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Electronic Discovery in Litigation

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Your firm is involved in litigation and you get the call from your attorney asking for "all your emails." The request could be made by your attorney because she wants to understand the facts underlying the dispute. More likely, the request is being made because another party in the litigation has made a request for production of all of the project documents, including emails. You check the hard-copy project file and gather all of the emails that you had previously printed out because you felt they were important at the time. Your attorney calls you back and asks if the emails include all of the "electronic emails."

Electronic discovery, or "e-discovery," is the discovery of electronic data and documents in litigation. This article will provide an overview of e-discovery and discuss how document retention policies can help respond to a request for e-discovery. The focus will be on emails, which are a component of ESI, but oftentimes are the most important electronic documents in a case.

E-discovery Overview

In addition to the parties in a lawsuit, non-parties may receive a request for e-discovery through a subpoena by one of the parties. In the litigation context, electronic data and documents are often referred to as electronically stored information, or "ESI." ESI includes emails as well as other documents such as word processing documents, spreadsheets, PDFs, CAD files, digital photographs, and frankly, any type of electronic file whatsoever in your firm's possession that relates to the project that is the subject of the litigation. ESI may reside on servers, the hard drives of desktop and laptop computers, backup tapes, thumb drives, and even on smartphones.

For large projects spanning years this can literally add up to gigabytes or terabytes of ESI. The cost of retrieving and producing ESI can add up to thousands of dollars and in the very largest cases, into the millions of dollars. That is why it is important for you and your firm or employer to understand ESI and how to manage it properly, so that when and if the times comes, you can minimize the burden on the time and cost of retrieval and production.

E-discovery has been specifically addressed in the Federal Rules of Civil Procedure since 2006. North Carolina did not amend its Rules of Civil Procedure to account for e-discovery until this past legislative session. The new Rules are effective October 1, 2011, and are applicable to litigation commenced on or after that date. This does not mean that e-discovery did not occur in state actions until now. Rather, e-discovery was addressed under the general discovery provisions in the North Carolina Rules, which did not always fit neatly around e-discovery. With the revisions in effect,

North Carolina's Rules now provide more certainty about how e-discovery is to be carried out in state actions.

The request for production of ESI may be broad or very specific. You and your attorney will consult on what ESI is responsive to the request and how you should search for ESI. If the request is too broad, your attorney can talk with the opposing counsel and attempt to narrow the request. Sometimes you just need to ask what it is the other party is really looking for, and you can greatly reduce the size and undertaking of the search. In litigation, however, the right to make discovery requests is a broad one, and the party will generally be able to enforce his request.

Document Retention Policies

The duty to preserve ESI begins at the moment that litigation is anticipated. This means that the duty to preserve may begin before an actual complaint is filed. Failure to preserve ESI once the duty attaches may result in sanctions by the court or even an adverse jury instruction. A judge's adverse jury instruction is where the judge informs the jury that someone did not produce evidence, or spoiled the evidence so that it could not be brought to court, with the intention of concealing information which might hurt her case. Some firms or companies may have a routine document retention policy that governs what types of documents are retained and for how long. While it is not a requirement that there be a document retention policy, it can be helpful to the litigant in showing compliance with the duty to preserve when litigation is reasonably anticipated. Once litigation has begun or is reasonably anticipated, your attorney may issue what is known as a "litigation hold." A litigation hold means that the routine document retention policy is suspended and all non-privileged information that is potentially discoverable must be retained.

Document retention policies should ideally already to be in place to govern the business needs of retaining all types of documents, not just ESI. Concerns about e-discovery may also be addressed by the policy. Types of documents that may be retained include correspondence (letters and email), drawings (including CAD files), photographs, time and billing records, and other project documents. If your client calls you with a question a year after the project is complete, you may need to refer to an email or earlier CAD file to answer the question. And if you are involved in litigation years down the road, for instance, you may need to refer to an email to help prosecute or defend against a claim. Most types of litigation will commence within three years after the alleged negligent act or breach of contract. But in certain instances, that time can expand to six years or longer.

Emails: Key ESI

Emails can be a very important source of information in litigation. Oftentimes, emails provide the best chronology of facts and events which are so important to most construction disputes. Engineers in my experience, typically do not keep detailed time records of what they worked on a given day. And engineers not involved in the actual

construction typically do not maintain a diary or work log as the construction superintendent may do. For questions of who did what when, email may be the best source of an answer.

