



A Primer: eDiscovery Preparedness for Construction Disputes



This booklet contains a series of ten articles which explore practical tools and strategies to proactively manage costs and effectively navigate through the eDiscovery process for construction-related matters.

The articles provide practical tips on document management, data mapping, discovery planning, custodian interviews, document processing and hosting, eDiscovery technology, and explores proposed construction arbitration rules and alternative dispute resolution.

The articles were first published in similar form in The Journal of Commerce and the Daily Commercial News, two of Canada's leading construction publications.

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Document Management Systems - Part 1

Candice Chan-Glasgow

Document management decisions made well before the commencement of any dispute impact document authenticity, as well as ease and cost of navigating through the eDiscovery process.

An initial step for any construction company looking to proactively manage costs through the eDiscovery process is to re-examine its document management system (DMS).

A DMS is a system used to store, manage, and track electronic documents. The general benefits of an effective DMS have been touted for years – a DMS offers enhanced security and employees spend less time searching for information while losing less time to versioning issues. While these are all important considerations, a crucial perspective that is often overlooked is the eDiscovery aspect. An effective DMS can save an organization significant time and money in identifying, preserving, collecting, and reviewing documents for litigation, internal investigations, and other regulatory matters.

The most fundamental feature of an eDiscovery-friendly DMS is the ability to export data out of the system. This may sound basic, but it is an important inquiry to make - several DMS use proprietary formats which cannot be exported, creating an expensive eDiscovery nightmare. You may have the most organized and categorized document set, but if you cannot export the data in a suitable format, your eDiscovery costs will soar.

It is also important to consider whether native file metadata and metadata associated with the DMS metadata can be preserved and exported from the DMS. Metadata is information about the data and can include the author of the document, the date the document was created and last modified, the location of the document on the server, and the author and recipients of an email. Not only is metadata important for efficient searching and document review, it can also be of evidentiary value in legal or regulatory proceedings. Metadata is important in the eDiscovery world, and a good DMS will preserve both the native file metadata, and the metadata associated with the DMS.

To effectively identify sources of potentially relevant information, an eDiscovery-friendly DMS should have robust search capabilities. This should include the ability to search date ranges, email custodians, folder names and file names, and even the full text of a document. While it is important to understand the metadata fields that can be searched through your DMS, it is equally essential to understand the information that *cannot* be searched. For example, some email systems search the body of an email, but not the content of the email attachments.

From an eDiscovery perspective, an effective DMS will allow an organization to effectively identify sources of potentially relevant information and then export the data in a manner that preserves the integrity of the document. Equipping an organization with an eDiscovery-friendly DMS is the first step to containing eDiscovery costs. The next challenge, to be explored in our next article, is properly utilizing the DMS, including following consistent conventions for naming and saving documents within the organization.

“ an effective DMS will allow an organization to effectively identify sources of potentially relevant information ”

Document Management Systems - Part 2

Candice Chan-Glasgow

Construction disputes are inevitable, and the document review process is often the most expensive part. The emails exchanged, and documents created over the course of a project can be voluminous, and parties to a dispute will need to carefully sort through the mountain of digital paperwork to identify relevant documents. Fortunately, good document management protocols can streamline the process, saving time and money.

Non-Email Documents

Following consistent naming conventions for recurring documents goes a long way towards reducing the costs of eDiscovery. For example, change orders are often saved as “CO Number 1”, “CO#1”, “CO No 1”, “Change Order 1”, “Change Order #1”, “Change Order No 1”, or (and even more problematically) “Scan 0001.pdf”. Similarly, meeting minutes are saved as “Planning Committee Minutes”, “MOM Planning Committee”, “Meeting Minutes – Planning Committee”, or any number of additional variations.

It does not matter which naming convention your organization chooses (though you should avoid “Scan 0001.pdf”); the key is to pick one method for each grouping of documents and be consistent in how those records are referred to. While the differences in naming may seem insignificant, choosing a consistent naming convention will allow counsel to efficiently identify and sort through the relevant change orders or meeting minutes, speeding up the document review process.

Another common document management issue is overuse of the phrase “Privileged and Confidential”. The issue with writing “Privileged and Confidential” on every document (without regard to whether the document is actually privileged) is that the phrase becomes meaningless. In fact, it slows down the document review process as counsel are unable to rely on the designation and must thus carefully examine the origins of each document. On the flip side, it would be extremely helpful if documents that are created for counsel, or at the request

of counsel, are designated as such. This helps minimize the risk of inadvertent disclosure and speeds up the document review process.

