

A&E Briefings

Structuring risk management solutions

Tons of paper

In the federal indictment charging Arthur Andersen, LLP of obstruction of justice, it was estimated that between October 10 and November 9, 2001, the accounting giant shredded "tons of paper...as part of the orchestrated destruction of documents. A systematic effort was also undertaken and carried out to purge the computer hard-drives and e-mail system of Enron-related files."

By the time the U.S. Supreme Court reversed Arthur Andersen's conviction in 2005 (because the jury instructions "failed to convey the requisite consciousness of wrongdoing"), Arthur Andersen as an entity was dead.

Morgan Stanley didn't die in the wake of similar legal proceedings. But, in May 2006, it had to pay a \$15 million fine to the Securities and Exchange Commission for failing to properly maintain and produce e-mails related to several investigations. Morgan Stanley could afford to take the financial hit. Could your firm say the same?

Document management programs and policies, incorporating both retention and destruction, are relevant to all business enterprises, including A/E firms. As part of a risk management program, A/E firms need to develop and maintain a document management policy that takes into account practical

storage requirements and legal considerations. You can't keep everything, but you can't throw it all away, either.

SOX

This isn't a reference to baseball or footwear. SOX is the Sarbanes-Oxley Act of 2002, which created new laws involving obstruction of justice. Unless you're a big publicly traded accounting or securities firm, you may think that SOX doesn't apply to you – but you would be wrong. The legislative intent of SOX is affecting the private sector with the philosophy that people should not be destroying, altering or falsifying documents to obstruct

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any government function. Obstruction of justice is more far-reaching because it does not require you to be involved in any underlying criminal activity.

SOX isn't the only law affecting document management policies; there can be dozens. For example, employment records may be subject to Employee Retirement Income Security Act (ERISA) and Health Insurance Portability and Accountability Act (HIPAA) requirements six years from the date filed, and up to 30 years after termination for OSHA-related documents. And, the IRS requires businesses to retain corporate records for the life of the entity.

As for project documentation, individual state law – either at the principal place of business or where the project is located – is probably controlling for private work. Statutes of repose offer a rational basis for determining the length of time to retain contract documents before destruction. Public projects may be subject to additional retention guidelines determined by the Federal Acquisition Regulations. Obviously, reconciling these competing interests can be a challenge.

Courts will consider these two factors when considering the legitimacy of a document management policy:

- Is the policy reasonable considering the facts and circumstances surrounding the relevant documents?
- Was the policy instituted and enforced in bad faith?

Not having a policy can get you in trouble, too: selectively destroying documents in the absence of a document management policy may be evidence of bad faith. Timing is everything. In the case of an unusual circumstance, when a party should have known that the information may be relevant to future litigation, adhering to an established document management policy may be inappropriate. The exemplary cases in this situation involve the Union Pacific Railroad Company. In two cases where accidents occurred during track maintenance, Union Pacific's practice of automatically recording over voice tapes of radio communications after 90 days and destroying track maintenance records after one year were inappropriate.

Generally, you should not retain documents beyond established business or legal requirements. However, if there is any question regarding the length of time a piece of information should be retained, it's wiser to err on the side of caution. Courts will factor in ordinary business operations with legitimate business needs to determine whether good faith has been exercised.

Where in the world?

You probably know where your paper is; it's fairly easy to keep track of hard copy documents, even individual employee project diaries. It may be in horizontal or vertical files, in the office, on the job site, or in storage.

However, keeping track of electronic information is more difficult. Think of all the different

ways that electronic information can be stored: individual hard drives, removable drives, servers, backup tapes and portable devices. And although that's quite a list, there is more to consider. Hard drives can be located on desktop computers in an employee's home office or on laptops that could be anywhere. Removable drives include floppies, CDs and flashdrives. Portable devices can include digital cameras, cell phones and PDAs.

In the unique world of construction, project documentation flows between many parties. Information is usually available from more than one source and in more than one format. This may be a blessing and a curse. Think of all the multiple copies and multiple versions that are out there. Some versions of a document may be unnecessary draft copies that were merely reviewed and edited for readability and grammar. Other multiple versions and commentaries may prove the standard of care to which your firm performed. Any good document management effort starts with a data map of what information you have, and where and how you store it.

FRCP

The Federal Rules of Civil Procedure (FRCP) govern the conduct of all civil actions in federal district courts. Although they do not apply to suits in state courts, many states have closely modeled their rules on the FRCP. On December 1, 2006, the FRCP was expanded to better address the discovery of electronically stored information (ESI). The new FRCP amendments add "electronically stored

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information” to “documents” and “tangible things” as initial disclosures which must be provided to the opposing party.

