



## Questioning Project Web Sites

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Design professionals know the fees that they earn for construction administration rarely compensate them for the time spent and headaches incurred. An exciting, but controversial tool for construction administration is the project Web site. These Web sites include several features to simplify and streamline project administration, such as photos and videos to minimize site visits; online drawing with markup and commentary; requests for information (RFIs) and other communications; and scheduling data and updates.

Productivity gains earned, however, may pale when compared with new risks implied by the technology.

## Web Site Savings

Early in a project, the Web sites promote a collaborative effort among the project owner, engineer, architect and contractor and facilitate the flow of information among parties.

There can be significant savings in soft costs, such as travel and reproduction expenses. During construction, a Web site can minimize time lag for the exchange of important information and ensure that all parties have access to the most up-to-date version of drawings, schedules and other data. In the event of a dispute, a Web site can provide detailed and accurate records of what communications were sent and received by the various parties — and when.

## Unanswered Questions

Several questions and potential problem arise: Who owns the Web site? In addition to the traditional agreement with the owner or architect, is another agreement needed between the engineer and a software or extranet site provider? Are the creation and maintenance costs included in general conditions, or are they reimbursable expenses?

Basic administration of the Web site brings up a host of important issues. Which software or extranet provider will be used, and who will make this decision? Who will be responsible for maintaining the Web site, and what contractual provisions will describe the degree of maintenance required? Who will be the “Webmaster” and decide which parties receive various levels of access? Who will back up the information on the site and how often, and who will keep possession of the backed-up data? Will the technology and software that are used today be archaic and undecipherable 10 years from now? How are these issues to be policed and enforced, and what happens to ownership or use of the web site in the event of default or termination?

What happens if the software or extranet site provider goes out of business? Internet companies have come and gone like the tides. Whose responsibility is it if the Web site goes out of business during the project? More than just an issue of responsibility, how does one find and hire the necessary technical expertise to continue the operation of the Web site? The information on the Web site might be needed many years after completion of the project. Should the participants bet on the likelihood of the software or extranet site provider being around and in business five or more years later?

Another important set of questions concerns the insurability of the contents of the Web site. What if the server crashes and valuable work is lost? Is the party responsible for maintaining the Web site liable? Would “valuable papers” insurance cover such an event? What if the server crashes and causes a significant delay to the project? Is the owner or operator of the Web site liable for delay and consequential damages to the other parties who use the Web site? Can insurance be provided to cover such damages?

## The Reliability Issue

A problem may be posed by the reliability of information, drawings and documents published on the Web site. Who is responsible for any errors or omissions that appear on the version of a drawing, specification or test result that is published on the Web site but not on the record or hard copy? Is the “publisher” liable, or must the engineer check every detail of the Internet or extranet version? In preparing shop drawings or other submittals, to what extent can subcontractors rely on and copy portions of the construction documents? Who can modify the drawings and specifications online and for what purpose? Are some drawings and specifications published for information only and if so, how is this made clear to the user?

Other issues may have an effect on engineers and other design professionals. For example, does the collaboration of many parties in the development of the design blur or dilute the engineer’s professional responsibilities? What effect does extensive collaboration have on the engineer’s standard of care? If coordination occurs on a site owned or hosted by the engineer, is the engineer responsible for the coordination of parties other than its own subconsultants? Can the engineer ignore coordination problems that become obvious merely by reading Web site communications that are posted but not ordinarily read by the engineer? Does the engineer imply that he or she knows everything posted on the Web site? On a public project, if a fraudulent change order is processed through a

project Web site, does the engineer assume any responsibility for false claims?

## Contractual Notice

Project Web sites may change the rule of contractual notice. Although most construction contracts have provisions requiring advance written notice of various claims or other issues, can communication via a project Web site take the place of such notice? Can the parties to the project be deemed to have actual notice — which may legally obviate the need for providing written notice — of various issues or facts because the computer can provide the precise identity, date and time at which a piece of information was reviewed?

The impact of the Internet on traditional intellectual property issues is unclear. By posting and exchanging information on a Web site, does the author waive trade-secret information? Will engineers, who typically remain the owners of the drawings that they produce, be deemed to have given up ownership rights or unintended licenses to use the drawings by publicly posting them? Should the Web site be structured to require each user to accept a license agreement before being granted access to the information, similar to the installation programs for software today?

The impact that use of project Web sites may have on litigation is also uncertain. For example, the “business records” exception to the rule barring admissibility of hearsay evidence in court requires a party who presents business records as evidence to establish that the information in them was recorded in the ordinary course of business and maintained with adequate safeguards to assure its integrity. What steps should the Web site host take to assure that the documents are properly signed, authenticated and maintained? If a party wants to introduce as evidence data from a Web site, how can the party prove that the data was maintained as required by this rule?

The only thing that is certain with regard to project Web sites is that they will continue to proliferate. As they evolve, and as business procedures and legal rules evolve in parallel with them, it is a virtual certainty that new kinds of disputes will arise and that a new kind of vigilance will be necessary.

Finally, it should not be forgotten that when Web sites are used to design and manage a project, fewer paper documents are produced by the parties. Therefore, important information may exist in electronic form only, and this may make agreements that address Web site ownership and control an important interest to all parties.

## About the Author

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Former Schiff Hardin associate James D. Weier also contributed to this article.

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