Version control is another area that should be addressed in a revamped document management protocol. During the document review process, counsel often need to distinguish final versions of documents from draft versions. To streamline this process, organizations should adopt common naming/numbering conventions for draft and final documents.

A Document Management System (DMS) is designed to resolve most of these issues through document profile selections, taking file naming and management out of the hands of individual users. Users will still need to apply consistent tags and follow the organization’s DMS guidelines, but it is easier to manage one system than 100 engineers.

Emails

Emails typically form a large proportion of the documents collected in a construction dispute. To reduce the cost of review, mailboxes (both inbox items and sent items) should be organized. While specific folder structure needs can vary by organization, it is extremely helpful to utilize separate folders for separate projects. While not always possible, it is also best to avoid emails that discuss multiple projects. Additionally, best practice is to always include the relevant project in the email subject lines. An organized inbox can significantly cut down on the cost of document review.

A proper DMS and some upfront work in managing an organization’s emails and documents can have a significant impact on eDiscovery costs down the road. Once these procedures are in place, the next step to proactively manage eDiscovery costs is to create a Data Map. Our next article will discuss this topic in further detail.

“ A proper DMS and some upfront work in managing an organization’s emails and documents can have a significant impact on eDiscovery costs ”



3. Data Mapping

T. James Cass

Once a dispute has arisen your enterprise will be required to preserve and produce records relevant to the issues in the dispute. This is referred to as the “Identification” phase of an eDiscovery project. As part of this phase, you need to identify the location of potentially relevant data. The identification phase involves understanding the location and nature of the data, and the people involved. This article will address the location and nature of the data, also referred to as a “Data Map”.

A Data Map is required to maintain appropriate records of the project and will assist in creating a defensible and most efficient preservation and collection plan.

There are many sources of potentially relevant electronically stored information (ESI). These sources include traditional sources such as project servers, email accounts, local computer drives. It also can include data from project management software, smart phones and devices, social media and the IoT (Internet of things, for example vehicle GPS data).

Despite the name, a Data Map is not actually a map, though in some cases a visual representation does assist in mapping out networks, or if data is in multiple locations. A Data Map is simply a detailed list/spreadsheet of the hardware and software sources of potentially relevant ESI. It should also identify any record retention schedules and locations of relevant ESI that may be hosted in the cloud or held by a third party (i.e., a subcontractor or bank).

Your Data Map for each source of potentially relevant ESI should include information on:

- Hardware and operating systems
- Location of Geographic sources of data
- Whether data is hosted Internally or externally
- Software used and whether current or legacy
- Document retention policies

The above list is not exhaustive. The required information will need to be obtained from discussions with persons involved in the enterprise’s IT systems. It is critical to have a clear understanding of the source and location of potentially relevant ESI so that it can be properly preserved. If you do not identify the source and location of the ESI, it cannot be preserved. A detailed Data Map is also used to confirm that all necessary ESI has been collected.

A Data Map used in conjunction with custodian interviews (to be discussed in a future article) will allow an enterprise to defensibly identify, preserve and collect the least amount of data while still complying with its obligations to produce relevant information. A well-thought-out preservation and collection strategy will minimize costs throughout the eDiscovery process.

A comprehensive Data Map will also assist in developing a discovery plan with opposing parties by providing an understanding of what is reasonably available, and as importantly, understanding what is not reasonably available. This includes the ability to obtain information and records out of proprietary document management systems and other databases. Combined with custodian interviews, this information will allow the parties to begin to assess the time and costs associated with preservation and collection of sources of potentially relevant ESI.

It is unlikely that any one person within an enterprise can construct an accurate, comprehensive, and defensible Data Map, and a fulsome Data Map will typically require multiple conversations. In our experience, employees will work around even the best implemented document management policies, and it is important to supplement the Data Map with custodian interviews to locate all required data.

As with all phases of eDiscovery, keeping good notes that also include rationales for decision-making points is important to maintain continuity, defensibility, and to allow an appropriate transfer of knowledge to counsel. As noted, custodian interviews will be the subject of a future article in this series.

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04

Discovery Planning

Candice Chan-Glasgow

“ parties should come to an agreement on the scope of disclosure ”

Our previous articles discussed document management systems and provided some tips that can be implemented prior to a dispute or investigation, such as the creation of a Data Map at the outset of an eDiscovery project. This article focuses on discovery planning and agreements with opposing parties on the scope and nature of the eDiscovery process and exchange of data. During this phase, the parties and respective counsel must work with their document management systems and the data that is available from all relevant sources.

