# Why Documentation Matters Now More Than Ever

*By John F. Mullen and Mary Teresa Soltis*

*In a perfect world, your company will never need to retrieve information from a job to litigate a dispute. In a perfect world, all parties to a contract perform precisely, fully and on time. In a perfect world, we all move on to the next job. This, however, is not a perfect world.*

While we don't enter contracts expecting to litigate performance matters, how many of us have been sued or have ever needed to sue another? Litigation is, like it or not, an unfortunate but unavoidable part of the business world for structural engineers. However tempting, leaving litigation issues to the last minute is probably not your best option. Keeping ahead of them, although requiring more initial effort, is by far the better way.

In the past, a lawsuit was filed, responded to, and discovery (the exchange of written documentation and answers to written and oral questions to gather facts) proceeded. After discovery ended, law was applied to facts and a resolution was reached or parties moved through a trial for a final (although riskier) resolution. Emotions, facts, law, and business concerns all played a part in this progression and guided it to an early or later ending.


Over the past decade or so, more and more business has been conducted electronically (think email, voicemail, spreadsheets etc…) while the litigation rules addressing this information remained the same. It is estimated that there are over one billion business emails created in the United States EACH DAY. Less than 30% of these emails are ever printed. 95%, or greater, of all new documents are stored electronically. Some formal structure was needed to govern this volume of data in the litigation context.

That structure arrived on December 1, 2006, when the rules of document retention for all federal litigants (rapidly being adopted by the states) changed to reflect the reality that many, if not most, of the "documents" that are increasingly important in litigation are electronic in nature. Note our use of the term "rules," for they are not optional. Failure to comply with these rules will likely lose your case.

What was once a simple matter of accessing hard copy files and producing documents has now vastly expanded to include what is termed: *electronically stored information* (ESI). In short, it is no longer enough to review and provide hard copy files, which might or might not include printed emails, voicemail transcripts, spreadsheets, etc.

The new rules treat ESI as a separate category of discovery as opposed to just additional documentation that a party must produce. They compel litigants to affirmatively offer ESI (i.e., the nature of electronic systems, the location and categories of types of ESI) very early in litigation in mandatory disclosures without a request from the opponent. Litigants must now discuss and attempt to resolve, among others, ESI preservation, production, privilege, confidentially, scope, form, waiver, inadvertent disclosure, accessibility and cost issues, in a "meet and confer" exercise prior to an initial court conference. Litigants should now work toward an agreement that memorializes the steps they agree to take with respect to these issues regarding ESI. Failure to agree leaves you open for later, larger problems.

Most importantly to you, the non-lawyer engineer, the new rules impose an affirmative obligation on any likely litigant to implement a Litigation Hold once it reasonably believes litigation is likely to ensue from a specific dispute. This may occur when a litigant receives notice that a complaint was or will soon be filed – even though that complaint has yet to be formally served. A Litigation Hold requires the preservation of all ESI from all key personnel who may possess discoverable information on topics related to the dispute.

The capture of existing and/or ongoing ESI can be a large and potentially very expensive task. The use and cost of third party services and/or internal staff raises many questions. Will any of this be paid by insurance? What is or what is not accessible data that can be searched? Who should bear the costs? These and many other issues are raised by the new rules.

This area of law is brand new, very unstable and subject to wide interpretations by the courts. The standard of review used by an appellate court reviewing a district court's rulings with respect to ESI requires the higher court to determine whether the district court "abused its discretion." This is a difficult standard to meet and, therefore, it is best not to assume that relief will be forth coming from the appellate level if you disagree with the trial court's rulings.

What are the "take away" items from this very complicated shift in the law?

1) Have your act together on ESI issues before you find yourself in litigation, because otherwise you won't have time to comply with the rules.
2) Train you staff to be very careful with what they put into a computer, email, voicemail, text message etc… These documents, without context, can destroy your fact position in a given piece of litigation. Instruct everyone that an email or document should be fit for review by their boss and their boss' boss, or it should not be written.
3) Once you are aware that litigation may ensue, document all internal steps you take to comply, in good faith, with the Litigation Hold requirements.

Although getting ahead of these issues will take time and cost up front dollars, it will almost invariably pay off by controlling expenditures down the road and increasing your likelihood of success in the broader litigation context.▪

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