

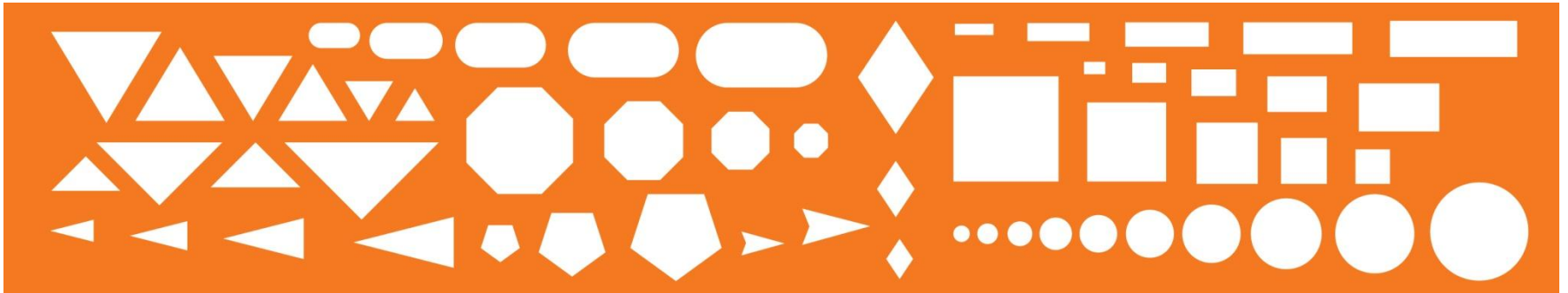
Learning objectives

1. Understand how to define “document.”
2. Evaluate why documents should be kept on any given project.
3. Learn the importance of formulating a company-wide Document Retention Policy.
4. Identify potential problems caused by not having a Document Retention Policy.



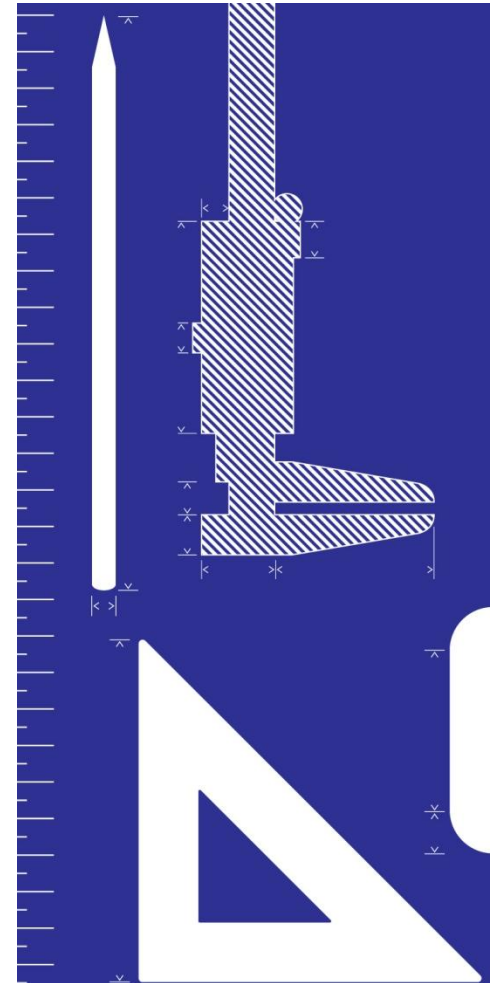
Questions to consider

- What are “documents”
- Why you need a specific policy
- What should be included in your policy
- What are some best practices for document creation