Discovery planning allows parties to discuss and obtain disclosure of information needed to identify any document issues early in the process. A discovery plan sets out the roadmap for the discovery process and requires meaningful collaboration and information sharing between the parties. Planning can help the parties identify issues arising due to complex types of data and forms of storage, including what data is no longer available or reasonably accessible. Failure to address issues of this sort early on can generate cost consequences.

To minimize eDiscovery costs, discovery planning should start as soon as litigation is reasonably anticipated, or immediately after litigation has commenced. Planning should occur prior to document collection. This is to ensure the scope of the collection is known and agreed to by both parties, and to avoid a costly “do-over”.

During discovery planning, parties should come to an agreement on the scope of disclosure, how each party will locate and identify electronically stored information (ESI) to be disclosed, and any classes of ESI that will not be disclosed. This includes search criteria such as custodians, the relevant time frame, key data types, systems from which information will be retrieved, deduplication, and search and review methodology, including the use of analytics or machine learning as part of the document review process. These decisions can all have a big impact on an organization’s eDiscovery costs.

Parties should also agree on the form of production and a document exchange protocol prior to processing or reviewing data. Documents should be exchanged in a meaningful and accessible format, including native production with metadata.

It is worth noting, however, that not all documents should be processed and put into a review platform. For example, in construction disputes, AutoCAD Drawings are typically relevant. The native versions of these documents are large and can only be reviewed in their native application. As a result, we advise parties that documents of this sort be exchanged separately, saving all parties the hosting fees associated with such documents.

Regardless as to whether the court jurisdiction or forum requires mandatory Discovery Plans, discovery planning is a critical component of an eDiscovery strategy and will minimize costs. Once this discovery roadmap is in place, all parties will be in a better position to execute the plan in a cost-efficient manner.

There is some concern in the legal profession that engaging in meaningful discovery planning and exchanging information on the proposed eDiscovery process will disclose litigation strategy. It is important to understand that the types of information exchanged during discovery planning are not privileged, and courts have tied discovery planning to counsels’ professional obligations. Engaging in discovery planning also helps to ensure defensibility of the process and to avoid disputes arising after the parties have already spent considerable time and expense on document productions that are found to be incomplete or deficient.

Custodian interviews, conducted to identify sources of potentially relevant ESI, is the subject of the next article in this series.

Custodian Interviews

T. James Cass



“ one of the most important steps is to carefully document the custodian interview process ”

Custodian interviews are an important and necessary part of the identification phase of an eDiscovery project. Early interviews are necessary to develop a proportionate and defensible discovery plan. The purpose of the interview is to identify the cast of characters, the relevant time periods, the potential sources of electronically stored information (ESI), and to confirm that the individuals understand the legal hold requirements. If they are not done there is a risk that the relevant information won't be preserved and collected or conversely that too much data is preserved and collected. Either way, this could result in extra costs being incurred.

The custodian interview should include general questions about the employee's history with the enterprise as it relates to the issues in the investigation/dispute. The objective of these questions is to obtain an understanding of the scope and timing of the employee's role. It should also include the details about the employee's reporting structure, including direct reports, peers, and superiors.

In addition, the questions should elicit information about who the employee interacted with – both internally and any opposing parties. This can assist in determining the key custodians for the other party to the dispute.

With respect to the potential sources of ESI, it is important to ask employees about the software and computer equipment used during the relevant time period, and where they saved the ESI. This includes where the equipment is currently located, whether records were stored locally or on servers, and if possible, any naming conventions used for the key records which were created.

By asking open questions there is a greater chance of obtaining more complete information about where potentially relevant ESI is located. Ask follow-up questions as people often forget some details or past practices. It is also important to ask about any code words, acronyms and abbreviations which were used with respect to the matter. This information will assist in the analysis of the ESI and assist with the understanding of the records during the review. It is vital, from a defensibility position, to verify the answers that are provided.

Not every employee in your enterprise will require a face-to-face interview. A questionnaire can be used to determine the extent to which an employee has any potentially relevant ESI in relation to the dispute or investigation. For those employees with little or no involvement, this initial questionnaire might be sufficient. For key employees, however, a custodian interview will definitely be required in addition to a written questionnaire.

