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Special Report: E-Discovery

Information readily available, but it takes time, money to organize it

Commentary by David B. Mankuta



For today's litigators, e-discovery is clearly a two-edged sword. On the positive side, attorneys have much greater access to information that was not available in the past. Today, people are more apt to communicate in writing rather than by telephone. Revealing comments about a matter are often transmitted in e-mail, text messages and social media, providing clear, hard, discoverable evidence for a plaintiff or defense attorney. But based on our experience in representing a foreign bank in a \$23 million civil theft claim against a group of Broward County defendants, e-discovery can be an expensive, time-consuming process adding to the cost of litigation and the necessity of state of art technology in the courtroom.

In this case, our client, the Bank of Mongolia, engaged the defendants to aid in financing an affordable-housing program in Mongolia. Rather than arranging financing, the bank ended up losing millions of dollars as a result of actions by the defendants. We filed an action in the U.S. District Court for the Southern District of Florida against eight individual and corporate defendants, seeking treble damages under the civil theft claim, as well as a claim under the Racketeer Influenced and Corrupt Organizations Act and a number of state causes of action. Over the past 10 months, our client invested several hundred thousand dollars in the e-discovery process made more complicated by a lack of cooperation by the defendants.

We commenced our discovery by tendering a request for production of documents. Upon not receiving a response, we endeavored to resolve the issue without filing a motion. Unfortunately, there was no cooperation, and a motion to compel was filed, which resulted in an order to show cause. In response, the defendants produced a handful of documents that were undoubtedly incomplete. At the hearing, the court appointed a forensic computer expert to mirror-image the defendants' computers. The parties established parameters for the search and required the expert and anyone working with him to sign a confidentiality agreement.

One of our initial steps was to create a list of search terms. This is a task that should not be taken lightly since it determines the scope of what you receive. Too narrow a list, and you may miss things. The flip side is a long list that may capture a lot of irrelevant information. Interestingly, one also must be sensitive to words that are typically misspelled.

The result was the receipt of hundreds of thousands of pages of documents. Thus begins the task of the growing litigation team to cull through each and every piece paper while numbering them, organizing them and determining their relevance on a sliding scale.

Having dissected all the documents, we were now ready to commence depositions. Early in the process, it became apparent we had not been provided all of the computers or a server under the control of the defendants. This resulted in another hearing, another court order, another confidentiality agreement. At this juncture, we were clearly concerned about items that may have been deleted and began a parallel task of searching for deleted materials. We are about one year after propounding our first request for production, and we may be near the end of gathering all the relevant information.

Based on our experience in this complex case, there are several significant points for attorneys relating to the e-discovery process:

When composing any e-mail message, thinkv before you hit "send." You may feel better having gotten something off your chest, but it may come back to haunt you. Keep it professional, keep it concise, and think.

Be certainv your e-mail messages to clients are marked attorney/client privileged. Clients are not necessarily as sensitive to the privilege as we are, and it is not unusual for a client to forward attorney e-mail to an unrelated third party. Obviously, this will destroy the privilege. The flip side is where the client copies the attorney on every e-mail in an effort to envelop everything in attorney-client privilege. This will lead to reviewing every e-mail, presumably by a third party or special master to determine if it is in fact truly privileged communication.

Engage a forensic computer consultant early. The expert will helpv tailor requests and create instructions and definitions.

In your request, try to capture as manyv sources of data as possible, which would include not only the desktop computer but backup servers, personal laptops, smart phones and the like.

When getting involved in av matter that would appear to require discovery of e-mail and computer data, be sure to provide the opposing party with an "obligation to preserve" message as soon as possible. This puts the other side on notice that all electronic data must be preserved and will set the stage for a spoliation claim or other punitive measure if any relevant data is "misplaced."

Without question, e-discovery is an extremely valuable tool for litigators, particularly in this age when it is easier to send an e-mail rather than have a phone conversation. But the process takes time, money and particular skills to be able to identify the universe, sift through the vast trove of data and find those nuggets of gold for your case.

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