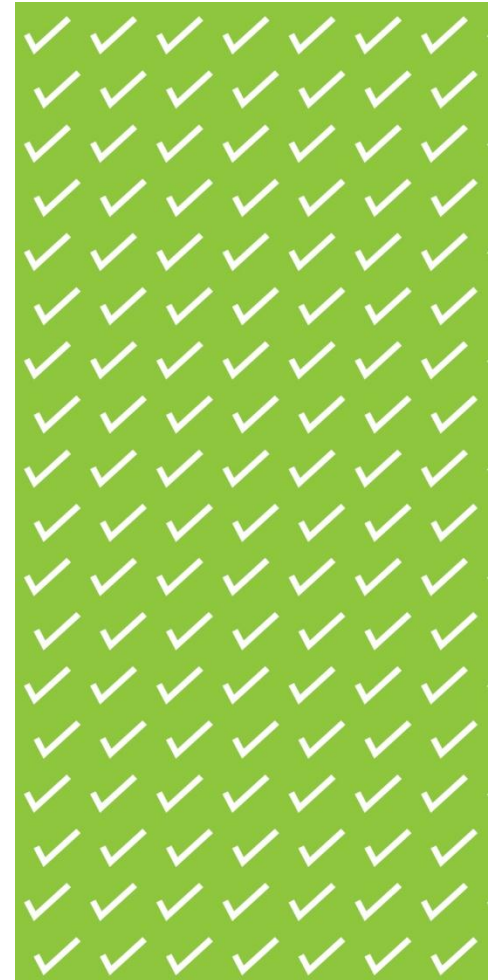
What are documents

- Electronic documents
- Digital photographs
- Paper documents
- Physical models



Definition of Documents

- “All [final] documentation related to the Project, including but not limited to project contracts, correspondence, memos, plans, requests for information, change orders, diaries, journals, invoices, construction change directives, manufacturers’ warranties, manufacturers’ materials, meeting notes, photographs, field observations, submittals, schedules, permits and calculations. It also includes information stored in any electronic medium including emails, digitally retained voice mails, text messages, electronically saved documents, computer assisted designs, building information modeling information and spreadsheets.”



Electronic documents

- E-mails
- Telephone voice mails or text messages
- CAD files
- BIM models
- Digitally transferred files of any type stored in a computer system – includes voice mails and other files whether or not you consider them “documents” or “records”



Digital photographs

- Make sure your staff is aware of what they are photographing and why
- Non conforming work or progress made
- Consider using the 10 feet or 10,000 feet rule
- Include a ruler or other object for context



Claim examples:

Photos gone wrong (or right)

- Photographs that are taken and stored in files without review might reveal errors later for which the photographer (your company) might be held responsible
- The case too many photos
- The case of the right photo at the right time



Physical models

- Mock-ups of a specific design, if saved, can sometimes help years later if that design is called into question
- Models might clarify design intent if changes are made to the plans



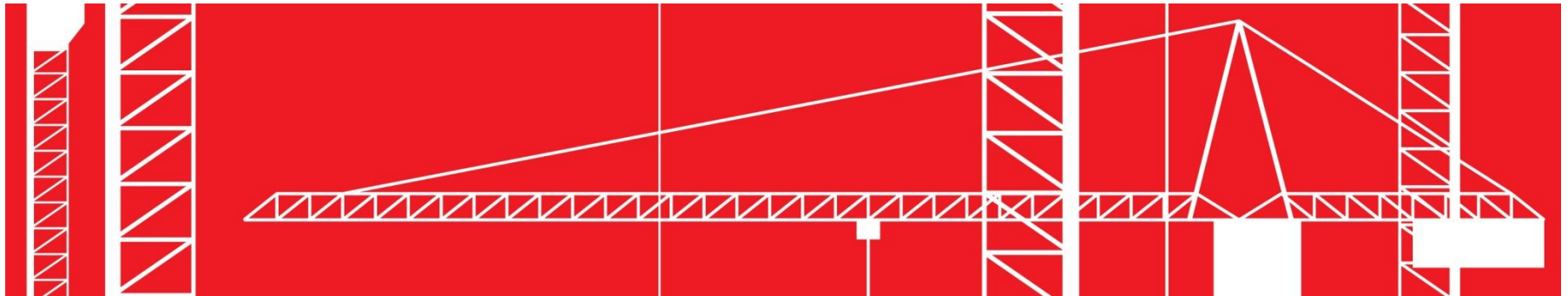
Website documents

- Best practice is to print/PDF the specific pages on which you are relying;
- Examples:
 - Manufacturer's specifications and usage explanations (title of the manual, publication date, and specific pages)
 - Specific code requirements of certain cities, counties or other governmental agencies
 - Installation instructions used in your specifications



Why have a document retention policy?

