Discovery Management For Construction (Or Other) Projects

By **Christie Cardon, Martha Buttry Daniels and Kevin Clark**

Law360, New York (July 11, 2017, 11:18 AM EDT) -- Another e-discovery article? Why bother? Before you close the tab, note that this article is specific to the unique nature of construction projects, but is helpful for any practitioner dealing with a workforce that turns over quickly and a project that generates significant documentation.

If that sounds like a situation you've encountered, there's something here for you, even if you don't specialize in construction litigation. For all readers, this article contains best practices and lessons learned from years of handling discovery related to construction projects of all sizes.

Christie Cardon

Pre-Litigation Discovery Considerations in Construction Projects

Before litigation is imminent, certain good practices are recommended to set the stage for efficient, cost-effective discovery. The theme that runs through each of these is that a modicum of pre-dispute planning and organizing can save significant time, money and stress if the project runs into problems.

In our experience, these practices are useful for managing any ongoing construction project, even if it never runs into problems.

Martha Daniels

Schedules are key

For any project, maintenance of up-to-date, properly formatted schedules is essential. Collect and maintain schedules in native format — e.g., as .xer files rather than .pdf — on a regular basis during the project. Non-native versions of a schedule make it difficult, and sometimes impossible, to perform in-depth analysis.

Collecting and maintaining native schedules in real time is much better than scrambling to identify and collect those schedules after a dispute arises. Best practice is to make the publication and distribution of native schedules a contractual requirement.

Kevin Clark

Meeting minutes provide important documentation

Meeting minutes provide useful insight into a project, and should be compiled and organized in one set. There may be numerous different types of meetings on a project — e.g., design meetings, construction meetings, owner meetings, subcontractor meetings — but that is exactly why it is worth the time spent gathering and organizing them before and during the project.

A complete collection of meeting minutes allows you to analyze a potential claim pre-litigation, and to understand your best claims and defenses once litigation ensues. On a large project, identifying, gathering, organizing and reviewing all pertinent meeting minutes from different (possibly unknown) locations (project databases, Sharepoint, different current and former employees) when the first request for production is served is likely to be impossible.

Identify the important drawings

Drawings may be maintained electronically in a project database, or stacked up on site. It is important to know the location of all final drawings.

Where are the as-builts? Which drawings have been revised? Which have not? Which have been approved or signed? Particularly if there are quality issues with the drawings it is important to distinguish the important ones from those that may not be relevant at all.

It is much easier to do this on the front-end, including by maintaining a log of all drawings and revisions. Paying outside counsel or experts during litigation to wade through hard-copy drawings in the hopes of identifying the important ones after the fact is often expensive and unproductive.

Understand how your project databases are used

Most major construction projects utilize one or more project databases or SharePoint sites. A plan should be implemented at the outset for which database will have what kind of information in it. One of the first requests for production often served in construction litigation is for project database files. This can be an easy endeavor if all of the project files are saved in one, uniform location.

But if, for example, bid documents, contracts, drawings, manuals and change orders are saved across different project databases by different people for different reasons with different access levels, the collection and digestion of the relevant materials is much more time-consuming and costly. Many of these employees will be gone and possibly unavailable by the end of a large project.

Understand access to your project databases

It is also important to answer certain questions about who has access to the project databases. Does the owner have an internal site to maintain confidential records, contracts, etc., and an external site to share with the contractors?

In the event an external site is created and shared, be certain you know all parameters of third-party access to that site. For example, an owner may provide its managing contractor with unlimited access to the central project database, including certain basic legal analyses and confidential information. When a dispute later arises with the managing contractor, those documents could not be protected from production or disclosure — in large part because the managing contractor had already been provided access.

With an external database you can usually control permissions and access, and it is important to utilize those tools. Many databases also allow you to track database activity, answering possibly relevant questions — i.e., what drawings and specs are your construction contractor accessing from the project database?

Another crucial aspect of database management is to ensure that copies of documents shared there are saved. Some shared databases are set up to wipe older data, or the links from emails go dead after a certain period of time. Do not rely on a third-party's e-room or database for storage of project documents. Your access may vanish if there is a dispute or a claim, leaving you with only the discovery process to obtain documents that you need to analyze your claim.

Manage document dissemination occurring on site

With a big construction project, data is often exchanged on site. If it is hard copy, ensure any important hard copies are transformed into electronic format. That will make them more searchable down the road and adds limited front-end cost. Given the nature of most e-discovery agreements, hard copy documents often have to be produced electronically regardless! We are moving farther away from the days of simple banker-box productions.

If the data is being stored onsite electronically, make sure there is a backup, and more than one individual is aware of the material on the onsite storage system. You do not want one project manager to be responsible for all of the electronic files via an unduplicated external hard-drive on site (something which certainly happens).

Require reporting from third parties

A best practice is to require certain reporting requirements from third parties, and to enforce those rights in real time. Should litigation arise down the road, it is not helpful if possibly useful reports were never created in the first place.

Generally, it is important to maintain documents throughout a project to help with a panoply of issues — understanding expectations, enforcing rights and managing in-project disputes. And these efforts, though minimal on the front end, can provide tremendous cost savings in terms of attorney time and processing time if the project ever becomes embroiled in litigation.

