How to Mitigate 3 Key eDiscovery Challenges

Minimize the time & money spent managing litigation & maximize your business

By Barry Schwartz
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Legal disputes are a fact of life in the construction industry. The cost and time to resolve them increased significantly in 2019, according to Arcadis's "2020 Global Construction Disputes Report." The same research also found that the cost per construction dispute in North America jumped 15% to $18.8 million. The average length of time to resolve the dispute rose 16% to nearly 18 months.

Disputes and claims costs are likely to increase in 2020 as the threat of COVID-19 exposes workers to health risks and forces delays in project completion. If construction companies have a comprehensive and integrated eDiscovery process in place, they can be proactive versus reactive in how they prepare for litigation. The following are the top three legal challenges construction companies face and solutions for managing those risks with a finely tuned eDiscovery plan.

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1. Construction business owners face frequent litigation.

The challenge: Lawsuits in the construction industry often allege either negligence (workers are injured when safety protocols are not followed) or breach of contract (project completion is materially delayed due to any number of reasons: scheduling issues, staffing, alleged faulty work product and more). Research by McKinsey & Company found that a typical construction project takes 20% more time to complete than initially scheduled and goes up to 80% over initial budget, which can then lead to litigation. Another telling statistic: Work-related injuries resulted in the loss of 103 million production days in 2018, according to the National Safety Council. All of that culminates in a continued increase in litigation type and frequency.

The solution: To control costs related to increasing litigation, companies need to have in place clearly written policies and procedures for managing those litigations. The plan should address each part of the discovery process, for example, from the first litigation hold through the final document production. You may also want to craft a clear role and process for social media investigations and collections, an essential element in many cases, especially workplace injuries. Your plan should designate an employee or group of employees who will coordinate all discovery activities, both internal and external. Additionally, your company should select a vendor with proven computer forensics and eDiscovery expertise. A litigation and eDiscovery game plan, especially when combined with a fully vetted and capable eDiscovery vendor/partner, will ensure that each legal matter is managed consistently, efficiently, correctly, and legally defensibly, which will save your company money and time.

2. Construction companies accumulate vast quantities of data.

The challenge: The amount of data the construction industry generates per project can be enormous. It involves multiple vendors, applications, documents, emails, texts, voice messages, videos and more. Additionally, the data ends up stored on a multitude of devices and systems (desktops, laptops, tablets, servers, wearable devices, project management and other databases, perhaps proprietary). Reviewing this vast accumulation of data requires a customized solution that allows a company's legal team and claims experts to collect and sort the information.

The solution: Step one in getting a handle on your company's data is to determine what data is being stored, where it is being kept and who has access to it. A custodian questionnaire (CQ) will help set up a detailed data map to help you find relevant data more quickly and more easily. Once you understand where your data is stored and what types of data you have, you can work with your eDiscovery team to determine the best platform to preserve, collect, process and review data for discovery. The optimal solution should be a single platform that is customized

for your business to manage legal holds automatically and collect and process data. A second platform may be employed specifically for your legal team to review documents. Many review platforms allow plug-ins that provide advanced analytics features and additional functionality, such as clear visualizations, deep analysis, redaction assistance and technology assisted review.

3. Regulatory requirements can be significant.

The challenge: Construction business owners are no stranger to the wide range of federal, state and local regulations to which their industry is subject. Without a robust document management plan, managing compliance with, for example, the Occupational Health and Safety Administration (to protect workers) or the Environmental Protection Agency (to safeguard communities from pollutants and toxic waste) can be a significant administrative burden.

The solution: A detailed document retention policy is essential to help reduce your business's exposure to litigation risk. Be sure the policy clearly states what data should and should not be kept, where it is stored and how long it should be preserved. The policy should be audited on a regular basis (at least once a year) to ensure compliance with ever-changing regulations and with contractual obligations for new projects. It is also important to remember that your business has an obligation to retain data under litigation hold, as well as data that may be subject to other retention rules.

Construction projects are multifaceted endeavors that require advance planning and constant communication and coordination among employees in multiple departments, including legal. With a customized, detailed eDiscovery plan in place, you can minimize the time and money spent managing litigation and devote more of it to growing your business.

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