




THE PERILS OF E-DISCOVERY

Protecting your company's electronically stored information

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In recent years, the landscape of land rights acquisition in the United States has become increasingly more contentious. As a result, the likelihood that project work might lead to litigation in some form has also increased. This may involve defending a claim of property damage or overuse of vested rights. Or perhaps a client needs help with a declaratory judgment action to define existing rights or to exercise the right of eminent domain, if it exists.

In today's electronic age, every type of communication may become subject to litigation discovery requirements. Whether it's an email to a landowner or notes on an electronic mapping system, your writing should be done with the expectation that it may end up in court. To best protect your company and your client, right of way personnel should follow the mechanics of cautious communications and make it a core competency.

Electronic Discovery

Prudent service industry professionals are well served if they understand the requirements of electronic discovery (e-discovery), including what it covers and how to comply. E-discovery is a litigation discovery requirement for any potential party, mandated by the Federal Laws of Civil Procedure. It requires that entities have procedures in place for both the preservation and production of electronically stored information (ESI) in the event of threatened or actual litigation or regulatory investigation. ESI includes, but is not limited to, email, calendar entries, contacts and task lists, smart phone

text messages, voicemail messages, servers, hard drives, thumb drives, office laptops, social networking sites, and home computers if you do work on them, whether or not they are used to access the office network.

Although originally only a mandate of the federal courts, since 2013 over 30 states have adopted e-discovery protocols to maintain uniformity with the federal courts. The penalties for failure to provide documents during discovery phases of litigation or in response to regulatory investigation can be both civil and criminal and extend beyond the organization (whether employer or client company) to employees themselves. Therefore, entities must have protocols in place to protect electronically created and stored information and to be able to retrieve it upon demand.

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Document Retention

In the event of a discovery demand, the key to being able to produce the ESI is having an established document retention policy. The business entity establishes the time periods and circumstances for which ESI will be stored, retained and destroyed if no longer necessary for the business and to maintain availability of inactive records in response to an e-discovery event. The retention policy should have a minimum duration for which general records should be kept, recognizing that longer retention requirements are based on applicable laws, statutes and regulations. The retention policy should also restrict where ESI can be created, such as requiring that company business be conducted on business email instead of private accounts, whether for employers or client companies.

What is a Legal Hold?

In the event that litigation or a regulatory action is filed, or when it is reasonably anticipated, a company needs to initiate its legal hold procedures. This would be a trigger event for implementing the hold. For example, when a client company communicates a final offer to a landowner as the last step before condemnation, it should also notify the right of way agent's employer, other contractors and/or employees that litigation is reasonably anticipated and to employ legal hold procedures. In many state courts, this may arise during right of entry proceedings. Or it may occur in the event of notice of potential violation from a regulatory body investigating an environmental spill or release. Each of these could constitute a trigger for legal holds. In the event of such notification, any information related to the subject matter about the potential action should be identified and retained beyond the time period for destruction in the retention policy until a release of legal hold is communicated in writing.

Communication with Clients

There may be instances where a right of way company needs to initiate the legal hold on its own behalf, such as employment litigation brought or defended by an employer. However, most of the time, contracted companies will likely receive a notice of legal hold from the client or attorneys for the client company who are involved in litigation or regulatory investigation. It is important to recognize the realities and increasingly common requirements of litigation support in right of way projects. In response, it is imperative that contractors have a conversation early on about legal hold procedures that the client may have in place. This would include parameters for implementation and agreement, preferably in writing, of how the legal hold will be implemented. The moment that a trigger event arises, the agreement should stipulate that the client company will provide a copy of the discovery request, define the scope of ESI that contractors will be required to protect (meaning not delete) and produce an immediate notification when the litigation or regulatory investigation is completed and legal hold is released.

Penalties for Non-Compliance

As previously discussed, the penalties for non-compliance with e-discovery regulations can be harsh. Failure to protect discoverable information from untimely deletion after a trigger event is not only distressing for the right of way agent and employer, there is a real likelihood that the client company will not retain the contractor beyond the litigation, and will certainly not use them for future projects. Beyond that, the civil penalties for non-compliance can reach tens of thousands of dollars per occurrence for each ESI data not produced upon demand. In some cases,

courts have ruled against companies just for failing to comply with e-discovery, even if the facts and law supported a different result. Finally, criminal penalties, including incarceration, have been ordered against company officials and employees for willful non-compliance.

Conclusion

This article is intended to generate discussion with employers and clients about potential issues with the public. It is also to encourage more organizations to develop formal plans and policies specifically for e-discovery compliance. With the foregoing in mind, right of way contractors who do not yet have a retention policy or detailed plans to implement legal holds and produce ESI in the event of a trigger event, risk an increased likelihood of adverse consequences from client companies and the courts. A company's failure to understand the importance of e-discovery protocols will eventually render it, at best, unable to compete, and at worst, terminated from a project and facing criminal and/or civil penalties.

In a competitive industry, treating hard copies and ESI with the formality and organization they merit will help ensure that our country's service providers can compete, while protecting their companies and clients in this technological era. 🌟

Contract Land Staff is one of ten charter member companies of the Right of Way Consultants Council, which supports the best practices recommended in this article. For more information on membership or resources, please visit www.rowcouncil.org.



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