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Taming the Beast in Monster Defect Cases: A Discussion of Emerging Issues in Document and Information Management in Construction Claims

I. Introduction

The ever-growing number of construction defect cases almost always involves extremely large volumes of documents - both paper files and electronic documentation. The resolution of these complex construction disputes requires organization, review and analysis of these large numbers of documents. Early case assessment, budgeting, and reserving are all intimately entwined with the ability to perform a timely, complete analysis of the project documentation. How the documents are obtained and organized and stored can play a vital role in minimizing costs and fees, providing early assessment, and allowing for economical, efficient, and expeditious resolution of monster defect cases.

Types of Documentation in Monster Construction Defect Matters

Construction projects by their nature generate voluminous documentation. Electronic information such as emails, computer schedules, and financial information are most frequently stored electronically. Contracts and subcontracts between Owner, General Contractor, architect, subcontractors, sub-consultants, material suppliers and others form the basis for many of the claims from which defect matters arise and may be in either paper or electronic format.

Project specifications, drawings and plans lay the framework for the various scopes of work for sub-trades and is the main source for evidence and information the determination of design vs. construction defects. This documentation is often in specific formats such as CAD or .dwg files that require specific software to view.

Project schedules assist with determining correct coordination of trades and potential delays. Correspondence (paper and email) tells the story of the project and creates a timeline of events. Finally, bonds, insurance policies, governmental notice documentation, change orders, requests for information, invoices, payment applications, lien waivers, progress reports, meeting minutes, damage reports, cost analysis or estimates, as-builts, financial data round out the documentation produced during a project.

II. Identification and Preservation of Electronically Stored Information (ESI)

ESI is stored information: storage locations include computer drives, whether on the computer, on enterprise servers, on external media such as backup tapes, or on leased storage space ("the cloud"). Identification, retention, and preservation is a vital part of the handling of complex construction defect matters.

The identification and discovery of ESI includes pertinent issues related to limits on custodians, identification of relevant subject matter, time periods for discovery and other parameters to limit and guide preservation and discovery issues. Contractors are not known as the best record keepers that can make this process even more difficult.

Electronic Correspondence

Retrieval of emails and other correspondence can pose problems for the monster defect case. Often the correspondence between parties plays a crucial role in the reconstruction of the timeline and various factors such as changes in the scope of work, determination of responsibility for a particular alleged defect, and issues related to attempts to remediate.

Requests for electronic mail should seek the information in native format, such as a .pst file. However, often these items have been printed and are only available in paper form. Other issues related to electronic mail is that often this information is stored across not only an enterprise server of an organization, but individually on several laptops, cellular phones, or other portable devices.

Servers

Production from servers can be limited by access to the system. Additionally, information from servers should be requested in native format, to allow for investigation of metadata and metatags, which can assist in determining issues of timing.

Cloud-based Media

More organizations are moving towards cloud-based record retention. This format brings into play a third-party vendor who runs the "cloud" and may add extra layers to the timing and completeness of the production.

III. Best Practices in Monster Case Document Management

Preservation

Upon receipt of a claim, it is imperative to send a litigation hold (or "preservation order") to the insured client. This request the company preserve all data that may relate to the legal action involving the company. In the world of Monster Defect cases, this is extremely important given the requests for information in native format, and the breadth of potential requests.

To the extent the insureds project file is not in electronic format, all documentation should be digitized for ease of use and production. Decisions should be made at this stage

whether to digitize in OCR format for ease in searching, and whether Bates numbers or other identifying systems should be utilized.

Collection

Setting goals for a case document management as early as possible is crucial. It is important to decide what you want to achieve and determine how to measure the progress during a matter. Document management systems have lots of business applications, so it's important to be specific. It is always harder to go back and re-organize large amounts of production halfway through than it is to develop an organizational scheme early and maintain it throughout the litigation.

A major benefit of digital document management in construction defect matters is the ability to automate processes in ways that reduce the time and effort. Make sure that whatever system is used prioritizes automation efforts to focus on processes that are most important to the case. Being able to save time and keystrokes can be extraordinarily beneficial in the Monster defect cases.

Also, consider additional automation opportunities. Document management has the ability to automate numerous functions, integrating data capture with databases, applications and notifications. By automating how you capture documents, it's possible to gather information and make the contents searchable, using technology intelligently detect the document type and automatically organize it. This will save enormous amounts of time throughout the case and minimize duplication.

