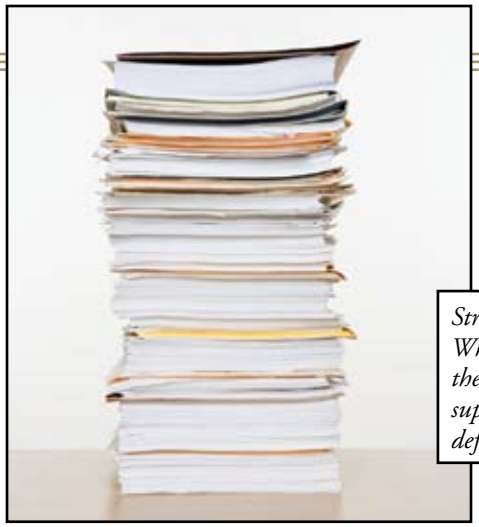

Building a Structural Approach to E-Discovery in Litigation

By Jennifer Jackson Spencer, Esq.

Structural engineers know that construction and design projects are often the subject of litigation. What makes such disputes complex is the number of claims and counterclaims that all relate to the facts. Project owners, architects, engineers, general contractors, subcontractors and material suppliers may all be involved in the same lawsuit, and each party will have its own position to defend and interests to pursue.

Rounding up all the information necessary for preparing a case is expensive. Called discovery, this process once meant going through boxes and cabinets of paper documents to cull relevant specifications, designs, schedules, change orders and correspondence. Since 2006, the Federal Rules of Civil Procedure require producing not just paper but all electronic documents and data for trial. Defendants and their counsel must carry out this duty to preserve and provide electronically stored information (ESI), and a court can inflict sanctions for failure to comply.

Huge Volume

Discovery can be long and costly because a party may make inquiries about any area that is relevant to a dispute or that may lead to relevant admissible evidence. Incomplete compliance with e-discovery requests is a particular danger, because it is often necessary to search not only current email and document files but also backup disks, system servers, off-line or off-site data storage, programs and utilities, personal digital assistants, notebook and laptop computers, and even cell phones with text messaging or home computers.

Defendants and their counsel must carry out their duty to preserve and provide ESI from all these sources, and most experts agree that more than 90% of the data generated in a given organization constitutes ESI. The sheer physical volume of this data can be huge. One gigabyte of ESI can equal up to 75,000 hard copy pages, and many lawsuits require e-discovery production of up to one terabyte (1,000 gigabytes) of material, or 500 million pages of paper – approximately equal to the height of 58 Empire State Buildings.

Short Timeframe

Also complicating e-discovery is that it must be done quickly. The Federal Rules of Civil Procedure allow only a brief window after a lawsuit is filed to identify, analyze and classify sources of relevant electronic data before the parties must meet in a conference required by Rule 26 to discuss e-discovery issues. The "Rule 26 Conference" must be held "as soon as practicable," and in any event at least 21 days before the scheduling conference that is required within 120 days of filing a complaint. It seeks to avoid loss of ESI and ensure its usability and timely production by resolving concerns up-front. Parties in the conference must identify all sources of ESI in their initial disclosures, and agree on such logistical issues as accessibility, location and types of information, production formats and matters of privilege.

Process Management

The solution to the volume and time crunch of e-discovery is to implement a process that manages your digital file cabinets before litigation hits. Week one of a major lawsuit is too late to develop a strategic plan for electronic evidence gathering. Creating a management program for ESI begins with identifying and interviewing everyone from executives, to IT and engineering specialists, to field personnel, who can help identify key actions and evaluate the status of records and decisions.

Once a company creates a data management plan that assesses what exists, it must develop best practices and procedures for storing and accessing ESI. Different types of documents may be stored for varying time periods. Storing everything forever can exponentially increase the cost of e-discovery. It is vital to prepare internal training materials and publicize the ESI management plans to all personnel, so that everyone understands the importance and responsibility of ESI retention procedures. An effective program creates a systematic approach that will identify key types of ESI, singled out by whom and how they are generated; generates detailed knowledge about where the e-documents are archived; defines how the servers are structured; and sets processes for securing the document types that must be produced.

Even with such a process in place, e-discovery is an expensive proposition, particularly if handled by traditional lawyer review. It is estimated that the typical cost for one lawyer to review one page for discovery relevance is $2.20, which for one million pages equates to $2.2 million. At a rate of 50 to 150 pages per hour, it would take up to five years for one attorney to undertake such a review.

That fact, combined with the enormous volume of discovery review that a typical case requires, has led more companies to use e-discovery software. Such programs can analyze the same amount of ESI in one-tenth the time, at a cost of around 25 cents per page and with at least 95% accuracy for the best systems. The software must be chosen carefully. Some products may be little more than glorified scanning services, while others may use complex algorithms that allow little flexibility, which may be good for some projects but not for all. The best programs for many cases identify keywords, group similar documents together in logical sequence, and segregate them into separate folders for lawyer review.

Conclusion

All of this complexity emphasizes e-discovery's importance. Decades ago, the existence of physically destroyed documents likely could not be proven. Today, ESI can be preserved in hard drives or backup systems indefinitely. And if the document is there, it must be produced in discovery or the courts will impose severe civil and even criminal penalties. Preservation of ESI is the duty of all employees, including engineers, managers, IT personnel and legal counsel, and must be an integral part of any engineering company's litigation strategy.▪

Jennifer Jackson Spencer is a founding shareholder of Spencer Crain, pllc. She is an experienced trial lawyer who is highly regarded for her knowledge of e-discovery issues. Jennifer may be reached at ***JSpencer@spencercrain.com****.*