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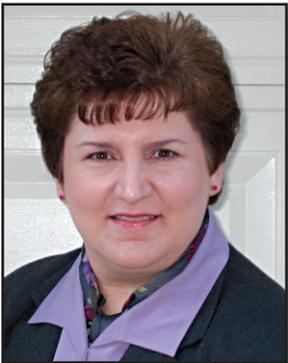
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Preserving electronic data in construction litigation

by Debra B. Norris

Recent changes to the Federal Rules have highlighted the importance of preserving electronic data in a construction project. In the past, all the information related to a project could be found in file cabinets. Much of today's project information is never printed in paper form but stored electronically. This creates a problem

when a dispute arises, and this project information is now needed to defend or prove your case. In fact, parties face sanctions for failure to preserve this electronic data at the earliest date that litigation is "reasonably anticipated." Construction parties must work hand-in-hand with their attorneys to determine how to comply with the requirement to preserve data.

The variety of players in the construction industry and the wide disbursement of information both in the office and the field create a unique problem for the construction litigant. A typical project has data stored by a variety of entities: the owner, the design professional, the general contractor, the subcontractors,

the subcontractors, and the suppliers. Each of these entities has network servers and desktop computers, and, in addition, project personnel carry laptops, blackberries, and other digital messaging devices that disperse information to a variety of potential sources. The Federal rules have adopted a "reasonably acces-

sible" standard for the data that must be preserved. The requirement to preserve information could extend to all of these active files.

Unlike paper documents, electronic data is routinely destroyed via standard backup procedures, archiving of emails, and purging of former employees' files. A court may not impose sanctions for information that is lost as a result of routine, good faith operation of an electronic information system, but courts have not looked kindly on parties who destroy relevant information once litigation is anticipated. The simple act of printing or converting data to another format can destroy some of the relevant information, such as date of creation or when the document was last accessed. Printouts of emails, for example, do not display the "bcc" or blind recipients of that email. Construction litigants need to review their data retention policies with their attorneys and discuss how they will gather the data without destroying relevant information in the process.

The requirement to preserve and to produce the project information in a "reasonably usable" format is a challenge

for the construction litigant. Project data is commonly stored in construction-specific software such as Prolog, Primavera, and ISquareFoot. Experienced project managers recognize that a schedule, for instance, can be displayed in multiple ways using today's software programs. Production of the raw data alone or even a printout of the display may not be meaningful and may even be misleading. Providing access to the software database itself may be needed to display the project information in a usable form. Litigants need to work with their attorneys and to carefully handle a project's electronic data to comply with the court's rules and to avoid sanctions.

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