E-Discovery: Implications for the Construction Industry

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By some estimates, 97% of all new information being created today is in electronic form. With the proliferation of digital information, it is no longer possible to litigate a construction case without locating, reviewing, and managing voluminous electronic documents. For example, a typical construction project might involve all of the following electronic information:

- job site e-mails
- schedule data
- bid materials
- change order documentation
- job cost reports and estimates
- financial statements
- payrolls
- project correspondence and diaries

Given this new digital reality, it is critical for all those involved in construction litigation to learn how to properly handle electronic information.

This can be a broad universe in the construction field. Any electronic document is fair game: RFPs, e-mails, bid takeoffs, building image modeling, specifications and anything germane to the construction of the project is arguably a "document" which must be produced. Moreover, routinely copying counsel with day to day e-mails will not immunize the electronic exchange.

Electronic discovery is the exchange of any discoverable information maintained in an electronic format. The Federal Rules of Civil Procedure will soon specifically address electronic discovery. Amendments to Rules 16, 26, 33, 34, 37, and 45 are set to take effect on December 1, 2006. Proposed changes include mandatory disclosure of categories and locations of electronic information, cost and burden considerations regarding production of electronic information, and rules regarding inadvertent production and form of production. See http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf for a complete copy of the amendments. In addition, some forward-thinking state courts and federal district courts have already adopted rules relating to e-discovery. For example, California has adopted Code of Civil Procedure § 2017.710 et seq., which permits a court to order the use of technology in conducting discovery under certain circumstances. The District of New Jersey has promulgated L.R. 26.1(d), which imposes a duty to investigate and disclose responsive electronic information, a duty to notify the opposing party that electronic information is being sought, and a duty to meet and confer to discuss methods of production and cost allocation.

Although the rules are only now being amended to address electronic discovery, cost and preservation issues have dominated the electronic discovery field for several years. One important consideration with respect to electronic discovery is who will pay for the costs of production. Although the general rule is that the responding party bears the cost of production, a balancing test may be employed to determine if the burden or expense of the proposed discovery outweighs its likely benefit. See Toshiba Am. Elec. Components, Inc., v. Sup. Ct., 124 Cal. App. 4th 762, 769, 21 Cal. Rptr. 3d 532, 538 (6th Dist. 2004); see also F.R.C.P. 26(b)(2). Some courts have found that with respect to electronic discovery, a more nuanced approach is required. For example, in Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002), the court developed an eight-factor cost shifting test, as follows: 1) the specificity of the discovery request; 2) the likelihood of discovering critical information; 3) the availability of such information from other sources; 4) the purposes for which the responding party maintains the requested data; 5) the relative benefit to the parties of obtaining the information; 6) the total cost associated with production; 7) the relative ability of each party to control costs and its incentive to do so; and 8) the resources available to each party.

California has looked to statutory authority in concluding that the demanding party must pay the cost of production. The Toshiba court found that "when it is necessary to translate electronic data compilations in order to obtain usable information responsive to a discovery request," pursuant to Code of Civil Procedure 2031(g)(1), the demanding party must pay. Toshiba, 124 Cal. App. 4th at 767.

With respect to preservation of electronic documents, it is extremely important to remember that the duty to preserve electronic information arises prior to filing a complaint (i.e., once litigation becomes foreseeable). Thus, a company's document retention policy may be trumped. See Zubulake v. UBS Warburg L.L.C., 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (Zubulake V). In addition, the duty to preserve information may affect a vast network of persons. According to Federal Rule of Civil Procedure 34(a), a party served with a request must produce documents in the party's possession, custody or control. Thus, documents held by employees, subsidiaries and affiliates, and third parties with legal or practical control of documents may all be discoverable. However, a party need not preserve every document in its possession. See Zubulake v. UBS Warburg L.L.C., 216 F.R.D. 280 (S.D.N.Y. 2003) (Zubulake III). A litigant is only under a duty "to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request." Del Campo v. Kennedy, 2006 WL 2586633, at *1 (N.D. Cal. 2006) (citing National Assoc. of Radiation Survivors v. Turnage, 115 F.R.D. 543, 556-57 (N.D. Cal. 1987), quoting Wm. J. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)). Of course, in order for a party to do so, it must demonstrate that it has reviewed the body of documents to make this determination. This, of itself, can be costly and time consuming.

Because failure to preserve documents is sanctionable, companies must do their utmost to ensure electronic documents are not destroyed. Sanctions have been granted where managers failed to comply with an email retention policy and where defendants destroyed electronic evidence and failed to search for responsive documents. See U.S. v. Philip Morris USA, Inc., 321 F. Supp. 2d 21, 26 (D.D.C. 2004) (imposing both evidence preclusion and monetary sanctions for failure to comply with document retention policy); E*Trade Securities v. Deutsche Bank AG, 230 F.R.D. 582, 595 (D. Minn. 2005) (recommending an adverse inference be presented to the jury regarding information not preserved and recommending imposition of monetary sanctions). One solution is to implement and ensure compliance with document retention and preservation policies. Document preservation instructions should also be issued in response to litigation or anticipated litigation.

Preserving electronic information requires extensive planning, especially given the challenges of collecting electronic information. As mentioned above, the scope of e-discovery is exceptionally broad due to the ease of copying, forwarding, and searching for electronic information. Consequently, in order to effectively create a document retention policy, it is important to understand the IT network and systems, back-up and archiving practices, and how custodians create, access and store documents.

In light of the upcoming changes to the Federal Rules of Civil Procedure and the increasing sophistication of courts and practitioners in dealing with digital information, it is incumbent upon those involved in construction litigation to learn how to deal with electronic information in an effective manner. Understanding the scope of information sought by e-discovery requests, creating comprehensive document retention policies, and recognizing cost and preservation issues are important first steps in managing information in the digital age.

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