OBER | KALER
Attorneys at Law

Construction OberView™

Construction Group

Jackson B. Boyd

Raymond Daniel Burke

David L. Cole, Jr.

James E. Edwards, Jr.

Ian I. Friedman

David G. Kinzer

Joseph C. Kovars, Co-chair

John F. Morkan III, Co-chair

Sylvia Ontaneda-Bernales

Eric Radz, Editor

Michael A. Schollaert

Peter F. Stine

Paul S. Sugar

JANUARY 2010

What You Need to Know — The Impact of Electronic Documents on Everyday Business

Anthony F. Vittoria
410-347-7692
afvittoria@ober.com

There have been literally thousands of articles commenting on the new rules adopted by the federal courts regarding electronic documents (such as e-mail and spreadsheets) during litigation. Most of those articles focus on the obligations of the parties and their counsel to preserve and produce relevant electronic documents to the opposition. Still other articles focus on purely legal issues such as the preservation of the attorney- client privilege in the midst of a large production of electronic documents, and the "safe harbor" provision included in the new rules that addresses accidentally deleted electronic documents.

In the midst of this sound and fury, what is often ignored are the effects that this new focus on electronic documents has on the everyday operation of a business. One of the most important aspects of the new rules that could significantly affect how a business is run is the requirement that the parties address — very early in the litigation process — particular issues relating to electronic documents, including the number, location and format of the relevant electronic documents. Because court deadlines are tight and failure to meet those deadlines could result in severe penalties, companies that have a firm grasp of these issues prior to the commencement of a lawsuit will have a distinct advantage, both in litigation and in everyday affairs.

The following are a few of the important things regarding electronic documents that every business, especially a construction- related business, should know:

First, what are all of the sources of electronic documents in your organization? There has been a great deal of focus on e-mail, and that focus is deserved. That being said, many business leaders do not truly focus on all of the different sources of relevant e-mail. Specifically, it is not just the company's project manager who sends and receives project-relevant e-mail; rather, all of the company's employees, from the president down to an on-site administrator, are creators or recipients of relevant e-mail. Essentially, any person who has access to a computer can, and probably will, create or receive e-mail that would be considered relevant under the law.

Anthony F. Vittoria

M. Hamilton Whitman, Jr.

John Anthony Wolf

In addition to e-mail, companies must know the other types of electronic documents created and received by their employees during the course of a project. The obvious types include electronic schedules and accounting spreadsheets. Less obvious types include WORD or WordPerfect documents, digital photographs, text messages, Internet websites, and even voice mail messages. Again, every computer, Blackberry, voice mail system and digital camera is a likely source of relevant and important electronic documents.

Second, for what purposes are your electronic documents — particularly e-mails — being used? Less than twenty years ago, business correspondence was fairly formal, with an officer or project manager of a company writing a letter on letterhead to a peer in another company. Thought went into the words and information that was conveyed in that correspondence as well as in the manner in which that information was conveyed. With the advent of e-mail, business communication has become much less formal. Employees at all levels of the company regularly shoot off e-mails, both internally and to others outside the company, without so much as a "Spell Check." It is easy to imagine how a superintendent's internal email to his project manager complaining about a subcontractor's shortcomings might be harmful to the company vis-à-vis the owner should that e-mail ever see the light of day.

Third, where and for how long are your company's electronic documents saved? The preservation and production of electronic documents in litigation is an extremely important consideration for any business. If the company has solid knowledge about where the relevant electronic documents are located and how far back they date, the company has a "leg up" in the litigation process and will realize huge costs savings in terms of litigation expenses. However, a well thought-out document retention plan can also have real benefits to the everyday operation of a business.

Many companies still have a haphazard approach to electronic document retention — employees save e-mails and other electronic documents for as long as they think they need them. Most people operate under a "better safe than sorry" approach in this regard — they save everything, including the kitchen sink, in case they ever need it again in the future. Unfortunately, the server and hard drive space necessary to keep all of these electronic documents is costly, and overloaded servers and hard-drives can dramatically slow down a company's computer system. A document retention policy that sets out firm guidelines as to when, how and why electronic documents are purged can save a company real time and real money.

As shown above, the focus on electronic documents should not be solely on what happens once litigation commences. Rather, these issues can have real and important implications on the everyday operation of your business.

If you are interested in conducting a review of your company's electronic document and e-mail use and retention practices, please do not hesitate to contact the author or any of the other attorneys in Ober|Kaler's Electronically Stored Information (ESI) unit for assistance.