As mentioned earlier, important emails are often printed out and placed in the project folder. This may help for a quick reference, but the better practice is to also maintain all pertinent emails in their electronic form. This helps ensure all email attachments are preserved, which are usually not printed out with the parent email. Does every email having to do with a project need to be saved? No, but those emails addressing a substantive issue with the project, such as the client changing what he wants, should definitely be saved. Emails such as those attempting to schedule a conference call with multiple people may not need to be maintained, unless it is important to show that particular conference call happened in case no minutes were prepared. The decisions on what type of emails to preserve will change from firm to firm and from project to project. There is no right answer. Firms must also decide which employees will be expected to preserve their email. For instance, the project manager and project engineer will likely fall into this category. But what about the tech, the administrative assistant, and the intern? Again, there is no right answer. Judgments will need to be made on whether someone's email could be needed down the road.

The best way to store emails are in a shared folder for each project. Microsoft Outlook is the predominant corporate email system, and it provides an option for storing emails in public folders which can be accessed by each person in the firm. Most engineers assign a number to each project; this is one way of naming the shared folder. Project emails should be placed into the shared folder immediately or at least on a weekly or other regular basis. Diligently adhering to such a policy is by far the easiest way to respond to a request for production of electronic emails.

For those firms or companies that do not faithfully adhere to a comprehensive system for saving project emails into a shared folder, all is not lost when it comes time to retrieve relevant or responsive emails. Some employees will maintain separate project folders in their personal mailboxes. As long as all employees dutifully save their emails into personal project folders, it is a fairly straightforward process to combine these emails and remove duplicates. There are also the employees that do not segregate emails into project folders. These employees may keep everything in an inbox which can metastasize into thousands of emails extending into numerous gigabytes. The problem with this is that multiple projects are now mixed into one folder along with non-project related email such as administrative, personal, or spam. And depending on the employee's email settings, the sent and deleted items folders may contain thousands of emails as well.

Being faced with this situation can be akin to finding a needle in the haystack. When this happens, your attorney should consult with you about using "keyword search terms" to try and locate the relevant or responsive emails. Keyword search means that you search each email for relevant terms, such as company names, persons, and project issues. The choice of terms will vary depending on the type of project and nature of the

dispute. The selection of the search terms is very important and you and your attorney should collaborate to ensure a comprehensive list of terms. The attorney for the party making the request for production may provide her own list of terms as well. Outlook has decent keyword search functionality and there are other, more robust software programs that perform advanced keyword search. It should be noted, however, that some responsive emails are just not going to be picked up by keyword search. When the volume of emails to be searched is so large, this limitation is usually something each party accepts.

There are two ways to ensure every responsive email is included in the production. The first way is for the entire inbox, and potentially sent and deleted items folders, to be produced. The problem with this method is that all of the non-responsive and potentially confidential emails will be given to the other party. The second way is for the producing party to have someone individually read every email to determine responsiveness. The time and cost of such an endeavor may serve as a deterrent. If the parties disagree over how best to structure an email search, a judge will likely, but not in every instance, only require keyword search as long as the requesting party is allowed to select search terms.

Identifying privileged emails can be difficult in e-discovery. Privileged emails include correspondence between you and your attorney (attorney-client) or some type of communication that was prepared in anticipation of litigation (work-product). Privileged emails do not need to be produced so it is important to identify them. The potentially large volume of emails makes it impracticable to review each email to determine whether privilege should be claimed. Keyword search can be used to identify privileged emails.

Once the emails are retrieved, a decision must be made about the format of production. The emails (and attachments) may be converted to image files such as TIFF or PDF. Or the emails can be produced in "native" form, which usually means a PST file is created in Outlook and produced to the requesting party. The requesting party may then view the emails in the same way that you can. The requesting party may request one format over the other. The courts will generally not require both formats to be produced.

When a request for production is so broad in the volume of ESI or requests that potentially inaccessible data, such as backup tapes, be produced, your attorney may argue to the court that an "undue burden" is being placed on you. The responding party must show that the burdens and costs of production outweigh the relevance of the responsive information. On the other hand, the requesting party can defeat this argument by showing that its need for the requested information outweighs the costs of producing it. Sometimes, the courts will mitigate the burden by requiring the parties to share in the costs of production.

Conclusion

It is important for engineers to have a basic understanding of what can be involved in e-discovery. Firms and companies should determine whether or not to have a

routine document retention policy. Being able to access a specific electronic document, such as an email, could make the difference in litigation – including whether sanctions are assessed or whether there is an adverse jury instruction. The procedures in place for retaining your emails could affect whether the retrieval process is quick and easy, or burdensome and costly.

Bio

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