

# Managing e-Discovery in the Information Age

## Practical Tips for Lawyers and Clients

by Monica McCarroll and Stephen G. Test



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In the six years since Congress adopted the e-Discovery amendments to the Federal Rules of Civil Procedure, the volume of electronic data potentially at issue in even the most straightforward construction dispute has exploded. Many companies involved in the construction industry have a hodgepodge of systems and practices regarding their data. In addition to the standard office products such as Microsoft Word and Excel, and Adobe PDF, companies store financial records in databases that may be as simple as QuickBooks or as complex as an SAP or Oracle system. There are a myriad of CAD programs available today, as well as project management software and collaborative products such as SharePoint. Construction projects tend to generate a great deal of digital photographs and video and, of course, there are e-mail, text messages, and IMs.

While many companies generate the majority of their information in electronic form, they also maintain paper copies of some of this information, often in a manner that makes it difficult to determine whether the paper copy or the electronic version is the official record. Moreover, many construction companies supply their employees with laptops, smart phones, and tablets to enable them to access relevant information and generate new documents, drawings, change orders, etc., regardless of where they are. While this practice promotes efficiency and keeps cus-

tomers happy, it also multiplies the number of possible locations that must be searched for potentially responsive information when a dispute arises.

The large volume of data generated for even the most basic project, coupled with the multiple locations where that data can reside, leads directly to significant costs when a company finds itself involved in litigation or arbitration.<sup>1</sup>

Unfortunately, these costs can force many companies, especially small and mid-size companies struggling to emerge from the recession, to resolve such disputes based solely on costs rather than the merits. It does not have to be this way.

Construction lawyers and their clients can become proactive, protect against such outcomes, and navigate the brave new world of litigation in the Information Age.

### What Lawyers Can Do to Help Clients

Before you can help your clients ease the burdens of e-discovery, you first must understand what those burdens are. You owe your clients a duty of competence<sup>2</sup> and that duty includes knowing and understanding the rules and emerging case law that govern discovery today.<sup>3</sup> If you are too busy or consider yourself too much of a technophobe to learn and understand some of the more technical aspects of e-discovery, then you should associate with an attorney who does understand it.<sup>4</sup>

It is not enough, however, to know the rules and case law. You also must gain a working knowledge of the types of potentially relevant information your client may have and the multiple sources of that information (e.g., shared drives, local hard drives, e-mail archives, and cloud storage). Long gone are the days when you could instruct your client to send over "the Jones file" and reasonably assume that the box or file cabinet of documents identified by your client constituted the universe of potentially responsive information. Today, it is important for lawyers to speak to

records managers and IT staff to understand where, and how and for how long potentially responsive information is maintained. Unlike the good old days when discovery decisions could be deferred for months as the parties argued early motions, the nature of electronic information requires that these discussions happen early in a dispute to ensure that your clients are properly preserving potentially relevant information as soon as they reasonably anticipate litigation. Otherwise, they face the real possibility of a spoliation motion.<sup>5</sup>

While the preservation net needs to be wide and should be cast as early in a dispute as possible, there are a number of ways a lawyer can reasonably and defensibly narrow the scope of data within that net that will progress through discovery. One of the most important tools a lawyer can employ is cooperation.<sup>6</sup> By working with opposing counsel and disclosing some of the specifics involving your client's data, such as who the key custodians are, what types of potentially relevant data they have in their possession, where that information is stored, and how easy or difficult it may be to access that information, you can narrow the scope of discovery or at least identify areas of disagreement that you can then take to the court for resolution before incurring significant expense.<sup>7</sup>

While the parties in most construction disputes may not always be similarly situated in terms of size or cash flow, there is still an element of "mutually assured destruction" if one side does not want to cooperate in the discovery process and instead wants to play games or engage in extensive motions practice. Assuming the parties are willing to cooperate, the lawyers on both sides can narrowly target the documents or information that are critical to the dispute, and not default to seeking all documents relating to a contract or project.

To maximize the efficiency and minimize the costs of discovery, construction lawyers should consider adopting more innovative methods of review beyond lawyers flipping, or clicking, through documents. One relatively simple method for decreasing review costs is recognizing that documents that do not contain user-generated content should not be reviewed in the same manner as correspondence and e-mails. CAD drawings, pictures, and videos may be very important to a dispute, but they will not contain privileged information. Therefore, parties should be able to segregate those items by file type and produce to the other side in native format, fore-

going some of the costs associated with a more traditional review.