- Protects the Company from legal sanctions (monetary or legal)
- Acts as consistent history of what your firm did on any given project; if it is not written, it is solely a matter of credibility and popularity
- Establishes one go-to source for answering post-project questions or claims



The consequences of a formal policy

- You prove that a design change during construction was requested by the owner
- You prove that a manufacturer's design instructions caused a problem (if manufacturer's literature is not kept)
- It might increase your ability to defend against design claims



Problems of NOT following policy

- Zubulake v. UBS Warburg: Company destroyed documents and received a fine of millions of dollars
- Apple v. Samsung: \$1Billion judgment was partially related to document practices



What should be in your policy?

At a minimum, consider maintaining:

- All executed contracts related to a project; all final, stamped plans, change orders, requests for information and responses thereto, final shop drawings, manufacturers' literature, and job site/observation notes
- All documentation that shows significant changes in the design, the budget or the critical path schedule



Sub-consultant's documents

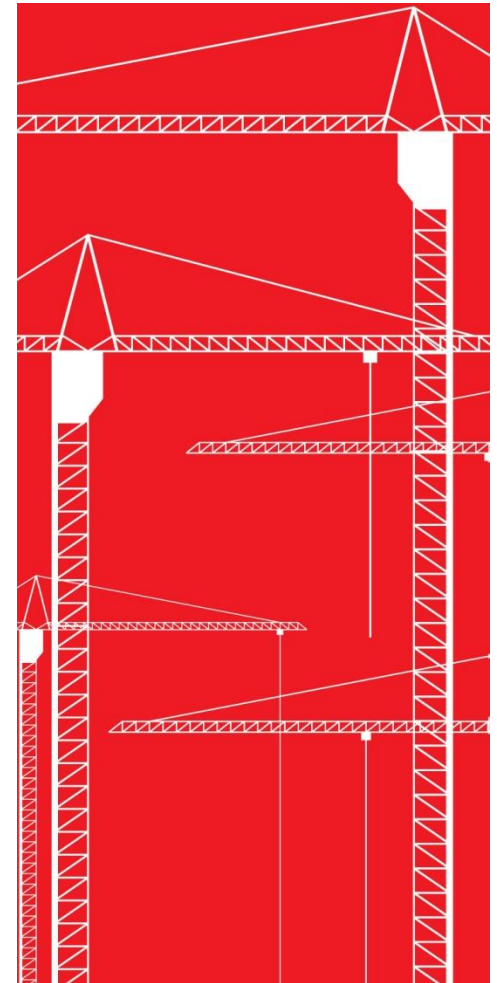
- Include a provision in your agreements requiring sub-consultants to maintain documents
- Make sure you and they understand “reasonably accessible.”
- In order to be considered reasonably accessible they must not be deleted or totally destroyed such that they cannot be reproduced or only be restored at a significant cost



