

HELPFUL TIPS FOR ELECTRONIC DOCUMENT MANAGEMENT IN CONSTRUCTION LITIGATION

BY TODD MAYO

It's not uncommon today for parties involved in construction litigation to request or receive documents in electronic form. Most of us have experienced receiving or producing documents on CD/DVDs by now. However, electronic document management is relatively new to the litigation process.

Although we have dealt with electronic documents for a number of years, and a plethora of software applications to manage electronic documents are already in existence, the Federal Rules of Civil Procedure have only recently adopted rules regarding electronic discovery. Rule 26(f) requires parties to discuss issues regarding electronically stored information such as scope, costs and burdens, and form of production in the early stages of discovery. Many state courts have not formally addressed the issue but are expected to adopt similar guidelines.

What does this mean? Electronic documents have become so prevalent that they are now recognized as a standard part of the discovery process. This, along with the fact that parties are increasingly turning their paper documents into electronic form, demonstrates that the love for paper in litigation is slowly fading. We may never be paperless, but we will surely find ourselves more frequently in situations where we must decide how to efficiently manage electronic documents.

There can be a tremendous amount of documents in construction litigation. Many documents only exist electronically and there are often too many boxes of paper documents to reproduce, transport, and store. For cases with large amounts of paper documents, the costs of transporting, reproducing, and storing those documents often exceeds the cost of managing documents electronically. Furthermore, parties are frequently splitting some of the costs involved with creating an electronic document database and realizing the benefits of searching and sorting large document sets electronically.

Parties electing to manage documents electronically typically send them to a shop where they are scanned into electronic images and then loaded onto discs. Each document usually receives bibliographical coding such as date, document type, author, subject, and so forth. Various software packages allow the documents to be viewed, searched, and sorted into issue folders. Although the bibliographical coding is searchable, extra measures may be taken during the scanning and coding process to allow for Optical Character Recognition (OCR). This allows the full text body of the document to be searchable, as well. Keep in mind handwritten documents or marginalia will not be recognized by the OCR.

VIEW THE DOCUMENTS IN PERSON

Some users advocate scanning the entire document set to create a complete database. If you insist on including the entire document set, you should at least flag the priority document folders prior to scanning and have those flags included in the coding so they are retrievable as a group later. However, scanning and coding unnecessary documents in a large document set may ring up a big price tag and hurt efficiency when it comes to navigating, searching, and sorting the database. The software's search functions are very powerful. In fact, they often return too many results. The need for long stringy searches and meandering through long search result lists can be a time-consuming task.

Take advantage of opportunities to eliminate unnecessary documents from your electronic database. It is recommended that you first sift through the paper documents by hand before they are scanned. Identify and make note of all folders within each box. A person familiar with the issues of the claim will be able to significantly narrow the necessary document set required for litigation.

In addition to identifying and eliminating documents that are not necessary for the database, sifting through the documents by hand will give you an idea as to how the documents were filed and managed. This can help in identifying what documents to search for, how to conduct your searches, and allow the ability to check quality control regarding the scanning and coding. In addition to the standard bibliographical coding, sifting by hand may give you insight about any fields you may want to include in the coding.

Make note of any relevant names or titles of subcontractors, reports, or diaries. The software's keyword and phrase searching functions are great tools, but they can be difficult if you don't know what keywords or phrases to use. Also, use this as an opportunity to review, limit, or eliminate oversized documents such as drawings. Oversized documents can be very expensive to scan and may not fare very well on a small computer screen. You may decide to select a few sets and have them produced on paper or scan only a limited number of these documents.

GET INVOLVED EARLY IN THE PROCESS

Participate in the set-up of the coding process. It's a big mistake to allow the scanning and coding firm, or your adversary, to decide how your document set is to be coded. Early involvement in the coding process can save a significant amount of time, money, and headaches.

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Coders often suggest fields that require the least amount of effort on their behalf. They may also suggest additional useless fields simply to enlarge the scope of their service. They are particularly fond of fields that can utilize a drop-down menu during the coding process. This provides their coders with the efficiency of a field containing a limited choice and without the need for unique data entry.

Naturally, fields that require unique handwritten descriptions are time-consuming and less profitable for the coder. So, pay attention to the recommended fields and make sure they have some use.

In fact, it is highly recommended that you review every suggested field and consider whether or not it is necessary to isolate the data in which you are interested. For example, the coder may suggest fields that identify a document's author and recipient. Determine if it is important to know the names of the individuals who draft the correspondence or if the drafting or receiving firm name is more valuable. If your case involves multiple pass-through claims from subcontractors, you may prefer the ability to search using a "Firm" field.

Searching by individuals' names can be difficult as you may not know all the names of persons responsible for drafting correspondence for each subcontractor, making it difficult to isolate correspondence from any one subcontractor. Similarly, relying on OCR may have limited success as it will locate every instance where the subcontractor was copied or mentioned, returning thousands of search results. If you're having trouble choosing between authoring and receiving firms or individuals, you should consider having a field for both.

Another issue to consider is how to handle attachments. Attachments are multiple documents stapled together. The coders typically code each document within the attachment separately, but link the individual documents together by coding them to an attachment range field that notes the start of an attachment and the end of the attachment. This allows each document within the attachment to have its bibliographical coding searchable and it gives the coders more documents to code.

Contemplate whether or not your project requires attachments to be coded as one document or if every attached document needs to receive coding. Consider the fact that most attachments in construction documentation contain documents that exist elsewhere. For example, a letter may have a CPM schedule or inspector's report attached to it. These attached documents exist on their own elsewhere in the documentation. Do you need to have their bibliographical coding available to searches in two locations?

Keeping the attachment together will reduce the number of documents to be coded and reviewed. It will also prevent a document within an attachment from getting sorted into an issue folder without the other parts of the attachment. In addition, it will reduce the number of duplicate documents in the issue folders. The drawback is that if you only want one document within an attachment, you can't isolate that document from the rest of the attachment. As a result, you will occasionally sort large attachments when only one document from within the attachment is needed. You will need to decide whether or not you should break up attachments or treat them as one document.

Another important issue to tackle early in the process is the "Document Type" field. You may want to give input on how certain construction document types (which are specific to the construction industry) are to be treated. Give the coders examples if necessary. For instance, CPM schedules will appear as calendars, charts, or as both unless an example is given and a special document type assigned.

Be aware that coders often overuse "report" as a document type. If you're not careful, you will be surprised to see what gets labeled as a report. Also, discuss the Subject field with the coder. This is the most descriptive portion of the bibliographical coding, and is heavily relied on when OCR is not available. "Subject" field coding often simply replicates the "RE:" within correspondence. All too often this simply references the project name.

When contemplating electronic document management, consider the fact that it requires a great deal of effort up front to create a successful database. Fortunately, most construction litigation ends without a trial. However, the further the case carries on, the more value you will receive from a properly set-up electronic database. So, get involved in the set-up of your database. And, if you have any doubts, seek advice from someone who is knowledgeable about construction documentation, as well as electronic document management.

About the Author

Todd Mayo is a construction claims consultant for PinnacleOne's northeast region. He received a Bachelor's degree in Economics, cum laude, from Worcester State College and a Juris Doctorate from Brooklyn Law School. Mr. Mayo holds a Massachusetts unrestricted construction supervisor's license and has on-site experience initially as a carpenter then as a construction manager. While in law school, he worked for the New York State Attorney General's Investor Protection Bureau. During this time, Mr. Mayo was introduced to managing electronic documents while assisting in the prosecution of fraudulent securities transactions.