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The Rise of AI and Technological Advancements in the Construction Industry Increases Litigation and Disclosure Risks

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In a rapidly evolving digital age, it is essential for contractors to understand the potential risks when managing voluminous amounts of project data and rolling out new communication platforms to employees. Certain policies and procedures should be implemented to better protect your company should a dispute arise on a project.

The construction industry has digitized over the past couple of decades, and with such technological advancement comes new and additional forms of risk requiring mitigation. With advancements in AI and the use of drones and aerial imaging, building information modeling (BIM), robotics, and 3D printing on projects, we are undoubtedly more efficient than ever. However, contractors should have policies and protections in place governing the use of any new, company-sanctioned platform. It is especially crucial to understand which communications on a job site may be protected from disclosure in the event of litigation and which ones are unprotected and subject to disclosure, even when such disclosure is unhelpful, damaging, or even embarrassing.

Be Wary of Informal, Project-Related Communications on Messaging Platforms

The communication channels on construction projects are ever evolving, and instant messaging platforms are replacing email. Should a dispute arise on a project concerning nonpayment, delayed completion, defective work, or the like, the parties may find themselves in court. An integral part of the pre-trial process is the "discovery" phase of litigation, during which information is gathered in preparation for trial. The scope of discovery is broad, and parties may obtain discovery concerning any non-privileged matter that is relevant to a party's claim or defense. One discovery tool used in virtually every case is a request for production of documents, which requires the responding party to produce potentially sensitive information contained in its project file and the relevant emails, text messages, and instant messaging communications in possession of its representatives and employees. Contractors should be wary of informal messages sent by personnel on cloud-based messaging platforms, such as Microsoft Teams, Slack, etc., for courts have found that such communications are in fact discoverable in litigation.

While instant messaging streamlines project communication, employees should be aware that their messages could be read in a deposition or on the stand one day, regardless of any personal expectation that such messages remain private. A California court recently held that the production of Slack messages in litigation is generally comparable to that of email.¹ A Canadian court recently found that a "thumbs up" emoji sent via text message was acceptance of an offer and that a binding contract had been formed.² While not precedential in the United States, this decision serves as a reminder to think before pressing "send."

Implement Policies and Restrictions Governing the Use of AI Meeting Assistants

Remote video-conferencing platforms, such as Zoom, Google Meet, and Teams, offer AI meeting assistants that can transcribe your meetings in real time and create meeting minutes, summaries, and action items. Litigants should assume those AI-generated transcripts will be discoverable in litigation, even though they were computer-generated. It is possible that AI transcription services may misinterpret or misconstrue conversations, producing inaccurate transcripts and leading to misrepresentations. It is essential to have a

company policy in place governing employees' use of the AI features on these platforms and delineating the "dos" and "don'ts" for use. Consider setting guidelines on when and how AI transcription services can be used within your organization.

Avoid Waiver of the Attorney-Client Privilege

The attorney-client privilege protects communications between an attorney and his or her client that relate to the client seeking legal advice or services. This protection extends to communications between the attorney and client, whether verbal or written. The client is the holder of the privilege, so the privilege can, in fact, be waived. Forwarding a protected communication to a third party can result in waiver of the privilege. To avoid inadvertent waiver of the attorney-client privilege, limit the individuals copied on your communications with your counsel.

Circulate a Litigation Hold to Comply with the Duty to Preserve Evidence

Contractors should be aware of their duty to preserve evidence, including electronically stored information (ESI), if a dispute is on the horizon. If your organization reasonably anticipates or is involved in a lawsuit, then it is imperative that your organization directs its employees to preserve all ESI and other records pertaining to the project. A "litigation hold" notice should be sent to your personnel on the project, advising employees of their duty to preserve communications related to the project. By doing so, you are taking affirmative steps to comply with your duty to preserve subject matter relevant to an anticipated or pending dispute and to prevent the spoliation of evidence. Spoliation refers to the deletion or failure to preserve evidence relevant to potential or pending litigation. The failure to preserve ESI can result in sanctions and other penalties assessed by a court. When litigation is reasonably anticipated, it is vital for an organization to suspend any auto-deletion policies to avoid spoliation. Ensure that you have a data retention policy in place and that project-related communications are not subject to auto-deletion.

If you have questions about avoiding inadvertent disclosure and mitigating litigation risk on your next project, please reach out to [Christopher M. Caputo](#), [Jordyne Johnson Richartz](#), or any member of Baker Donelson's [Construction Group](#).

¹ *Benebone LLC v. Pet Qwerks, Inc.*, No. 8:20-cv-00850-AB-AFMx, 2021 WL 831025 (C.D. Cal. Feb. 18, 2021).

² *South West Terminal Ltd v Achter Land & Cattle* [2023] SKKB 116.