Sample subconsultant document clause

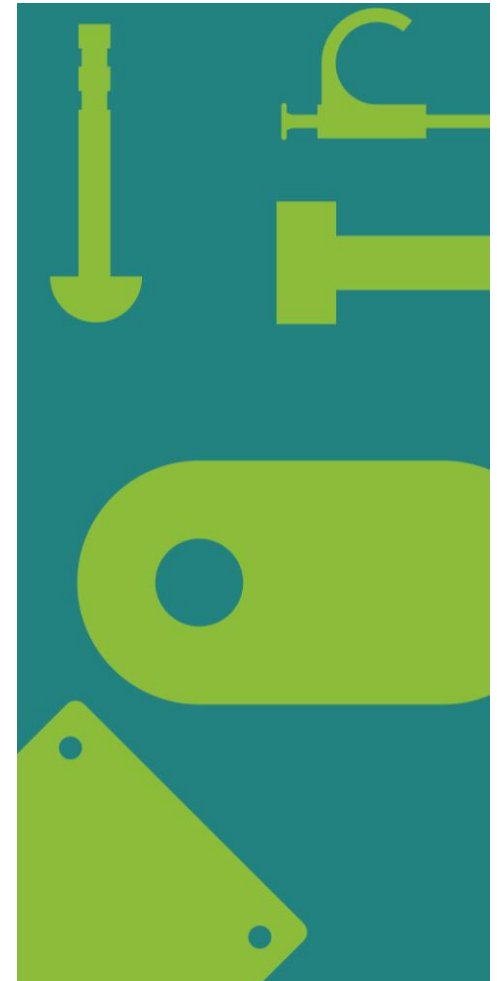
RETENTION OF DOCUMENTS

The Consultant and the Sub-consultant mutually agree to maintain [*all, final*] documents, including electronic documents, related to the Project for a period not less than _____ (____) years in a reasonably accessible manner consistent with each party's internal document retention policy.



Project Closure

- Recommended practices for project closure
- A firm's project close out practices provides a good defense against a claim
- Consider issuing a close-out letter: "We're done with our portion of the project now."



How many do I keep?

- Talk to your legal counsel about which documents should be included
- Some attorneys want *all* kept, some want *none* kept
- Regardless of which level of retention you choose, it must be the **same** for all projects and all employees must follow the same policy



How long should I keep them?

- Check with your attorney for the laws of the jurisdiction in which you are working; each jurisdiction differs – statutes of limitation, statutes of repose, etc.
- Check your contract for every project to see if there are specific document retention requirements



Good document equals a good defense

- Train your staff to be consistent in how documents are created and transmitted
- Make sure your staff is aware of potential pitfalls of poorly created documents
- Confirm that every member of your staff reads and follows the document retention policy



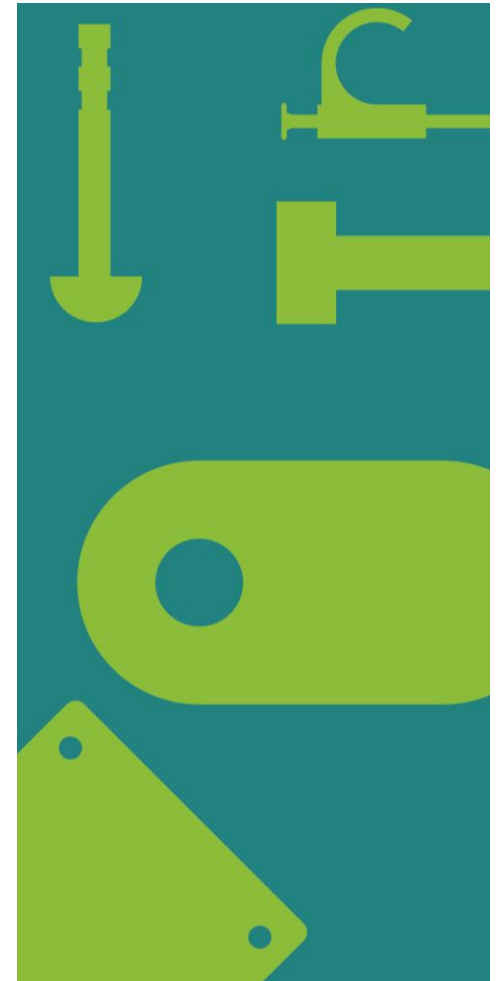
Good documents

- Clear, concise and unambiguous: LIGHT HOUSE KEEPER
- Accurately memorialize a project
- Spell out rights and obligations
- Create a roadmap for performance
- Safeguard against liability in the event of a dispute