As for items such as correspondence and e-mails, parties should consider employing sampling techniques, where a statistically significant random sample is generated, reviewed, and then disclosed so the parties can determine whether a particular custodian or data source is worth further exploration. For large cases where hundreds of thousands, if not millions, of documents may be at issue, parties may want to explore predictive coding or other advanced methods of technology assisted review.<sup>8</sup>

Many attorneys still default to using search terms, or key words, to try and narrow the scope of data that may potentially be responsive. While search terms are far from foolproof, there are ways to make them more effective. Foremost is to consult with the custodians whose data will be searched to determine how they refer to a specific project, as well as any nicknames, acronyms or other shorthand they may have used to discuss it. It also may be helpful to determine the universe of individuals on the opposing side with whom they may have discussed the project, as well as any third parties involved in the project with whom the custodian may have discussed the issues now in dispute.

Once you have conferred with the custodians, work with your internal litigation support resources or external vendor to understand what search tool you will be using and its syntax, so you can craft your terms to account for misspellings (through the use of wildcards) and variations of the same word (through the use of stemming). You will then want to test and tweak

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your terms against a subset of data. At this point, strongly consider sharing your terms and hit reports with your opponent to allow him to make any additional changes before proceeding. By sharing your terms and allowing the other side to weigh in on how you are proceeding, you can save your client time and money by preempting disputes. Construction lawyers will find that approaching e-discovery in a reasonable and



iterative manner, with costs and efforts proportional to the value of the case, will go a long way to helping ease the burdens of the process for their clients.

#### **What Clients Can Do to Help Themselves**

While lawyers can use these various tools and techniques to mitigate the costs of e-discovery in litigation, they cannot reduce the client's volume of data or sources of information. The best way for a business to mitigate the risks and costs of

### *IG programs address why a company has the documents and data it has, not merely where those documents and data reside.*

e-discovery and maximize the overall efficiency of its employees is to implement a comprehensive Information Governance (IG) program. IG programs address why a company has the documents and data it has, not merely where those documents and data reside. IG recognizes the critical role of identifying and retaining records in a logical manner, including the proper disposition of both documents that are not records, as well as documents that are records but have exceeded both their utility and any legal or regulatory requirements.<sup>9</sup>

Many businesses, including construction companies, have taken a haphazard or ad hoc approach to governing their information. Companies may have a dated record retention policy that applies to paper documents only, and nothing that addresses electronically stored information. Even worse, they may have retention and destruction policies implemented solely by IT for storage purposes, e.g., auto-delete policies on e-mail accounts, that users are either unaware of or have no way of halting in the event of litigation.

While exploring the nuances of an effective Information Governance program is beyond the scope of this article, there are some big picture items that construction companies should consider, whether they are serial litigants or lucky enough to have never been sued.

#### *Define your company's records and where they are stored*

One of the biggest cost-drivers in e-discovery is the need to review large volumes of documents that should never have been retained in the first place because they do not constitute a record.

This includes e-mail chit-chat, as well as long-discarded drafts of documents, along with multiple copies of the same document or e-mail, to name but a few. Defining your company's records should be done outside of the litigation context to avoid allegations of spoliation. Defining the source of the record, e.g., a network share or designated folder, is important because it may help eliminate the need to collect data from individual devices and expenses related thereto.

#### *Recognize the difference between record retention and disaster recovery*

Many businesses retain multiple copies of ESI for long periods of time just in case they might need them. To the extent this means just in case a catastrophe happens, there are much easier and more cost-effective methods of preparing for a disaster, including ensuring critical data are stored in network locations and backed up in a secure manner with media stored in a secure location. Disaster recovery generally refers to getting your business up and running again after disaster strikes, whether natural or man-made. General record retention for completed projects is different. Look to the terms of your contract to see if there is a provision requiring a specific time limit. Also, see how records are defined — do you need to retain every e-mail communication and draft or just the final version of the contract documents? Generally, accounting records and contract documents should be retained at least five years from completion. As with any business, clean out your files, whether paper or electronic, before sending them to off-site storage or copying them to a hard drive.

#### *Implement a Litigation Readiness Plan*

If you wait until litigation commences to figure out how to respond, it is likely too late. Every construction company should consider how it will respond to litigation when — not if — it happens. You should designate a person or committee able to quickly respond to a complaint, arbitration demand, or government investigation; to ensure that any data potentially at issue are identified and preserved; and to make certain that key custodians are notified that a claim has been filed and that they know to preserve any potentially responsive data in their possession.

