

Information-age perils

Understanding e-discovery rules and risks in the virtual world of electronic documentation.



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GUEST SPEAKER

In 2006, the Federal Rules of Civil Procedure (FRCP) placed more emphasis on e-discovery – production of electronic documentation as part of defending your firm in a lawsuit. Because anything you write could be held against you in a court of law, design and construction firms should understand the proper creation – and prudent handling – of their electronic documents.

One significant change to the FRCP is that the courts and the parties to a lawsuit, both defendants and plaintiffs, are required to give early attention to information stored electronically. The parties must meet within 99 days of a civil action to determine what information will be produced and in what format.

Even so, legal obligations can begin prior to litigation if the parties know – or could reasonably be expected to have known – that a lawsuit is forthcoming. Once you become aware of a claim or potential claim, obtain legal representation from your professional liability insurer. Request that the services be provided as “free pre-claims assistance,” if possible.

You should also gather and inventory your data *before* you receive a request for documents. That way, you will know what you have, and it will be easier to find. You may have to provide the opposing party with a description of the data you have by category and by location of documents.

If a firm is in litigation, it must preserve all documentation pertaining to the case; failure to do so can expose your firm to court sanctions and penalties. You’ll need to alert all employees not to destroy any information that may pertain to the project or matter subject to litigation.

An important element of risk management for all design firms involves managing the large volume of information that pertains to client work. The widespread use of email for internal and external communication, as well as the proliferation of smartphones, tablets, and other portable computing and communication devices has made document retention an increasingly significant challenge for design firms of all sizes.

Today, the tremendous volume of electronic information together with legal requirements with respect to e-discovery have complicated the process of identifying, managing and storing critical information for design firms to defend themselves in litigation.

Don’t overlook all places electronic documents may be stored, including hard drives, desktops, laptops, smartphones, tablets, data recorders, audio and video recordings, employee home/personal computers, flash drives, and your servers and backup storage.

Firms involved in litigation shouldn’t just hand over all of their records to opposing counsel. First, meet with your attorney to review the relevance of the information before disclosing it.

The court may require opposing counsel to pay part or even all of the cost of your search if it determines the expense of obtaining the information outweighs the benefits of having it. The court also determines the appropriate allocation of costs, which can run into the millions of dollars.

ELECTRONIC DOCUMENT RETENTION PLANS. The legal requirements in discovery all point to the need for a formal document retention plan. Accordingly, here are some considerations for creating effective plans:

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- Have one overall policy that addresses both electronic information and hard copies, and enforce it to maintain consistency.
- Know what is being stored, including where and how long it needs to be stored to comply with statutes and court rulings.
- Be sure your IT department is involved in creating your plan and understands when certain electronic information should be destroyed.
- Designate a key executive as “keeper of records.” That person will be responsible for testifying about the firm’s document retention/destruction policy and must be fully informed.
- Be certain everyone in the firm understands that email is subject to discovery.
- Be sure employees understand how to manage their email, including protocols for retaining relevant information once the company is informed of a lawsuit, claim, or potential claim.
- Include a schedule for document destruction.
- Consider segregating personal from professional email and having different policies for each.
- Suspend regular retention and destruction policies when the firm faces litigation or a legal document request – or the likelihood of that happening. Notify everyone in the firm as quickly as possible.
- Notify IT of any pending litigation and involve them in the document retrieval process.
- Audit the server and employees’ hard drives periodically to be certain the plan is being followed.
- Check how your IT department handles laptops of departing employees. Be sure they backup any relevant information before scrubbing the laptop for use by another employee.
- Work with IT to address any compatibility issues related to system upgrades. You may have to print documents from the outdated system or retain a laptop or server with the old software so critical files can be accessed if needed.
- Recognize that management buy in is critical to the success of any document retention plan.

Once you become aware of a claim or potential claim, obtain legal representation from your professional liability insurer. Request that the services be provided as ‘free pre-claims assistance,’ if possible.

The length of time documents – both electronic and hard copy – should be retained varies by state. Every state has a statute of repose that defines the time period *after* which a design or construction firm *cannot* be sued for the damage or failure.

In many states this timeframe is 10 years, but this is not universal. For firms operating in only one state, the document retention policy should reflect the statute of repose plus some additional period, such as one year, to allow for documents that have been sent, but not received.

Firms operating in more than one state can either determine the statute of repose for each state where they operate and establish state-specific document retention policies or use the longest statute of repose for any state in which they operate and establish a company-wide document-retention policy based on that length, plus one year.

Today, the tremendous volume of electronic information together with legal requirements with respect to e-discovery have complicated the process of identifying, managing and storing critical information for design firms to defend themselves in litigation. A carefully constructed and well-managed document retention plan is an increasingly important element of a firm’s overall risk management strategy. ▀

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can be because they visited your firm in the middle of winter. This is a very simplistic example but you want your new hires to be “all in!” and not griping about a situation that could have been avoided.

Lastly, you need to develop a metric for keeping track of your recruitment process. If you don’t know how many people you are sourcing, calling, interviewing, making offers to, etc., you will find it difficult to track your success. If you are a smaller firm and you don’t have an HR department to do this, you need to have someone in your office who’s good at keeping track of things. We keep track of this information for our clients in our executive search group for everything we do. These metrics tell us where we run into problems in the recruiting process and where we have success.

You need to develop a relocation plan that speaks very clearly to the benefits and challenges of moving to your neck of the woods.

This sounds like a lot but in order to hire the best people you need to have a strong HR recruiting system in place. I would be more than happy to speak with you further about some of the challenges you are having from a recruiting perspective. Sometimes an outside perspective makes all of the difference in the world. ▀

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