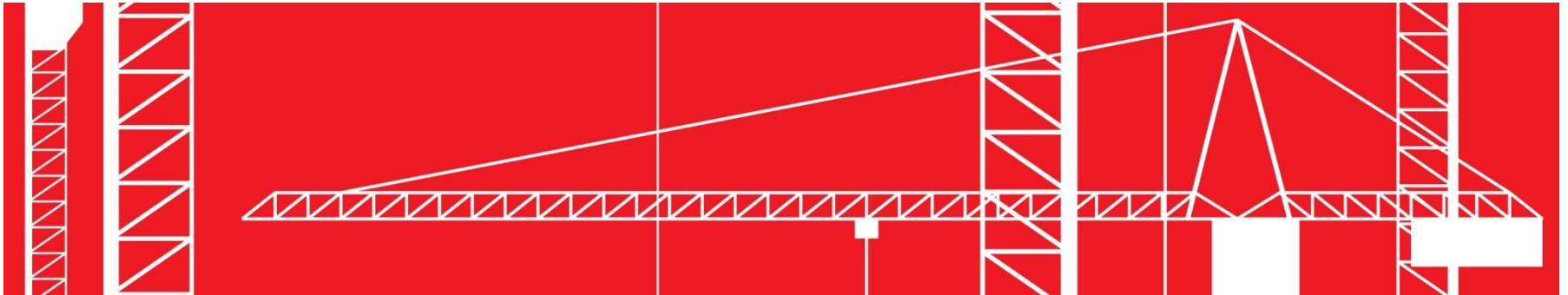


Examples of good documents

- Final, executed contracts & amendments
- Final, stamped set of plans
- Change orders
- Correspondence from owners or contractors
- Manufacturer's installation instructions
- RFIs, responses to RFIs, submittals, work scope variances, etc.
- Final copies of budgets and schedules, and any documents that evidence change in cost/critical path



Learn from others' mistakes



Bad email habits

- An e-mail chain about Project A that also includes details of Project B
 - Limit the subject of any e-mail to one project only
- An e-mail chain about a project meeting that gets sidetracked about an upcoming bowling night
 - Start a new email if you are no longer discussing the project



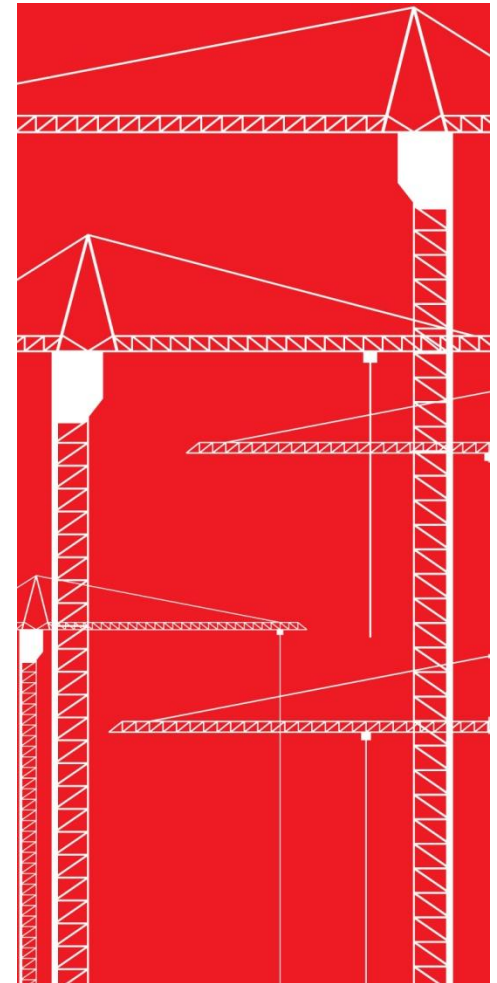
How to say it.?

