

FIVE COMMON MISTAKES LAWYERS MAKE IN ELECTRONIC DISCOVERY

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No. 1: Failing to understand what electronically generated/stored information your client or the opposing party has.

- You must force your client to explain what electronic information it creates and what electronic information it stores. All forms of electronic information have long been discoverable (Santiago v. Miles, 121 F.R.D. 636, 640 (W.D.N.Y.1988)) and may be so even if the data has been deleted but is recoverable at substantial additional cost. Your client contact is unlikely to know everything about the client's IT system so you must find out to whom else you must speak. Do not expect your client to always know if its production is complete or if the disks it is producing contain information beyond that which was requested. It is your job to find out from your client's IT personnel. For example, electronic documents have "metadata" – information about when a document was created, edited, sent, and received or how data on a spreadsheet was calculated – embedded in them that does not appear when the document is printed or seen on the screen. You may produce metadata that waives a privilege or gives away a trade secret or fail to produce metadata that was supposed to be produced leading to sanctions for discovery failures. See, for example, Williams v. Sprint/United Management Company, 230 F.R.D. 640 (D.Kan.2005) in which the defendant was ordered to show cause why it ought not be sanctioned for scrubbing metadata from spreadsheets when previously ordered to produce the electronic spreadsheets in the manner in which they were maintained.
- In document requests, you will have to specifically request that electronic data be produced in the form it is maintained or else you will only get copies of screen shots. Preliminary depositions of the opposing party's IT personnel may be necessary prior to merits discovery as noted in In re Carbon Dioxide Industry Antitrust Litigation, 155 F.R.D. 209 (M.D.Fla.1993).

No. 2: Failing to understand what hardware and software your client or the opposing party has and what capabilities they have.

- Again, your client contact is not likely to know all this. You must push and dig for this information from your client's IT personnel. Do not forget to find out about offline storage (such as backup tapes) and external electronic data sources like company laptops or PDAs or permitted use of personal computers and PDAs to link into the company IT system from outside the office.

- You should discover this from your opponent in your first round of written discovery and/or in initial depositions. Once you know what the potential evidence is, you may have to ask the court to establish a search protocol if you do not trust the opposing party or that party is obstructive.

No. 3: Failing to tell your client and the opposing party to preserve electronic information immediately upon your being engaged.

- You and your client must identify any potentially relevant electronically stored information immediately and your client must preserve it. In Metropolitan Opera Association v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003), the court entered judgment against the defendant as sanctions for a variety of discovery failures including counsel's failure to cause the defendant to adopt a retention policy to prevent destruction of responsive information.
- If you expect that the opposing party has important electronically stored evidence, you should send a letter to opposing counsel (or to the opposing party if unrepresented) immediately at the outset of the case reminding him/her of the opposing party's preservation duties and the consequences of spoliation.

No. 4: Failing to ensure that your client or the opposing party has gathered all requested, discoverable electronic information.

- If you do not ensure that your client searches all of its electronic archives and then produces complete, unaltered copies of the discoverable information, your client may be subject to a wide variety of harsh sanctions, including dismissal, adverse inferences, striking of claims and defenses, monetary penalties, and paying the opposing party's attorney fees. In Zubulake v. UBS Warburg, 2004 WL 1620866 (S.D.N.Y. 2004 (Zubulake V)), the court stated that counsel "must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."
- If you do not inquire deeply enough of the opposing party, you will likely either fail to get complete discovery or fail to put the opposing party in the adverse litigation position it would richly deserve for its discovery production failures.

No. 5: Failing to think outside the box.

- Stay current about the latest technology used to create, transmit, and store electronic discovery. Who knew 10 years ago about universal series bus (USB) drives, personal digital assistants (PDAs), digital cameras, memory cards, and stored instant messaging? New methods of creating and storing electronic information are constantly being developed or evolving.