MEDIATION CENTRAL

The Game Changer: E-Discovery

By Laurie Quigley Saldaña

Earlier this year, a lawsuit filed in 2008 by mortgage insurer Ambac Assurance Corp against Bear Stearns and JPMorgan was unsealed. The lawsuit's supporting e-mails, going back as far as 2005, highlight Bear traders telling their superiors they were selling investors like Ambac a "sack of shit."

Former SuperSonics owner Howard Schultz filed suit to undo his sale of the franchise to a group of Oklahoma City businessmen. Asserting that he sold the franchise based upon the promise that the team would stay in Seattle, Schultz alleges emails exchanged between the buyers just two days before the sale reveal they never intended to honor that promise, planning instead on a “sweet flip” and a Seattle departure.

It is no surprise that emails and social networking sites have become a treasure trove (or a minefield, depending on your viewpoint) of evidence in the last decade. In fact, a survey conducted by the American Association of Matrimonial Lawyers revealed that Facebook accounts for a whopping 66% of the electronic evidence used in divorce cases.

More and more frequently in mediation, parties rely upon emails to support the merits of their case, just as they would in court or arbitration. Emails are highly persuasive, often devastating in nature, and can play a key factor in reaching resolution. In some mediations, however, attorneys appear stumped as to how to discover and use electronic evidence in litigation. I often hear comments like, “If I can get the emails...” and “If I can decipher their software...” As electronic evidence is now a “game changer” in litigation (and mediation), attorneys must know how to navigate the rules pertaining to “e-discovery.”

In 2009, the California Legislature enacted the Electronic Discovery Act (the “Act”) which gives litigants the power to demand, defend, compel, search, and use electronic data. In my view, here are a few of the “must know” provisions of the Act.

1. “Electronic” is defined very broadly to include “technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” CCP 2016.020. Emails? Tweets? Skype recordings? All are fair game.

2. The Act “does not alter any obligation to preserve discoverable information.” CCP 1985.8(l)(2). Absent some other independent duty, a litigant or a lawyer need not preserve electronic data <u>even after a lawsuit is filed</u>. If your client follows its regular “purge/delete” procedure regarding electronic data before a demand is made for such information, there has likely been no spoliation of evidence. The lesson? As soon as a lawsuit is contemplated, send a letter to the opposing party demanding retention of all electronic information related to the subject at issue.

3. No later than 30 days prior to the initial case management conference, parties must meet and confer on "any issues relating to the discovery of electronically stored information . . ." including: scope, preservation, form and timing of production, method for asserting privileges, cost, and "any other issues". Rule of Court 3.724(8). The lesson? Be proactive. Send a letter to opposing counsel documenting your efforts to preserve, and set parameters regarding, electronically stored data. Seek important information such as: the identity of custodian of records; names of assistants of key players (you will want their emails, too); a description of the computer back up system; the form in which data is maintained; policies/ procedures for e-mail use and destruction; type of hardware used, etc. If opposing counsel refuses to cooperate, raise this at the CMC. It is much easier and cost-effective to garner support from the court at the CMC, rather than fighting in motions to compel down the road.

4. This is big... A party demanding electronically stored information may "specify the form or forms in which each type of electronically stored information is to be produced." CCP 2031.030.(a)(2). The lesson? Before you demand the data, consult with an IT professional as to the format in which it should be requested. You will likely want the data (and can demand it) in a searchable format. If you fail to specify the format, the opposing party may produce the data however it is ordinarily maintained (which may do you no good!). CCP 2031.280 (d)(1).

5. The court may use its discretion to allocate the expense associated with the discovery of electronically stored information. CCP 2031.320(f). Further, the court can limit the discovery of electronic information, even if it is reasonably accessible, if the information: may be obtained in a different way; is duplicative; could have been obtained earlier; or has limited benefit when weighed against the expense involved. CCP 2031.320(g).

6. Familiarize yourself with the "claw back" provision of CCP 2031.285 in the event of inadvertent production of electronic information.

Importantly, electronic information is used not only by attorneys and litigants. A recent case suggests that judges use social media as evidentiary support for their opinions. In *Purvis v. Commissioner of Social Security*, 2011 WL 741234 (D. N.J. Feb. 23, 2011), plaintiff applied for supplemental Social Security income claiming disability due to asthma, which was denied by the Commission of Social Security. An administrative law judge supported the Commission's denial by finding that Purvis's symptoms were not credible. On appeal, the court noted that "[a]lthough the Court remands the ALJ's decision for a more detailed finding, it notes that in the course of its own research, it discovered one profile on what is believed to be Plaintiff's Facebook page where she appears to be smoking ... If accurately depicted, Plaintiff's credibility is justifiably suspect." Id. at *7.

We have all heard the sage admonition: "Do not put anything in email or on a social networking site that you would not want to see on the front page of the newspaper." However, careless

and embarrassing messages and images persist. Such electronic evidence may compromise trade secrets, decimate the credibility of a witness, and severely harm consumer confidence in a business or product. Therefore, more and more parties seek the refuge of a mediated agreement, where confidentiality provisions are carefully crafted to protect information the parties prefer not be made public. There is rarely the same opportunity once a matter reaches the public forum of a courtroom.

The take away from all this? Educate your clients about electronic data. Instruct your employees on the use of electronic data. Develop and adhere to strict destruction/use policies within your firm/business. Use the Electronic Discovery Act to your client's advantage. And never forget that people say things in emails and in social networking sites that they would never write or say in more formal modes of communication. This is why e-discovery is such a "game changer." Electronic data can be embarrassing, costly, and devastating to a lawsuit. Once discovered, the best way to preserve the confidentiality of such information is to resolve the case in mediation and craft an acceptable confidentiality agreement. Better yet? If you are concerned about the discovery of your electronic data, get your case into mediation before the "game changer" is out of the bag.

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