- Avoid creating unnecessary fault or liability for your company
- Train your staff to:
 - Review their communications (whatever form); consider who really needs to receive it (avoid “reply all” when possible)
 - Minimize the impact of miscommunications by sending a follow-up to clarify or correct
 - Avoid posting anything on social media sites that would embarrass the firm



From our claim files

- E-mail to a client admitting “we do not have enough qualified professionals to staff this project.”
- E-mail to a client: “We’re sorry we caused the problems on the project.”
- Internal e-mail: “We need to increase the value of these work scope variances as much as possible without getting caught.”



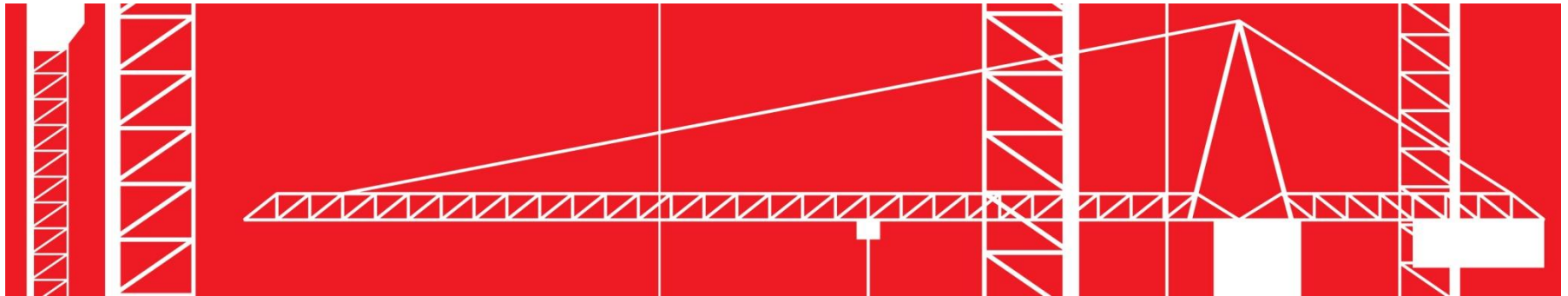
From our claim files

- “Dear Owner: We regret that your building experienced a catastrophic failure and collapse. We believe that the cause of the failure is due to an engineering deficiency created by our design team. We apologize for this mistake and will do whatever it takes to fix this situation.”
- Inter-Office E-Mail: “John, you told me not to put anything in writing about it being our fault that the building design failed, so let’s set up a time to sit down and talk about it.”



And another...

- Contractor's e-mail to Architect
 - “Are you Ok with the change I want to make to the plans, and are you free for lunch?”
- Architect's response:
 - “Yes.”
- Cost of lunch for Architect:
 - \$375,000



Train your staff

- Send e-mails that are short, simple and difficult to misconstrue
- Keep e-mails and communications related to only one project
- Always think about the viewpoint of the recipient
- Review your message before sending it
- If it is clear that someone has misunderstood a communication, clarify it in writing. Even go so far as to write, “This will clarify my communication of ____ {date}.”