What does this mean in practical business terms? First, once litigation is anticipated, the legal doctrine of “spoliation of evidence” kicks in. This is a fancy term for the idea that you can’t spoil or destroy any information that could be relevant to a claim or lawsuit. This preservation of documents and data is known as a “litigation hold.”

For paper documents, this means one of two things: stop shredding or don’t start shredding. It’s trickier with electronically stored information. With ESI, what you see is not always what you get. ESI contains metadata, which is data about data. You can see some of it when you hold a cursor over a document icon on your desktop: title, author, date modified, etc. Simply turning a computer on and using it may alter the embedded metadata information and destroy evidence. An anticipatory way to deal with this situation is to implement a standard software scrubbing procedure that removes metadata from individual files as part of a document management policy.

Second, FRCP provides that electronic data must be produced in a reasonably useable and accessible format, not just a data dump. Just as you keep paper-based information in organized files, an electronic records management software application can organize electronically stored information.

The appearance of impropriety

Sometimes doing the deed pales in comparison to covering up the deed.

Having a document management policy on paper is not enough. Once a policy has been developed, all employees must follow it consistently. As the Supreme Court stated in the Andersen case, “It is, of course, not wrongful for a manager to instruct employees to comply with a valid document retention policy under ordinary circumstances.” What is wrongful is suddenly resurrecting a dormant or ignored policy under extraordinary circumstances – such as a subpoena landing on your desk. This kind of behavior would almost certainly create an “adverse inference” in the eyes of any court; that is an unfavorable deduction drawn against a party that failed to produce information, presumably because that information was self-harmful.

With any document management policy, the decision to retain or destroy a particular document should rest not on its contents, but on its business purpose. And never destroy the documentation that documents your destruction: what was destroyed, when it was destroyed, how it was destroyed, by whom it was destroyed, and under what authority.

Now what?

If you’ve never been through a lawsuit and the requisite “document production,” it’s hard to comprehend the time, effort and money involved in finding information that is not systematically archived.



If you haven't already done so, gather a multidisciplinary team of employees: technical professional, administrative support, executive, managerial, finance, human resources, IT, legal. This core group should prepare a data map of information your organization produces, determine how that information is stored, appropriate retention periods for different types of information, method of destruction, and a procedure for dealing with a litigation hold. The focus of this group should be to look ahead, not backward. It is easier to start implementing a document management policy with a "from this day forward" attitude. Then, as resources permit, you can systematically organize existing information.

Document management policies and procedures developed at a neutral time, rational, transparent and consistently applied are more defensible. If you should find yourself inside a courtroom, you want to be arguing the merits of your case, not the technicalities of document production.



Risk tip: e-mails and diamonds are both forever



If construction was merely about bricks and mortar, we would all be bricklayers. Instead, construction is about the hundreds of people who plan, design, build and maintain a construction project. As with anything involving people, construction success lies with communication – much of which today takes place via e-mail. And therein lies a risk.

Most people are probably aware of the “smoking gun” e-mail. Just ask Bill Gates how his e-mails outlining plans to “kill” products of rivals came back to haunt him during the Microsoft antitrust trial. But just as important as what you say in an e-mail is how you say it.

In essence, there is no difference between fancy company letterhead and e-mail. Like letterhead, a printed e-mail includes your name and your company’s name at the top. Yet most people are inclined to treat communication on company letterhead more seriously than communication in an e-mail – and that’s a mistake.

The tendency with company letterhead is to be more formal, cohesive and temperate, no matter the subject. In contrast, e-mails by their very nature tend to be the opposite – informal,

chatty, colloquial and flippant, even profane.

Although you don’t have to sound like a lawyer in every e-mail (or text message or voicemail) you send, imagine this scenario five years from now.

You’re sitting on the witness stand in a courtroom. Your opponent’s attorney is reading aloud an e-mail you wrote today about a project you’re working on. What will it sound like? Will the attorney’s inflection give your message a different meaning than you intended? Standing alone and out of context, what will this communication say – about the project, the person receiving it, your firm and you?

E-mails can be retrieved from backup tapes, servers, other computers in other inboxes, or in print in someone’s project file.

Just because you hit the “delete” button when you’re going through your e-mails doesn’t mean they are deleted. E-mails can be retrieved from backup tapes, servers, other computers in other inboxes, or in print in someone’s project file.

So the next time you’re composing an e-mail, take a moment to think about the similarities between e-mails and diamonds: both should be polished, and both are forever!

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