Through the use of custodian interviews and questionnaires, the enterprise and counsel will be able to better determine and narrow the scope of ESI that needs to be collected. It goes without saying that one of the most important steps is to carefully document the custodian interview process. With proper documentation, the defensibility of the process and the decisions on what data was preserved and collected can properly be asserted.

Please **contact** us for more information or to discuss your Discovery needs.



06

Data Processing

Candice Chan-Glasgow

“ process the incoming production to identify duplicates across both production sets ”

After potentially relevant electronically stored information (ESI) has been identified, preserved, and collected, it must be processed. Processing is converting the ESI to a usable format for review and analysis. Before processing the ESI, agreement should be obtained on processing specifications. Many processing decisions are common, and agreement on these issues is generally non-contentious.

One primary decision to be made is how you will deduplicate the data. This is important due to the volumes of duplicate records that are typical for any enterprise. Deduplication will reduce the volume of documents that will need to be hosted in a review platform and ultimately reviewed for relevance. During processing, an algorithm is used to generate a unique “hash value” (commonly referred to as a ‘digital fingerprint’) for each document based on characteristics and content and exact duplicates will have the same hash value.

Deduplication is often misunderstood to mean that all duplicates, and apparent duplicates, will be removed from the review set. Firstly, many documents that appear on their face to be duplicates will not be exact duplicates based on the hash value. For example, a PDF version of a Word document will have a different hash value from the Word version and is not an exact duplicate, despite the fact that the content of the document is the same.

Secondly, the standard practice is to deduplicate a dataset ‘globally, by family’. This means that if multiple custodians each have a copy of the exact document outside of email, only one copy of the document will be identified for review. Where it is important to identify which custodians possessed a copy of a certain document, a field can be created to identify the names of all custodians who had a copy of the exact duplicate.

The ‘by family’ aspect means that if the duplicate document is attached to different emails, it will not be deduplicated. This is the proper approach, otherwise, attachments will be stripped from emails without an ability to link back to the email. Deduplicating all attachments to emails is referred to as deduplication by item, and would never be recommended except in very narrow circumstances and only upon clear agreement of all parties that emails will be stripped of the attachments.

As a result, even with deduplication there will be both exact duplicates and ‘near’ duplicates in the data. These can be reviewed efficiently using other tools available in the review platform.

One approach that will reduce the costs of reviewing the opposing party’s productions is to process the incoming production to identify duplicates across both production sets. This can result in a substantial reduction in the volume of documents requiring review. In our experience, a large percentage of documents exchanged in construction disputes are common documents such as project change orders, contracts, and email exchanges between the parties. This cost saving approach does require the parties to exchange documents in native format, which is recommended in any event.

Other decisions at the processing stage include the time zone the emails should be normalized against, the prefix to be used for the document IDs, and the order of importance of the individual custodian.

During processing, document metadata such as author, recipients, file name, and document dates are extracted into searchable fields. The text of a document is also extracted, and optical character recognition (OCR) can be performed

Data Processing

Candice Chan-Glasgow

on documents without text (for example, scanned documents). It follows that the content of these scanned documents is not searchable until after the OCR process is complete. This is important to keep in mind because if the document collection was limited by keywords (which is not advisable), the content of scanned documents would not have been searched and the document collection may be deficient.

Once the documents have been processed, the processed data should be reconciled against the collection plan to ensure that everything that should have been collected was in fact collected. Identifying any issues or gaps in the collection as early as possible is important.

After processing, many platforms provide the ability to conduct preliminary assessments of the data, including identifying the document types, date ranges, and number of documents collected for each custodian. This allows only documents of interest to be put into a review platform for further review.

Strategies for utilizing technology to reduce review costs will be explored in our next article.

Please **contact** us for more information or to discuss your Discovery needs.

Review Technology

Candice Chan-Glasgow

The discovery process is typically the most time-consuming and expensive aspect of any legal dispute. Fortunately, by adopting appropriate technology and best practices, parties can achieve significant cost savings in the review process. This article will outline functionality that is available and should be used in every discovery project involving electronic evidence.

