MELAND | BUDWICK

How to Avoid 5 Common E-Discovery Mistakes

https://melandbudwick.com/2015/07/15/how-to-avoid-5-common-e-discovery-mistakes/

Joe Van Acker

New e-discovery rules approved by the U.S. Supreme Court in April will go into effect in less than six months, with changes designed to spur attorneys to narrow evidentiary requests to be "proportional to the needs of the case." With the new rules in mind, here are five blunders you should avoid when tracking down computerized data, documents and dialogue.

Failing to Communicate

Paul Newman's character in "Cool Hand Luke" learned about the importance of communication the hard way, but clients don't have to. Open discourse is crucial when representing Fortune 500 companies and other large clients with email trails a mile long, but it's mutually beneficial in every case, according to Michael Napoleone, a shareholder at Richman Greer PA.

"Even in smaller cases, you're going to find that you have a lot more electronically stored information when you think about the number of potential places that documents can be," Napoleone says. "Emails tend to multiply and multiply and multiply."

That means lawyers have to be upfront with their clients about what needs to be done in order to comply with discovery requests and avoid spoliation sanctions, namely identifying what information is needed and who has it.

"Clients and lawyers need to be speaking the same language when they're talking about the scope of discovery," Kirkland & Ellis LLP partner Michael Williams says. "Outside counsel should be able to rely on inside counsel, and inside counsel should be able to rely on business people.

“But the perspective should always be trust, but verify,” he adds.

Penny-Pinching

Few realities are as frustrating as the fact that you pretty much always get what you pay for. While it’s important to trust clients’ dedicated information technology professionals to help track down data, the stakes are too high to forego thirdparty vendors who specialize in that kind of work if the coffers are full.

Zachary James, of counsel at Meland Budwick, P. A., says that calling in the pros is a great idea if the budget allows.

> “It helps the requesting party by creating a protocol for collecting and producing documents,” James says. “And on the receiving end, vendors work with the client and IT personnel, making sure the process is done properly.”

Bringing on vendors may seem like an unnecessary upfront expense, but their ability to organize and document the data collection process can save cash, claims and even an entire case in the long run, providing proof that attorneys and clients acted in good faith when searching for responsive documents.

And experts say vendors are actually a bargain compared to attorneys who have to pore over troves of information, and are able to streamline the process. Napoleone says a vendor assisting in a recent case was able to trim a batch of 3 million documents down to 400,000.

That’s mostly due to proprietary software that searches for keyword combinations to efficiently identify relevant documents. Without good keywords, important files may slip through the cracks. Or, as Napoleone says, “Garbage in, garbage out.”

Poor Planning

E-discovery has become the costliest, most time-consuming part of trying a case, and the new rules approved in April are a reflection of that, according to Williams. Much of the burden stems from the fact that a lot of documents produced at trial wind up being irrelevant, but James says preemptively hammering out solid

document retention and destruction procedures can help current clients avoid future headaches.

“Some companies spend huge amounts of money trying to preserve everything, but that’s not really legally required and really not the best practice,” James says.

He also stresses that it’s important to get a handle on clients’ current procedures before making any agreements with the opposition when a lawsuit crops up, noting that it’s hard to provide documents if clients have already deleted them.

Napoleone advises attorneys to not only put a litigation hold in place to avoid spoliation but also to figure out any potential issues with what he refers to as the “electronic environment,” and James says that’s an ongoing duty.

“It’s good to audit clients quarterly to make sure instructions have been disseminated, that everything is running smoothly and that they have a resource to go through in your office,” James says.

Negotiating with a Chip on Your Shoulder

Harboring the desire to win doesn’t mean attorneys should go into a case treating opposing counsel like the enemy.

> “The biggest mistake that attorneys make is not taking a cooperative approach with opposing counsel,” James says.”Rather than viewing discovery as an opportunity to go after your opponent, you can manage e-discovery more effectively and spend more time litigating claims.”

Reaching out to the other side adds integrity to the process, according to Napoleone, and also presents an opportunity to come to terms on clawing back any inadvertently produced privileged documents, a pitfall that’s nearly unavoidable in light of the broad requests associated with e-discovery.

Williams says that once litigation has kicked off, lawyers on both sides will “reflexively” challenge e-discovery and document preservation — but cooperating in the early stages allows everyone to avoid unpleasant surprises if things get testy later on, according to Napoleone.

“If you don’t cooperate because you reject that out of hand, you find out that you should have in order to develop an adequate list of keywords,” Napoleone says. “The quantity of electronic communication is growing much bigger, the types of communications are more diverse and the stakes are much higher for e-discovery mistakes.”

Committing the Cardinal Sin

E-discovery may have ushered in some new headaches, but the cardinal sin — destroying or hiding documents — remains the same, and now it’s almost guaranteed to leave a trail.

That trail, composed of digital breadcrumbs of metadata, can be as valuable as the documents they accompany, detailing who knew what and when.

Williams recalls artist Shepard Fairey’s case against The Associated Press, in which Fairey was found to have repurposed an AP image to create the iconic “Hope” portrait of President Barack Obama popularized during the 2008 presidential campaign. Kirkland & Ellis associates discovered through metadata that Fairey had both deleted and created documents to support his case, later resulting in criminal charges and probation for the artist.

“With metadata being what it is today and with the sophistication of lawyers being what it is today, when a party withholds documents that they should produce, they will almost certainly be caught,” Williams says.