#### *e-Discovery in Advance in Contracts*

In addition to recognizing the need to govern information effectively outside of the litigation context, construction companies should decrease

the risks and costs of e-discovery by including provisions in material contracts that limit e-discovery obligations in the event of litigation or arbitration arising from a breach of such contracts. Jay Brudz and Jonathan M. Redgrave, e-discovery practitioners, advanced this groundbreaking proposal in the most recent e-discovery issue of the *Richmond Journal of Law and Technology*.<sup>10</sup>

As Brudz and Redgrave note, many contractual provisions that we consider boilerplate today modify the litigation process, including arbitration provisions, governing law provisions and jury trial waivers. Absent fraud, public policy concerns, or unconscionability, courts routinely enforce such provisions. Construction companies should consider one or more of the following limitations for their material contracts:

- Circumscribing the duty to preserve ESI until a notice or request to preserve is received (as opposed to the requirement that each party preserve once it reasonably anticipates litigation);
- Limiting the amount of discovery allowed, including what needs to be preserved (e.g., eliminating the duty to preserve backup tapes); and
- Limiting the application of sanctions for purported e-discovery failures (e.g., requiring evidence of malicious intent).
- Assuming both parties are similarly motivated, such contractual provisions can provide certainty and foreseeability should a dispute arise.<sup>11</sup>

### Recommendations

Discovery in the Information Age can be daunting and expensive. Construction lawyers should help their clients avoid common e-discovery pitfalls by ensuring that they are familiar with the governing rules and case law, by committing themselves to cooperate with opposing counsel to facilitate the process and reduce costs, and by keeping up with the latest trends and technology regarding review options. By practicing e-discovery in a reasonable, iterative and proportional manner, construction lawyers will better serve their clients by ensuring that discovery is about finding the facts that support or refute a claim, and not a means to an end in and of itself, or even worse, a method to force settlement.

Construction companies can mitigate the risks and costs associated with modern discovery by governing their information effectively and

efficiently before they become involved in litigation. They also should consider adopting provisions in material contracts to limit some of the uncertainty and potential expense of e-discovery.

### Endnotes:

- 1 It does not matter whether the case is pending in federal or state court, as Virginia amended its rules to reflect the reality of e-discovery in 2009. Nor does it matter if the matter is slated for arbitration, as most arbitration rules, including AAA, look to the Federal Rules of Civil Procedure for guidance.
- 2 Model Rules of Professional Conduct 1.1.
- 3 See, e.g., The Sedona Conference® Best Practices Commentary on Search & Retrieval Methods, August 2007 <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20-%20Best%20Practices%20Commentary%20on%20Search%20%2526%20Retrieval%20Methods>; see also Michael Roach, “Judge Facciola Addresses Competency, Ethics, and E-Discovery,” LTN 06-22-2012 [www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560511347&Judge\\_Facciola\\_Addresses\\_Competency\\_Ethics\\_and\\_EDiscovery](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560511347&Judge_Facciola_Addresses_Competency_Ethics_and_EDiscovery)
- 4 Some resources to consider when delving into eDiscovery include The Sedona Conference® Working Group 1 publications and the annual eDiscovery issue of *The Richmond Journal of Law and Technology*, see, e.g., Bennett B. Borden, Monica McCarroll, Brian C. Vick & Lauren M. Wheeling, “Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System,” XVII RICH. J.L. & TECH. 10 (2011), <http://jolt.richmond.edu/v17i3/article10.pdf>
- 5 See *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 11-1846 LHK (PSG), Docket # 895 (N.D. Cal. July 25, 2012); *E.I. DuPont v. Kolon Industries, Inc.*, 2011 WL 2966862 (E.D. Va.); *Isaiah Lester v. Allied Concrete Co., et al.*, (City of Charlottesville, Sept. 1, 2011).
- 6 The Sedona Conference® Cooperation Proclamation, <https://thesedonaconference.org/cooperation-proclamation>
- 7 Va. Sup. Ct. R. 1:19, 4:13; Fed. R. Civ. P. 26, 37.
- 8 See *Global Aerospace, Inc. v. Landow Aviation, LLP*, (Loudoun County, April 23, 2012); see also *Da Silva Moore v. Publicis Groupe*, 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. February 24, 2012).
- 9 Monica McCarroll, Bennett B. Borden, Jay Brudz and Brian C. Vick, “Information is Your Company’s Most Valuable Asset-Are You Treating it That Way? How Information Governance Can Help You Support Revenue Growth and Decrease Expense, Risk and Operational Cycle Time,”

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NCRMA The Retailer, Volume 94, April 1, 2012  
[www.williamsmullen.com/news/information-your-company's-most-valuable-asset-are-you-treating-it-way](http://www.williamsmullen.com/news/information-your-company's-most-valuable-asset-are-you-treating-it-way)

- 10 Jay Brudz & Jonathan M. Redgrave, "Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation," XVIII RICH. J. L. & TECH. 13  
<http://jolt.richmond.edu/v18i4/article13.pdf>
- 11 See generally Note 10, *supra*. Some caveats to consider before incorporating such contractual provisions include, without limitation, the likelihood of enforceability will increase the more closely tailored these provisions are to the facts and cir-

cumstances of a particular transaction, the functionality of these provisions will depend on how well they are adapted to a party's objectives in a particular transaction, and the scope of these provisions will be confined to the contract terms; *i.e.*, a party may still owe preservation duties, for example, to third parties or pursuant to regulatory obligations.