Email Threading

Email threading is now considered a basic tool that should be employed on every discovery project. Email threading groups the conversation that happens back and forth in email and identifies the “end points” (or “inclusive emails”). The time and cost savings arising from this analysis is twofold. First, the non-inclusive emails (the emails which are fully contained in inclusive email) can be removed from the review as they do not contain any unique content. The second benefit from email threading is that counsel can group and review email conversations/threads together. Even where only inclusive emails are reviewed, there will still be multiple inclusive emails in a thread. For example, an underlying email can be forwarded to another recipient, creating a separate “branch” in the email thread, or an earlier email could contain an attachment that is not carried through the entire email thread. Reviewing the inclusive threads together provides better context around the emails and is more consistent and efficient. In our experience, email threading has reduced the volume of emails by up to 70% in construction litigation.

Email threading should be discussed with opposing counsel and agreed to in the discovery plan.

Textual Near Duplicates

Our last article discussed deduplication. Textual Near Duplication is a tool that groups together textually similar documents that are not exact duplicates. For example, a PDF of a Word document will not be considered an exact duplicate but can be identified as a Textual duplicate. Another example is an early draft of

a contract. The function can be set to identify documents between 80 – 100% textual duplicates. Grouping similar documents also increases efficiency and accuracy, and allows counsel to easily identify drafts or various versions of a document. Some review software also allows you to generate a blackline to compare the text of the two documents.

Continuous Active Learning (CAL)

Continuous active learning (CAL) is often referred to as predictive coding or AI. While technically it is neither of these, it is a form of machine learning that assists in determining the likely relevance/non-relevance of documents.

Using CAL, a team of counsel “trains” the algorithm on examples of relevant and irrelevant documents. The program will then rank the documents in the review set on a scale of 1 to 100, with the higher number rank as more likely to be relevant based on the example documents provided. The algorithm continues to refine the rankings as the team continues to identify documents as relevant or irrelevant – it is in this sense it is considered to be “continuous active learning” as it continues to fine tune the algorithm and learn from counsel decisions. The goal of this exercise is to reduce the number of documents requiring manual review. If done well and adequately audited, you can defensibly set aside the unreviewed documents that the algorithm predicts to be irrelevant. In our experience, the use of CAL in combination with other review techniques has reduced review costs by more than 90% as compared to a traditional linear review.

Email threading, textual near duplicate identification and CAL are just three examples of the technology that is available to decrease the costs associated with discovery. These tools are most effective when used together by counsel trained in navigating the intricacies of the technology and who can understand the legal and factual aspects of the claim or investigation.

“ These tools are most effective when used together by counsel trained in navigating the intricacies of the technology ”

Technology Options

Crystal O'Donnell

Proactive management of electronic information is one of the best ways to minimize costs and risks associated with eDiscovery. This includes enterprises making decisions on the appropriate approach to managing eDiscovery based on needs, volume and resources available.

Over the last few years, the options available to enterprises to manage eDiscovery needs have changed considerably. The choices of available technology have increased, the functionality available has improved (and continues to improve), and the options for purchasing the technology have also changed.

While there is a wide spectrum amongst the below list, generally speaking, enterprises have the following options for managing eDiscovery:

1. Outsourcing
2. In-house
3. Hybrid

Outsourcing

Many enterprises leave all aspects of eDiscovery to external litigation counsel to manage as part of the litigation, including the decisions to further outsource the eDiscovery work to vendors. This approach can work well, if external litigation counsel have a strong understanding of, and experience dealing with, all aspects of electronic information.

The challenge with this approach is that, in our experience, litigation counsel are often insufficiently experienced to adequately manage the eDiscovery in a defensible and cost-effective manner. The methods and approaches to eDiscovery used by many counsel and law firms are frequently outdated and do not incorporate current state-of-the-art technology and processes.

If enterprises leave the management of the eDiscovery process to litigation counsel, it is important for external counsel to be able to demonstrate experience and expertise with eDiscovery, or a willingness to retain competent eDiscovery counsel for assistance.

There is also a growing recognition of the professional responsibility of counsel to understand and be able to properly advise clients regarding all aspects of eDiscovery. Increasingly, enterprises and/or their litigation counsel are retaining specialized eDiscovery counsel to ensure matters are handled proportionately, defensibly and cost effectively.

In-House

Increasingly, large enterprises that are involved in multiple litigation/arbitration matters or regulatory proceedings are building internal teams to manage all aspects of eDiscovery directly, including procuring and managing all technology and substantive review.

This model requires the enterprise to invest in the technology and human resources within the legal department, and to have law clerks and in-house counsel who understand the legal obligations arising from eDiscovery and who have the technical capability to manage/optimize the review platform software.