It is also important to capture content close to the point of origin. You should be able to capture electronic records without the need to print a document and scan it into the system. Capturing your content as close to the source as possible increases efficiency by eliminating unnecessary steps and improving data quality. By requesting documentation in native format, metadata and metatags will be maintained, and searchability and functionality during the entire case are amplified.

Finally, keep the user interface simple: A good system should allow administrators and users to show only the most useful elements for the user. Simplifying the interface makes it easier for a person to accomplish their tasks without confusing or overwhelming them with details that aren't relevant.

Another piece of managing the monster defect cases is attempting to get document management tools into case management orders. Most courts handling complex matters such as multi-party construction defect cases routinely enter initial and interim case management order as a rule. In these instances, try to convince the parties to agree upon various document management items in the order. For example, the use of a single source court report for depositions to maintain the integrity of deposition exhibits. An agreement to use a vendor for a document depository for all discovery, to allow for one source of documents and greatly reduce duplication, as each party can simply place its discovery into the depository instead of responding to multiple document requests. This also allows for a repository of non-party discovery, eliminating the need for requests for copies and production of multiple copies of different discovery responses.

Implementing these methods early in the case and having the weight of a court order behind them will streamline processes, eliminate duplication and allow for easier retrieval of important documents throughout the matter.

Organizing

Once the documents have been gathered, systems must be in place for the review and indexing of documentation for use throughout the case. This allows for the analysis of documents for early case assessment, to develop a discovery plan and resolution strategy, and to assist in the preparation for depositions.

Storage issues, search methodology, retrieval

Given the numerous formats of ESI, and the sheer volume of data in Monster Defect Cases, determining the best storage can be crucial. Also, determining whether the electronic information has been saved in some searchable form (such as Optical Character Recognition) must be determined. Finally, ensuring options in retrieving the documentation when necessary, such as via external hard drive, network or portable electronic device must be considered.

IV. Preventing Wasted Costs

While production of electronic documents rather than producing multiple sets of paper copies often results in great cost savings on the expense side, the ongoing need to review, search and organize the growing amounts of data can lead to great expenditure of fees in even the smallest construction defect matter.

On Boarding All Parties

A major difficulty is getting all parties to buy in to a plan for each case. Whether it be the attorneys who are reticent to try a new system, or the insurers who have particular methods in place that are difficult to circumvent, early discussion with all parties is imperative.

Indexing and Organizing for Use

Try to prevent duplication. As noted above, having a single source for “document dumps” and production can eliminate time and money spent needlessly on multiple versions of the same discovery. Reducing the instances of lost or misfiled documents saves time and money during the discovery process. Faster search and retrieval also assists in allow for greater, more detailed preparation, but at the same time saves costs of unnecessary steps in the process.

Effective lawyering can also dramatically lower the costs of electronic discovery, principally by better targeting the scope of ESI that is collected in the first place. Learning and truly understanding the most informative client data sources and educating your adversaries and the court, if necessary, through a case management order or agreement, can greatly reduce costs. This coupled with appropriate objections regarding collection from redundant sources and a custodian-centric collection process can go a long way in reducing the amount of ESI you need to collect. As always, minimizing spend, whether defense spend, indemnity spend, or eDiscovery spend is important from a business perspective but can also positively affect the handling and resolution of complex, multi-party claims.

V. Advantages of Different Methods of Document Management

Imaging

If project documentation and correspondence is in paper format, it must be scanned and saved in electronic format for ease of use throughout the case. If a document depository has been enlisted for use in the case, that vendor often provides scanning services.

OCR

If paper documentation is saved, it is critical that it be saved in a manner, such as Optical Character Recognition (OCR) that allows for ease of indexing, organizing, and searching throughout the life of the case.

Bates Labeling

Maintenance of some sort of indexing or numbering system, such as Bates Labeling should be maintained for integrity of the production and for ease of use of identification in depositions, hearings and otherwise.

Software Programs

There are numerous case management software programs on the market that allow for organization and indexing, integration with online produces such as DropBox and ShareFile, the ability to access files on any platform, instant synchronization of files, and granular control of data.

Legal e-service providers

Legal e-Service providers can also be utilized to assist in the management of Monster Defect cases. These services allow for access controls, archiving & retention, collaboration, document indexing and tagging, full text searches and assist all parties with implementation.

CONCLUSION

Monster Defect cases present unique issues relative to the identification, collection, preservation, organization, and use of documents – whether paper or electronic. By looking at the issues early in a case, using resources and technology to assist the practitioners, and by always looking for new and better ways to handle the reams and terabytes of information, claims professionals and defense counsel can better assess, more easily analyze, and more quickly resolve the Monster Defect cases.