Discovery Once Litigation Has Commenced

If a dispute progresses to litigation, an early, comprehensive plan is critically important to efficient investigation of claims and compliance with discovery obligations. Ad hoc management of the discovery process is costly and leaves parties vulnerable to spoliation claims.

The best practice is to have a discovery plan that can be executed when a dispute is reasonably anticipated. Any plan can be adapted to fit specific cases and should be reviewed periodically to stay abreast of current developments in the ever-evolving field of e-discovery. Understanding the universe of available data at an early stage is critical to efficient investigation and compliance with discovery obligations.

The overarching objective of any discovery plan is to identify the universe of available data and act decisively to preserve relevant evidence. In the construction setting, the following steps make sense,

although they may not always be sequenced in this way:

Determine the relevant time period for the dispute

This is an important step in isolating the documents to be preserved and the witnesses with knowledge. Narrow the focus to the extent possible but err on the side of being over-inclusive.

In a construction case, we recommend including the period when the bidding was planned and carried out, even if the claims post-date the bidding process. Those documents often contain helpful explanatory information about the project, even if they are not directly relevant to the claims at issue.

Identify the witnesses who worked on each relevant aspect of the project over time

Diligence in maintaining project personnel rosters and/or documenting assignments to the project in HR files will go a long way toward making this a straightforward exercise. Construction projects often experience considerable turnover in personnel over time, with multiple people cycling in and out of the same role.

For project roles that are central to the issues in dispute, ensure that you have identified the witnesses that account for the entire relevant time period and that cover each aspect of the claim (e.g., engineering, procurement, materials management, etc.).

Identify the scope and content of the project file

Adopting the types of pre-litigation good practices outlined above ensure that this a relatively straightforward task. Otherwise, extensive time, multiple interviews and site visits may be necessary to reconstruct the project file.

Even with a well-maintained project file, it may be necessary to consult a project historian or other key witnesses to confirm how project documents were maintained and where they are archived. In many instances, someone will have been tasked with writing a project closeout report or summary. That person or that group (it may be different than the project team) will be a good resource now and throughout the discovery process.

In trying to identify the scope of the project file, do not overlook shared network drives, legacy databases and third-party repositories that may be reasonably deemed to be within the company's custody or control. Also explore whether conventions for filing and sharing documents shifted over time, particularly as the project moved from planning to execution in the field.

Suspend routine record retention policies and issue an appropriate preservation notice

Once a dispute is reasonably anticipated, affirmative steps must be taken to suspend routine record retention policies and direct employees to preserve relevant information. A preservation notice should only be sent to people who are reasonably likely to have relevant information, which may be considerably less than the entire project roster.

The notice should identify the project, the time period encompassed by the notice and the categories of information to be preserved. It is unnecessary to include legal positions or strategy in these notices, and it is best to avoid doing so in the event the notice is deemed discoverable — generally they are not.

Counsel and information technology personnel should interview those who respond affirmatively to the notice, and, at a minimum, identify the specific information that the custodians think may be relevant in their files and the specific words and phrases that the custodian routinely used in referring to the project and the issues in dispute. This is particularly useful in complex construction disputes, which can be hyper-technical and prone to industry and project-specific jargon.

Document the collection process

Collections in all types of cases must be forensically sound and well-documented by the responsible counsel and information technology personnel. Thus, although witnesses may direct these personnel to where the relevant information is located, so-called self-collections — situations in which the witnesses are permitted to collect their relevant data and provide it to counsel or information technology personnel — should be avoided.

Self-collections place the relevant information at significant risk for loss or alteration and may generally draw undue focus to a party's otherwise sound collection practices. Documenting the collection process is a best practice in all types of cases, but it is particularly important in a project setting.

Unlike an ongoing business, a project, once completed, disperses, and the offices, people, computers and handheld devices move on to other projects, companies or even countries. In our experience, documenting reasonable steps taken to address these realities effectively counters spoliation allegations.

Do not neglect HR's role in the discovery plan

As noted earlier, the construction industry is notoriously fluid. Projects personnel switch assignments and companies with some frequency, all of which poses special challenges for information preservation that have to be addressed.

Do not expect that a court or tribunal would easily dismiss a preservation failure under these circumstances. Designated HR personnel should be advised of all record retention suspension measures and preservation notices and work in coordination with counsel and information technology personnel to ensure that if relevant witnesses leave the company or the project, their data that is subject to a preservation notice survives intact.

Create a case-specific glossary

Use the custodian interviews and review of the project file to create a glossary of key terms. This is especially important to grasping the multiple highly technical issues that animate construction disputes.

Do not wait to organize relevant documents

Organize relevant documents as they are located. If there are multiple claims and issues, it is helpful to create corresponding files and chronologies to track that information. If you maintain the files electronically on shared network drives, establish uniform naming conventions that will ensure the files are easily accessible, including through embedded hyperlinks in other work product.

Consider investing in software that will permit the team to organize and annotate documents by issue in a

centralized, collaborative repository. Ideally that same software would handle document productions or interface seamlessly with another product for that purpose.

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