Under this approach, the internal legal department will engage/manage external review counsel either on a general retainer or project basis to review documents and provide its external litigation counsel the relevant records for production.

“ responsibility of counsel to understand and be able to properly advise clients regarding all aspects of eDiscovery ”

Technology Options

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Hybrid

What is becoming more common is a hybrid approach that combines outsourcing and internal enterprise management of eDiscovery. This approach is widely varied but can help manage costs without over-taxing the enterprise's human resources and capital budget.

While the range of options are seemingly endless with a hybrid approach, common models typically include the enterprise procuring the technology, while outsourcing the management of the databases and review to eDiscovery counsel, or directing that external litigation counsel work with specific providers and eDiscovery counsel chosen by the enterprise.

One of the biggest challenges enterprises and counsel face is the fact that the technology is ever evolving. Review and business models to manage electronic evidence need to evolve with the technology, particularly to help ensure a proportionate and defensible process. Regardless of the model chosen, it is important to understand the costs and risks of each of the options.

“ Review and business models to manage electronic evidence need to evolve with the technology ”

Please **contact** us for more information or to discuss your Discovery needs.

Cost-Effective Document Disclosure in Construction Arbitration

Martin Felsky

There are four rules-based approaches to document disclosure in legal disputes. From broadest to narrowest they are:

1. **Relevant:** Each party discloses all documents relevant to the issues in dispute.
2. **Responsive:** Each party discloses documents responsive to requests by the other party.
3. **Material:** Each party discloses only those documents that could have an impact on the outcome of the dispute.
4. **Reliance:** Each party discloses only those documents upon which it intends to rely.

Each of these approaches is often supplemented by two underlying principles: first, a party can always be ordered to produce a document the arbitrator deems relevant (which enhances fairness but expands disclosure), and second, all disclosure models may be subject to proportionality, so that the cost of disclosure does not overtake its value to the parties. While the intention of proportionality is to provide a means of keeping disclosure reasonable, logically it could be applied to enlarge the scope of disclosure where a party is being too parsimonious.

Because the first two approaches (Relevant, Responsive) can result in massive volumes of data disclosure, rule makers, thinking that the volume of documents disclosed is what determines cost, limit disclosure using one of the other approaches (Material, or Reliance, or both).

Another innovation, the Redfern Schedule, is thought to help pare things down, but it is more accurately viewed as a disclosure management tool, based on the “Responsive” model. While it can help focus the parties on priority issues, and track the disclosure process as it plays out in the arbitration, its use alone may not have any impact on the volume of disclosures. (For a modest proposal to refine the Redfern Schedule, see “[Heuristica Proposes Better Disclosure Rules for Construction Arbitration](#)”.)

It may seem logical that disclosing a limited set of documents would be less expensive than disclosing a large set. This is only partly true, because no matter how small the disclosure itself, parties must still identify, preserve, collect, process, analyze and review all potentially relevant documents in order to disclose a set of any size. All the work that it takes to find “key” documents exists because the universe of data is not affected by the applicable rule of disclosure.

The problem exists not just because the starting point for data volumes is enormous, but because digital information is fundamentally different from paper records. Paper records were usually managed in a central filing system. Digital records such as email are managed by the individual custodian, even though the email technology platform is provided to all users by the business. Emails are stored in a database, and linked in conversations or threads. Attachments (including digital photos, drawings, videos, etc.) proliferate and are stored in multiple places, not only in centralized server shares or document management repositories, but on laptops, USB keys, or cloud services. Recorded video conferencing meetings now comprise another set of digital records that must be reviewed. Modern business executives and construction workers in the field use text messaging on their smartphones, whether sanctioned by their employers or not. Pulling together all potentially relevant digital information about a single project, or within a single timeline is no longer simply a matter of pulling open the right file cabinet drawers.

“ no matter how small the disclosure itself, parties must still identify, preserve, collect, process, analyze and review all potentially relevant documents in order to disclose a set of any size ”

Cost-Effective Document Disclosure in Construction Arbitration

Martin Felsky

Construction disputes share many characteristics, but they also fall into different categories. From an evidentiary point of view, there is a big difference between a dispute about certain decisions or incidents, which can be isolated and proven with scant documentation, and a dispute that touches on the longstanding conduct of a project, or a series of relationships. While the former type of dispute can be settled with reference to the classic “smoking gun”, or a handful of key documents, the latter can only be settled by telling a story through years of communications.

