WHY CONTRACTORS MUST TUNE UP DOCUMENT RETENTION POLICIES AND PROCEDURES UNDER NEW MASSACHUSETTS RULES

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Perhaps the only thing grander in scope and magnitude than some of the major construction projects built in Massachusetts during the past two decades were the sheer size of the hard copy project files associated with these massive feats of engineering and construction. The evolution of the project file from tangible, hard copy documents to electronically stored information has undergone a virtual metamorphosis in the past decade – and it continues to evolve on a seemingly daily basis.

The explosive growth of the use of tablet computing has revolutionized the interface between constructors, owners and designers with ready access to plans and specifications in the field and a constant flood of text and e-mail correspondence that can expedite resolution of conflicts resulting in greater efficiency and reducing construction costs. Real-time video streaming is becoming more prevalent, capturing digital images and videos of daily activity and progress for management and security purposes. The modern construction process generates a vast sea of electronic data. The proper management of electronic data within all of the mediums is critically important.

While nobody plans or expects to end up in court due to disputes on a project, the often contentious nature of owner-contractor-subcontractor relationships means contractors have to be prepared for that unfortunate reality. If you are not properly managing your project files and electronic data, it can have costly or even disastrous consequences in litigation. Courts across the country have issued harsh sanctions against parties in litigation who fail to properly preserve and manage their electronic data ranging from monetary sanctions, to adverse inference orders that essentially direct a verdict against the party who failed to preserve such information.

Impending amendments to the Massachusetts Rules of Civil Procedure slated to go into effect on January 1, 2014, focus on the discovery, production and management of electronically stored information. While you should discuss the impact of these changes with your legal counsel, some of these rule changes could potentially impact how your company's policy on the maintenance and retention of electronically stored information should be modified, supplemented, or even implemented.

The amendments affect Massachusetts Rules 16, 26, 34, 37 and 45 governing the discovery process in litigation. The reasoning behind the changes to the Rules is eloquently described in the Draft Reporter's Notes and Introduction to the proposed Amendments.[1] Electronically stored information transcends emails – there's electronic data beyond the mere words typed in the email that could be subject to discovery,

including the digital footprint or "metadata" that provides the recipient the origin, contributors and document history of any given electronic document. Stop and consider how the following excerpt from the Prefatory Note accompanying the Uniform Rules Relating to the Discovery of Electronically Stored Information would translate to your firm's information technology infrastructure:

> Electronically stored information may exist in dynamic databases that do not correspond to hard copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers - including the simple act of turning a computer on and off or accessing a particular file - can alter or destroy electronically stored information, and computer systems automatically discard or overwrite as part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery.[2]

Although electronically stored information has always been subject to discovery in litigation, the 2014 amendments add explicit references to electronically stored information. For example, Rule 34 addressing the production of documents by parties in litigation adds express references to "electronically stored information," "sound recordings," images or other data "stored in any medium." Similarly, Rule 45, addressing subpoenas – the discovery process by which parties to litigation can attempt to compel a third-party to produce certain information relevant to their dispute – now make specific references to "electronically stored information."

The most significant changes are to Rules 16 and 26, the rules governing the discovery process. Rule 16 is being amended to add provisions relevant to electronic discovery at pre-trial conferences. Specifically, the parties must address the "timing and extent of discovery", the "preservation and discovery of electronically stored information" and the rules of engagement for asserting claims of attorney-client privilege and attorney work product.

Similarly, the amendments to Rule 26, the general provision governing the discovery process, addresses parties' plans for dealing with claims of inadvertent production of attorney-client privilege and requiring a conference and production plan to specifically address electronically stored information if requested by either party. The changes to Rule 26 also force the parties to address situations in which electronically stored information is not reasonably accessible because of undue burden or cost of recovering or producing such information.

The amendments also provide a "safe harbor" provision in Rule 37, protecting a party from sanctions where electronically stored information is lost and not produced "as a result of the routine, good-faith operation of an electronic information system." This change, perhaps more than any other, highlights the need for an effective document retention policy.

Whether you are a party to litigation, or the potential subject of a subpoena, have you considered where your firm's electronic data is stored, and more significantly, how long you retain the data? Construction companies should examine their document retention policies to ensure, first and foremost, that a sound policy is in place and second, that it is in compliance with applicable law. For example, does your company's policy require retention of project documents for the applicable statute of limitations or statute of repose period?

A sound document retention policy should include, among other things, a paradigm for identifying a firm's electronically stored information, explicit time periods for retention of such information, and a so-called "legal hold" protocol to stop the destruction of electronically stored information in anticipation of potential litigation. This can help to streamline the discovery process and to guard against claims of so-called "spoliation" of evidence – which could result in costly sanctions against your company in litigation.

The addition of the safe harbor provision to Rule 37, limiting sanctions when electronic information is destroyed by the routine, good-faith operation of an electronic information system, incentivizes the need for a document retention policy to establish a baseline for what the routine operation of your company's electronic information system entails and dictates the steps that should be taken to preserve data when litigation is reasonably anticipated. Simply put, such a policy is the first line of defense against a claim of evidence spoliation.

While nobody plans for litigation, it is a necessary evil in our industry. Investigating and initiating a document retention program could serve to reduce exposure to penalties and legal expenses and reduce organizational down-time for employees when a dispute arises. The changes to the Massachusetts Rules of Civil Procedure provide an opportunity to get under the hood and give your document retention policy a tune-up. If your company does not have a policy in place, make it your New Year's resolution to implement one.