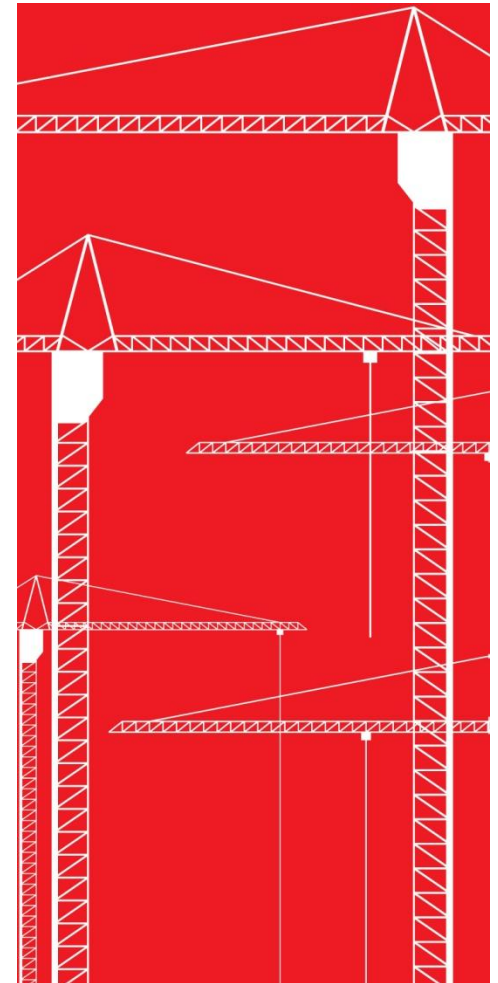
add an email footer

- All designs, plans, specifications and other contract documents (including all electronic files) prepared by (name of design firm) shall remain the property of (name of design firm) and (name of design firm) retains all rights thereto, including but not limited to copyright, statutory and common-law rights thereto unless otherwise specified by contract. No design changes or decisions made by e-mail shall be considered part of the contract documents unless otherwise specified, and all design changes and/or decisions made by e-mail must be submitted as an RFI or a submittal unless otherwise specified.



What can you do better?

- Create a document retention policy
- Revisit your document retention policy
- Train staff in the importance of thinking before hitting “Send”
- Audit how staff are handling this now
- Address it by contract



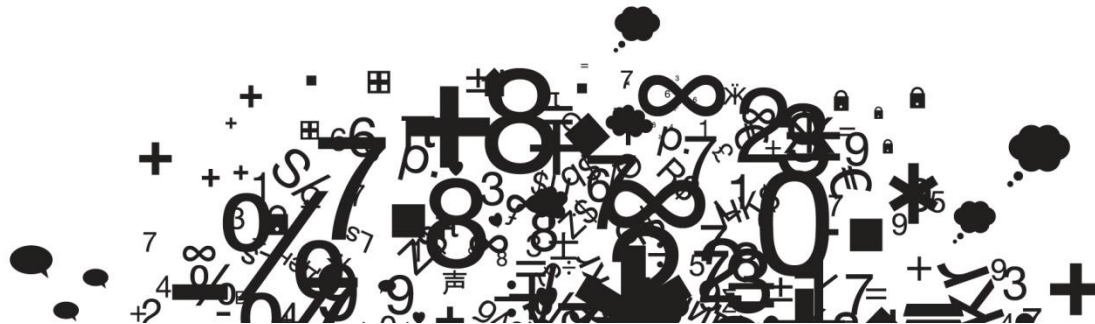
Recap:

- Develop a policy
 - Create a logical Document Retention Policy that works for your company
 - Talk to your counsel about what to keep and for how long
- Follow your policy
 - Make sure that every employee is aware of and follows the policy
- Train your staff



Questions?

- Consult XL's Contract E-Guide
- Talk to Your Counsel
- Talk To Your Broker



Legal Disclaimer

- *In the US, the insurance companies of XL Group plc are: Greenwich Insurance Company, Indian Harbor Insurance Company, XL Insurance America, Inc., XL Insurance Company of New York, Inc., XL Select Insurance Company, and XL Specialty Insurance Company. Not all of the insurers do business in all jurisdictions nor is coverage available in all jurisdictions.*
- *This presentation is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney.*
- *Any descriptions of insurance provisions are general overviews only. **THE INSURANCE POLICIES, NOT THIS PRESENTATION, FORM THE CONTRACT BETWEEN THE INSURED AND THE INSURANCE COMPANY.** Insurance coverage in any particular case will depend upon the type of policy in effect, the terms, conditions and exclusions in any such policy, and the facts of each unique situation. No representation is made that any specific insurance coverage would apply in the circumstances outlined herein. Please refer to the individual policy forms for specific coverage details. All coverages are subject to individual underwriting judgments and to state legal requirements.*
- *XL Group is the global brand used by XL Group plc's insurance subsidiaries.*

XL and **MAKE YOUR WORLD GO** are trademarks of XL Group plc companies