The goal of all disclosure rules is to achieve a fair resolution. Important evidence must not be missed, and unimportant evidence should be withheld. The problem is that data does not self-identify as important or unimportant. This is true even though all data used in the ordinary course of business is stored and managed by programs dedicated to the purpose.

To deal with disclosure effectively therefore requires the choice of a rule that best reflects the nature of the dispute, but more importantly, effective planning, project management and use of technology. The costly part of the disclosure process happens long before the disclosure itself.

“ The goal of all disclosure rules is to achieve a fair resolution. ”

RECAP: Towards More Efficient and Cost-effective Discovery in Construction Disputes

Crystal O'Donnell

Our series of short articles about the eDiscovery process offers practical guidance for minimizing risk and cost. In this, the last article in the series, we highlight a few of the key tips for construction companies involved in disputes or regulatory matters that require the production of electronically stored information (ESI).

The most effective way to minimize eDiscovery cost and risk is to start with good document management and retention policies. While document management and retention are substantive and complex areas, there are a couple things that do not require software or expenditure and that can make a substantial difference. Consistency in file naming and storing are key factors to identify relevant electronic information more easily. Another simple tip is to identify drafts or final documents within the file name. These tips alone, if followed consistently, can substantially decrease the time and costs associated with eDiscovery and do not require specialized software.

Poor email management can add substantially to eDiscovery costs. Developing a practice of foldering email, both incoming and outgoing, will reduce risk and costs. Moreover, email threading and associated technology can be used to effectively reduce the cost of disclosing email.

If document management systems are utilized, critical features to look for are the ability to export workable native data without altering metadata, and the ability to maintain links between the documents, including attachments. Document management systems that can only export to PDF or convert standard formats to a proprietary format can exponentially increase the eDiscovery costs for any size matter.

Maintaining an updated report or “map” of data sources, including third party hosted data, will assist in responding to the need to preserve electronic information. Data mapping in conjunction with custodian interviews will allow an enterprise to defensibly identify, preserve and collect the least amount of data while still complying with obligations to produce relevant information. A well thought out preservation and collection strategy will minimize costs throughout the eDiscovery process.

A comprehensive Data Map will also assist in developing a discovery plan with opposing parties by providing an understanding of what is reasonably available, and as importantly, understanding what is not reasonably available. This includes the ability to obtain information and records out of proprietary document management systems and other databases. Combined with custodian interviews, this information will allow the parties to begin to assess the time and costs associated with preservation and collection of sources of potentially relevant ESI.

Regardless as to whether the court jurisdiction or forum requires mandatory Discovery Plans, discovery planning is a critical component of an eDiscovery strategy and will minimize costs. Once this discovery roadmap is in place, all parties will be in a better position to execute the plan in a cost-efficient manner.

Planning should occur prior to document collection. This is to ensure the scope of the collection is known and agreed to by both parties, and to avoid a costly “do-over”.

“ an effective DMS will allow an organization to effectively identify sources of potentially relevant information ”

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During discovery planning, parties should come to an agreement on the scope of disclosure, how each party will locate and identify ESI to be disclosed, and any classes of ESI that will not be disclosed. Engaging in discovery planning also helps to ensure defensibility of the process and to avoid disputes arising after the parties have already spent considerable time and expense on document productions that may then found to be incomplete or deficient.

While proactive management of ESI is one of the best ways to minimize costs and risks associated with eDiscovery, the choice of process and technology to use in the course of a dispute will have a direct impact on the costs and risk.

Over the last few years, the options available to enterprises to manage eDiscovery needs have changed considerably. The choices of available technology have increased, the functionality available has improved (and continues to improve), and the options for purchasing the technology have also changed.

To recap: Discovery is typically the most time-consuming and expensive aspect of any legal dispute. By adopting appropriate technology and best practices, parties can realistically achieve significant cost savings throughout the process.

“ choice of process and technology to use in the course of a dispute will have a direct impact on the costs and risk ”



About Heuristica

Crystal O'Donnell, Martin Felsky, Candice Chan-Glasgow and James Cass are Senior Counsel at Heuristica Discovery Counsel LLP. Heuristica has offices in Toronto and Calgary and is the sole national law firm whose practice is limited to eDiscovery and electronic evidence. Heuristica has considerable experience in construction disputes and recently became the first law firm in the world to be awarded RelativityOne Silver Partner status.

To learn more about eDiscovery Preparedness for Construction Disputes, please call 1-833-435-4321 or email info@discoverycounsel.ca

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