“Electronic Discovery: Ignorance Can Be Costly”

by
Mitch Miller and Nick Heimlich
Miller Law Group, P.C.
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E-discovery has become an integral part of the litigation process. The manner in which electronic documents are archived and the policies and procedures a company employs can significantly influence the outcome of a dispute. This article addresses some of the more important aspects of this process.

E-discovery denotes the process of demanding or producing electronic data or documents as part of a lawsuit. Actions in federal court have been affected by recent changes in the rules. The applicable rules state that parties must address issues related to discovery of computer files or other electronically stored information such as email, and electronic documents. Also, complying with “safe harbor” rules can avoid sanctions, when information is deleted pursuant to a routine implementation of a party’s document retention policy.

Many states are in the process of crafting specific electronic discovery statutes or rules. While California doesn’t have special electronic discovery rules like the federal courts, California’s discovery statutes allow e-discovery. A party seeking to limit electronic discovery can request a protective order from the court to limit discovery.

Tip 1: A Written Document Retention Policy is Essential

Following a written document retention policy can protect a company from claims it deliberately destroyed or withheld evidence. The impact of claims that a company destroyed documents or failed to produce documents can vary. Possible results include evidentiary or monetary sanctions. Just because a company produces no documents doesn't mean the company will prevail in a proceeding. If the company claims it does not have documents that it really should have, then it loses credibility.

Also, the amount of electronic data impacts the expense of e-discovery. An appropriate document retention policy will limit the total amount of electronic information that a company produces in litigation. By limiting the amount of electronic documents a company produces it minimizes the expense of production. A company should not base its document retention **only** on a desire to minimize e-discovery, as a court would critically scrutinize such a self serving policy.

Recent court cases make it clear that sanctions can impact the outcomes of litigation. It is critical that legal counsel assist with the drafting of the document retention policy, taking into account the company’s business and legal needs. For example, a company policy stating that records, without regard to the legal effect, will be purged after a certain

period of time can be problematic. Counsel, executives, and IT personnel must coordinate to develop a legally compliant and protective policy.

Tip 2: Policies and Procedures to Suspend a Document Retention Policy are Critical

Procedures must be in place to suspend the retention policy when triggering events such as lawsuits or claims occur. Once a triggering event occurs, a company must cease normal document destruction. To ensure compliance with these requirements, counsel and IT staff must coordinate their efforts. If the legal department is not familiar with e-discovery, then outside litigation support companies can help to fill that role.

Tip 3: Consider Trying to Shift the Cost of Discovery to the Opposing Party

The cost of E-discovery can vary substantially. Electronic documents on an active computer can be easily accessed. However, electronic documents on backup tapes with old or non-existent hardware and software can be difficult and expensive to access. Electronic discovery can impose significant expenses on the party producing documents. However, sometimes parties may stipulate, or obtain a court order requiring the party seeking discovery pay for the cost of the production. This cost-shifting is an important tool that reduces the expense of electronic discovery in a lawsuit. Keep in mind that you may also seek e-discovery and that if you have agreed that the other party will pay for your e-discovery production expenses, then you may have to do likewise.

Tip 4: What electronic documents do I have to Produce?

It is important for companies and their counsel to understand how the courts determine what documents must be provided in litigation. Courts use a balancing test weighing the burden of producing electronic documents with the probative benefit of the production. In so doing, the courts often consider the format of the electronic documents and the cost to retrieve such documents. The courts distinguish between “accessible” or “inaccessible” documents. Inaccessible documents include old program files for discontinued software. Accessible documents often encompass electronic documents stored on a functioning computer hard drive, server, cell phones, or PDAs. The definition of accessible documents varies based on the court. If electronic data is inaccessible, courts are less likely to require its production than if the documents are accessible.

Tip 5: How can I minimize the costs of e-discovery?

Companies can seek to control the costs of electronic discovery proactively and reactively. By being proactive, a company’s document retention policy will help to limit the amount of information produced. Once a dispute commences, an important way to limit the expense is for opposing attorneys to determine the relevant dates for the dispute. Trying to limit the dates of documents will serve to limit the number of years of information a company must produce. If you are unsure about producing a document, ask your attorney. Parties will often create an IT system map to show sources of electronic documents. If you can exclude backup tapes, non-functional systems, portable

devices (PDAs, cell phones, USB keys, iPhones, BlackBerries) that will serve to minimize the expense. A company can save a substantial amount of time and expense by attempting to get both parties to agree that certain documents are not relevant.

Think Before Sending. Emails Have Limited Expectations of Privacy

The full effect of these rules will change as the courts apply them and as technology and data storage evolves. It is critical for all companies to coordinate document retention policies with their legal counsel. One of the smartest ways companies can prevent having to turn over a damaging document is to avoid creating the document in the first place. For example, if you don't want to see the substance of an email on the front page of the Wall Street Journal, don't send it. That email could become evidence. Remember the news item about President Obama using his BlackBerry for his personal and non-official communications. The reason Presidents don't email is because email is not secure. Keep that in mind the next time you're sending an email!

The Miller Law Group, P.C. advises franchisees and business owners on many legal issues including franchisor/franchisee relations, corporate formation issues, litigation, real estate transactions, securities, and estate planning. For further information contact Mitch Miller call 650-566-2290, email mmiller@millerlg.com, or visit www.millerlg.com.